ANNOTATIONS INCLUDE 171 N. C.

NORTH CAROLINA REPORTS

VOL. 158

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1911
SPRING TERM, 1912

ROBERT C. STRONG
REPORTER

ANNOTATED BY
WALTER CLARK

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1911

E. T. HERRING AND WIFE, BETTIE, v. CARRIE WILLIAMS AND JOHN H. GREEN.

(Filed 23 December, 1911.)

1. Wills—Construction—Estates — Remainder — Intent — Real and Personal Property—Possession at Death of First Taker.

Giving effect to the intent of the testator from the language employed by him in the will: *Held*, a devise and bequest to A. of real and personal property "to have and to hold during her natural life," and at her death "the said property or so much thereof as may be in her possession at the time of her death is to go to B., her heirs and assigns forever," gave A. only a life estate in the lands, with remainder to B. in fee.

2. Same—Consistency.

When there is a devise and bequest of real and personal property to A. for life, with a limitation after the death of A. that the "said property or so much thereof as may be in her possession at the time of her death is to go to" B., her heirs and assigns forever, the words, "or so much thereof as may be in her possession at the time of her death," are construed, for consistency, to refer only to the peronal property bequeathed, and not to the realty, which is of a permanent nature.

3. Wills—Construction—Power of Disposition—Implication.

The intention of the testator to create the power of disposition in the devisee must clearly appear from the language of the will, and it will not be implied from language entirely consistent with the devise to him of a life estate.

4. Wills—Construction—Estates—Power of Disposition—Reference — Deeds and Conveyances.

A deed made by the devisee to a life estate with power of disposition, must refer to the power contained in the will to convey the fee, and in the absence of such reference only the life estate is conveyed.

ALLEN, J., concurring; WALKER and HOKE, JJ., dissenting.

(2) THIS is a petition to rehear this cause, reported in 153 N. C., 232, where the facts are fully stated.

Bunn & Spruill for plaintiffs.
T. T. Thorne and J. C. L. Harris for defendant.

BROWN, J. We have given this case a reëxamination and have been forced to the conclusion that our former construction of the will of the testator Williams was erroneous. The writer holds himself as much responsible for the conclusion reached in the first opinion as if he had written it himself, instead of the learned and able judge whose name is prefixed to it. But further examination having convinced us that we were in error, it is our duty to say so and to hold that the original judgment of his Honor, *Judge Guion,* is correct.

The facts are fully and accurately stated in the first opinion. By reference to the report of the case it will be seen that the defendant Carrie Williams, widow of the testator, executed an ordinary deed in fee to her codefendant Williams, without any reference in the deed whatever to any power conferred by the will.

This is an action by the remainderman, Bettie Meton or Melton, the *feme* plaintiff, against Green for waste, damages, etc., for wrongfully cutting all the timber from the land for purposes of sale only.

It is said in the former opinion of the Court in this case that "The primary purpose of the courts, when a will is presented for construction, is to ascertain the intention of the testator from the language used by him." And in determining this question the courts hold, as pointed out by *Justice Manning,* that the rules of construction require that all the words used by the testator shall be given effect, "unless they are in themselves meaningless, or so vaguely expressed a purpose that
(3) no definite intention can be inferred, or are plainly inconsistent with an otherwise clearly expressed intention, or are repugnant to some established rule of law." It is in our application of this latter principle to the will presented for construction that we now think we fell into error in the decision of this appeal. We gave to the words "or as much thereof as may be in her possession at the time of her death" an effect which, after further consideration and investigation of the authorities, we do not think can fairly be sustained. The will of the testator, William R. Williams, contained the following language: "I give, devise, and bequeath unto my beloved wife, Carrie Williams, all my property, real and personal and mixed, of what nature or kind soever, and wherever the same shall be at the time of my death, to have and to hold during her natural life, and at the death of my wife, the

said Carrie Williams, the said property, or as much thereof as may be in her possession at the time of her death, is to go to Bettie Meton, her heirs and assigns forever."

In construing this will we held that the use of the words, "or so much thereof as may be in her possession at the time of her death," conferred upon Mrs. Williams a power of disposition and thereby enlarged her life estate into an estate in fee in the event she should exercise such power. Guided now by that cardinal rule for the construction of wills—the intention of the testator—we are of opinion that it was the intention of Mr. Williams to give his wife merely a life estate, with remainder to Bettie Meton in fee.

In order to give expression to every word used by the testator, we are not required to hold that the language quoted above refers to real property, but can restrict it to the personalty of the testator, and such restriction is sustained by both reason and authority, because it avoids inconsistency in the provisions of the will and maintains its integrity. Adopting this construction, we hold that the interest of Mrs. Williams, the wife of the testator, in the real estate is fixed by the specific language of the will, "to have and to hold during her natural life."

It is said in 30 A. & E. Enc., 737-738, that: "Where the quantity of the estate is devised definitely and specifically, the rule that a devise coupled with an unlimited power of disposition and control (4) carried an absolute interest in the property has no application, and only a life estate coupled with a power of disposal passes. This power, it has been adjudged, is only coextensive with the estate which the devisee takes under the will." And the same text contains this statement: "It is clear, however, that by appropriate expressions of intent the power will not refer merely to the life interest of the first taker, but will give him a life estate coupled with a power to dispose of the entire estate absolutely." This latter statement is sustained by *Troy v. Troy,* 60 N. C., 624, in which property was devised to the wife for life, with remainder to testator's son, and the wife was by express terms given power to sell all or any part of the property in the exercise of her judgment, and other expressions in the will indicated a clear intention on the part of the testator to confer upon his wife a general power of disposition and to enlarge the life estate created by the will. Referring to this power, *Chief Justice Pearson* says that it is "a power appurtenant to the life estate, and the estate which may be created by its exercise will take effect out of the life estate as well as out of the remainder."

This case is not authority for the contention that the language in the will before us should be so construed as to give Mrs. Williams a general

power of disposition and thereby empower her to convey the real property in fee. The intention to confer the power was clearly expressed in *Troy v. Troy,* and the question of the establishment of such power by implication was not presented. The decisions in other courts are to the effect that the intention to create the power of disposition must clearly appear from the language of the will, and will not be implied from language entirely consistent with the special reference to the life estate; and in that view we concur.

In considering a case in which the testator used the words "the remainder that is left," the Supreme Court of Missouri says: "It is needless to say that an intention clearly expressed in a will should not be defeated, except by some inflexible rule of law or public policy, unless a wholly inconsistent intention is manifest upon reading the entire
(5) instrument. This is particularly true when the inconsistency is raised by implication only. The implication to have such effect should be very conclusive." In *Wardner v. Baptist Memorial Board,* 233 Ill., 608, it is held that the use of the words "all that remains of the property" did not manifest an intention to create a power in the life tenant to dispose of the whole estate, the Court saying: "It is a general rule in all cases where by the terms of the will there has been an express limitation of an estate to the first taker for life and a limitation over, with general expressions apparently giving the tenant for life an unlimited power over the estate, but which do not in express terms do so, that the power of disposal is only coextensive with the estate which the devisees take under the will, and means such a disposal as the tenant for life could make, unless there are other words clearly showing that a larger power was intended." And in *Giles v. Little,* 104 U. S., 291, the testator's property, real and personal, was left to his wife with the provision that "if she should marry again, then it is my will that all the estates herein bequeathed, *or whatever may remain,* shall go to my surviving children, share and share alike." It was contended that there are words in this clause of the will which imply an absolute power of disposition and give to the children only what may remain undisposed of in the wife's hands at the termination of her estate. "The contention," says *Mr. Justice Wood,* "rests upon the words 'or whatever may remain,' and is that they imply that a part or all of the estate might be absolutely disposed of by the wife during her widowhood. If the purpose of the testator in the disposition of his property is what the other parts of his will clearly indicate, then these words cannot be construed to change that purpose. They can have operation without giving them that effect. He was seized of real estate and possessed of personal property. Both were included in the devise to the wife, and she was to have

the enjoyment of both during her widowhood. The use of many species of personal property necessarily consumes it. The words under consideration may, therefore, fairly be construed to refer to the personalty, and the entire clause to give to his children a remainder in the real estate and whatever of the personalty was not consumed by the widow during widowhood." *Smith v. Bell,* 6 Peters, 68, (6) and *Bramwell v. Cole,* 136 Mo., 201, are to the same effect.

The case of *Green v. Hewitt,* 97 Ill., 113, strongly supports the views expressed in the foregoing cases. The following language was used by the testator in that case: "I give and bequeath to my beloved wife . . . the farm on which we now reside . . . also all my personal property of every description, so long as she remains my widow; at the expiration of that time the whole, or whatever remains, to descend to my daughter." It was held that the wife took a mere life estate in the entire gift. The Court says: "The misapprehension of the legal effect of the devise doubtless grows out of the use of the expression 'whatever remains' by the testator, in limiting the remainder to his daughter. The use of that expression is of no vital significance, and cannot be permitted to override the clearly expressed intention that the widow should take a life estate only. . . . It had reference to the anticipated condition of the personal estate when it would, under the limitation, pass into his daughter's hands. And this is all the significance the expression has." See, also, *Thompson v. Adams,* 205 Ill., 552, a more recent decision by the same Court.

In *Russell v. Werntz,* 88 Md., 210, the testator gave the residue of his property to his wife "to hold and dispose of as she may see fit, while she remains single, and at her death or marriage *the remaining property* is to be equally divided between my two daughters." The Court held that the widow took only a life estate in the real property, with remainder to the daughters, and that she had no power to dispose of the same in fee. "But it is contended," says the Court, "that the words 'the remaining property' should be regarded as indicating that the testator intended that the appellant should have the right to diminish the corpus of the estate. But we do not accept this view. The will, evidently, was not drawn by one accustomed to the preparation of such instruments. The words employed were not chosen with regard to their technical meaning. The property that passed under the second item comprehended both realty and personalty. All of it was liable to waste or decay; some portions of it doubtless would deteriorate (7) by its use and other articles were of such nature that their use was their consumption. In view of the general and particular intents of the will, it is not straining the construction of these words to regard

them as indicating the intention of the testator that his widow should not be accountable for such loss or waste as might result from her personal enjoyment of the property." In *Cox v. Shines,* 125 Pa. St., 522, the testator gave to his wife the residue of his estate for life, and after his death all of said property, or "so much as may remain unexpended," to his children. The Court in disposing of the appeal said: "We are satisfied that her estate in the lands of the testator is for life, and that she had no power, express or implied, to dispose of any interest therein." A similar ruling was made in *Taylor v. Bell,* 158 Pa. St., 651.

The English cases, which are reviewed by the New Jersey Court of Chancery in *Tooker v. Tooker,* 64 At., 806, will be found to sustain our conclusion that the words used in the will before us are not sufficient to create power to dispose of the real property of the testator in fee. *Constable v. Bull,* 18 N. J. Eq., 302; *Bibbens v. Potter,* 10 Ch. Div., 733; *In re Adams Trust,* 11 Jur., N. S., 961.

The view that the language of this will, which it is contended creates a general power of disposition, refers to the personal property that may be in Mrs. Williams' possession at the time of her death, finds direct support in *Williams v. Parker,* 84 N. C., 90, in which the devise was in the following language: "I give and bequeath to my wife, Polly Williams, and my granddaughter, Sarah Jane Williams, all my land whereon I now live, and all my personal property of every order, during my wife, Polly's lifetime, and at my wife Polly's decease, if there should be any property or money left, then I devise and bequeath," etc. It was held by this Court that the property referred to as being left was personal property and did not include the real estate. This case is cited and approved in *Brawley v. Collins,* 88 N. C., 605, in which the following clause appeared in the will under consideration: "It is my will that all property, money, and effects willed by me to my wife, Mary, (8) that may be left at her decease shall be equally divided between my daughter Betsy, and grandsons, Stephen Brawley and Peter W. Brawley." The plaintiffs, the grandsons referred to in this clause, asserted title to the land in dispute as a limitation in remainder to them and their aunt in equal parts, after the death of the testator's wife, contending that the use of the word "property" included real and personal estate. This Court in an opinion by *Chief Justice Smith* rejected this contention and held that it was the intention of the testator to limit the scope of the expression "all property, money, and effects that may be left at her decease" to personal property. *Chief Justice Smith* says: "Manifestly, as land is not subject to a contingency, since it *must,* not *may,* be left when life estate expires, he intended such goods as might be destroyed or consumed by the preceding owner, but in fact are not,

but remain for the bequest in remainder to operate on." The Court was guided in that case by the intention of the testator, and at the same time all the language of the will was given effect, and we accomplish a similar result in the case before us by holding that the words "or as much thereof as may be in her possession" refer only to personal property, thereby preventing the repugnancy that arises from a construction by which the will is held to create a life estate with remainder over, and in the same sentence grants a power by which the life estate may be enlarged into a fee and the remainderman disappointed. As the Court says in *Brawley v. Collins, supra,* our duty is not to inquire what the words may comprehend, but what do they signify, and in what sense are they used by the testator, and "When this is satisfactorily ascertained from an inspection and comparison of the several provisions of the instrument, the construction must be adopted which carriers out the intent."

We have not deemed it necessary to review the authorities cited in our former opinion. Many of them will be found to fall within one of two classes, both of which are readily distinguishable from our case: first, cases in which there is a devise for life with language which expressly gives the devisee a general power to dispose of both real and personal property, and, second, cases in which the devise is not limited to a life estate, but the property is devised absolutely, with a provision (9) that what remains at the death of the devisee shall go to certain designated persons. *Troy v. Troy, supra,* and *Parks v. Robinson,* 138 N. C., 269, fall within the first class.

There is a point made by the plaintiff, which we overlooked, which seems to us to be conclusive of her right to recover damages as against defendant Green. If we should concede that the language of the will should be so construed as to confer upon Mrs. Williams the power to dispose of the real property, such construction would not defeat the plaintiff's right to recover in this action against her grantee, Green. The deed to the defendant Green by Mrs. Williams does not purport to have been made in the exercise of the power of disposition; it contains no reference whatever to such power, and, upon a well-settled principle of law in this Court, the deed could not convey an estate in fee. The will, by language that is unequivocal, gives Mrs. Williams a life estate in her husband's property, real, personal, and mixed, and her deed, in the absence of any reference to the power of disposition, which she claims is conferred by the will, is held to convey only her life estate. "When the donee of a power to sell has an estate of her own in the property affected by the power, and makes a conveyance of the property without reference to the power, the construction established by the decisions is,

that she intends to convey only what she might rightfully convey without the power." *Towles v. Fisher,* 77 N. C., 440; *Exum v. Baker,* 118 N. C., 545. And "the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation; and if it be doubtful under all the circumstances, that doubt will prevent it from being deemed an execution of the power." *Carraway v. Moseley,* 152 N. C., 353. We are of opinion, therefore, that it was properly held in the court below that the deed from Mrs. Williams to the defendant Green conveyed only her life estate.

In view of the fact that this opinion affirms the judgment of the Superior Court in favor of the plaintiff, we have examined the other exceptions in the record and find that they are without merit. It was not necessary to consider them when the case was originally before the Court, because the main question was decided in favor of the
(10) defendant who brought the appeal to this Court.

Petition allowed.

ALLEN, J., concurring: Petitions to rehear, except as to the time of filing, are regulated by rules adopted by this Court, and not by statute, because a statute cannot be suspended, and a rule may be, if the justice of the cause requires it. They are for convenience and to aid in the attainment of justice, and not to perpetuate a wrong.

If, therefore, I come to the conclusion that a decision of this Court is erroneous, and that it unjustly deprives a citizen of his property, I shall favor a reversal of the decision, although no fact has been overlooked, and no new authority can be found.

Entertaining this view, I feel that it is proper for me to consider the questions presented by the petition, and in the outset it is well to state the facts.

In August, 1902, W. R. Williams died, seized in fee of the land in controversy and of a town lot, leaving a will, in which he disposed of his property as follows:

"I give, devise, and bequeath unto my beloved wife, Carrie Williams, all my property, real and personal and mixed, of what nature or kind soever, and wheresoever the same shall be at the time of my death, to have and to hold during her natural life, and at the death of my wife, the said Carrie Williams, the said property or as much thereof as may be in her possession at the time of her death, is to go to Bettie Meton, her heirs and assigns forever.

"And I do nominate, constitute, and appoint my said wife the sole executrix of this my last will and testament, hereby revoking and making

void all and every other will or wills at any time heretofore made by me, and do declare this my last will and testament."

Shortly thereafter the devisee, Carrie Williams, executed a deed to the defendant Green, her brother-in-law, purporting to convey the town lot in consideration of $700, which the defendant alleges in his answer he paid to her, and on 23 February, 1903, she purported to convey to said defendant in fee the tract of land in controversy, in ex- (11) change for a town lot conveyed to her in fee.

The deed to the defendant does not refer to any power conferred by the will, and the only consideration to support it is the execution of the deed to her in exchange therefor.

W. R. Williams and wife had no children, and Bettie Melton, now Bettie Herring, is their foster child, reared by them since she was ten weeks old.

It is true that the intention of the testator should be gathered from the will and the attendant circumstances, but it should be clear and unmistakable before it is held that one who takes a life estate under the will can, within six months after the death of the testator, sell one of the two pieces of land devised, and hold and use the money, and can exchange the other for other land and own that in fee simple, and thereby defeat the interest of the remainderman.

I concur in the construction placed upon the will in the opinion of *Mr. Justice Brown,* but if by any interpretation a power of disposition is conferred on the life tenant as to the land, it could only be exercised when necessary for support and maintenance, which does not appear here.

The testator gave to his wife a life estate in the land and personal property, and to his foster child an estate in remainder, and he must have intended both to take effect.

He appointed his wife executrix, and knew his personal property would be in her possession, and he also knew that it might be consumed or destroyed, and that in all probability some of it might not be in her possession at her death, and it seems to me that a reasonable construction of the language, "or as much thereof as may be in her possession at the time of her death," is that it refers to the personalty. When there are found two species of property, the one technically and precisely answering the description in the devise, and the other not so exactly answering that description, the latter will be excluded. *Bolick v. Bolick,* 23 N. C., 248.

I will not undertake to review the authorities supporting this view, as they are stated with clearness and accuracy in the opinion of the court. I also think it was necessary for the deed to refer (12) to the power.

It is said in 4 Kent, 335: "The general rule of construction, both as to deeds and wills, is that if there be an interest and a power existing together in the person, over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest and not to the power," and this is cited with approval in *Exum v. Baker,* 118 N. C., 545.

Towles v. Fisher, 77 N. C., 438, I think a direct authority on this point. In the case under consideration all the property, real, personal and mixed, is devised to Carrie Williams for life, and at her death the said property, or so much thereof as may be in her possession at the time of her death, is given to Bettie Melton. Carrie Williams attempted to convey to the defendant in fee.

In the *Towles case,* William Shaw devised his land to his wife for life, and he devised to James Callum and Mary Callum "on the death of his wife, all the property, real and personal, belonging to his estate, which may be in possession at the time of her death." There was a codicil providing that sales should be made with the consent of the executors.

The wife attempted to convey in fee without the consent of the executors, and without reference to the power.

After holding that the deed was not valid because the executors did not consent thereto, the Court says: "In addition to this, when the donee of a power to sell has an estate of her own in the property affected by the power, and makes a conveyance of the property without reference to the power, the construction established by the decisions is that she intends to convey only what she might rightfully convey without the power. These doctrines are so generally accepted that we think no reference to the authorities is necessary. They may be found (13) cited in the brief of the counsel for the plaintiff. The deed to Primrose conveyed only the life estate of Priscilla Shaw."

The rule seems to be well established, and it seems to me to be meaningless if it be said that when one who owns an interest with a power of disposition conveys more than he owns, without reference to the power, that the conveyance will be referred to the power.

If, however, these views are not sound, and by correct construction the wife took a life estate under the will, with the power to sell the land, I still think the deed to the defendant is not good, because I do not think an exchange of lands was contemplated, or that it would be a valid execution of the power for the life tenant to convey the land devised to her for life to her brother-in-law in fee, and receive in exchange therefor a deed in fee for another tract of land.

WALKER, J., dissenting: This Court has repeatedly held, and with decided emphasis, that the weightiest considerations demand that the Court should adhere to its former decision in a case, where it was made with unanimity and after full argument and consideration. *Lewis v. Rountree,* 81 N. C., 20; *Ashe v. Gray,* 90 N. C., 137; and it will not on petition, however earnestly and zealously pressed by counsel, re-examine the same authorities and reconsider the same course of reasoning in order to reverse its previous ruling. *Dupree v. Insurance Co.,* 93 N. C., 237; *Hannon v. Grizzard,* 99 N. C., 161. No case ought to be reheard upon petition, unless it was decided hastily and some material point was overlooked, or some direct and controlling authority was not called to the attention of the Court, and was overlooked by it. *Watson v. Dodd,* 72 N. C., 240; *Hicks v. Skinner, ibid.,* 1; *Devereux v. Devereux,* 81 N. C., 12; *Haywood v. Davis, ibid.,* 8. In *Weisel v. Cobb,* 122 N. C., 68, it was said that "rehearings of our decisions are granted only in exceptional cases, as the highest principles of public policy favor a finality of litigation, and even when granted, every presumption is in favor of the judgment of the Court already rendered," and, further, that where neither the record nor the briefs on the rehearing of a case disclose anything that was not apparently considered at the first (14) hearing, the judgment will not be disturbed. The present *Chief Justice,* in *Elmore v. R. R.,* 131 N. C., 576, strongly and earnestly inveighed against the prevalent and increasing tendency to ask for rehearings, and stated what he thought should be the invariable rule and the one established by more than a hundred decisions of this Court, that the purpose of a rehearing is not to consider the same facts, briefs, and authorities used on the former hearing. With all possible deference, I assert that we are doing that very thing now, as the sequel will show.

Nothing was brought forward on the rehearing but what we heard and knew before, viz., that there is some conflict in the authorities; but I do not think that I take much risk in stating that the great weight of authority in this country, if not in England, favors the judgment formerly rendered by this Court. The case was thoroughly and carefully considered by us, and it is manifest, from the opinion delivered by *Justice Manning*—one of the ablest and most learned, one of the most diligent and painstaking and exhaustive in investigation, of the judges who have ever sat in this Court—that no authority of importance was overlooked or disregarded. It is only a question now, as will be seen, whether we should follow our own decisions and the majority of the courts, or the minority of them. It may be remarked generally, and *in limine,* that the cases cited in the opinion now filed, as supporting the

decision, have no application to the special facts of this case, but were rendered upon a state of facts substantially different.

Consider *Giles v. Little,* 104 U. S., 291, the principal case relied on in the opinion of the Court, and we find that there was personal property of a kind which would be consumed by its use, and where the expression, "whatever may remain," is used in a limitation over, it was held as restricted to the consumable personal property, such as crops and provisions; and this testator had none of this sort. But even this view is rejected by some of the other courts, as not only changing the words, but as defeating the clearly expressed intention of the testator. In those cases where it is held that the *jus disponendi* is confined to the life estate given by the will, it appeared that there was no limitation
(15) over, and the language and nature of the devise required such a construction. A very few courts, confounding cases like ours with cases of that kind, have been misled into holding that where the general right to dispose of the property is given to the life tenant, with a limitation over of what remains, it is restricted to the life estate and does not extend to the fee. The fallacy of this reasoning is apparent when we consider that the life tenant has, by law, the right to dispose of the life estate, and did not require any authority or power from the testator to do so, and such a ruling makes the words as to the disposal useless and inoperative, contrary to the rule that we must sustain the will as a whole, giving effect to every part of it. The testator having devised the life estate, could not unreasonably restrict the right to dispose of it, which is a legal incident of it, and why should we say that he intended to give that right which she already had, rather than that which would be of some use and benefit to her? Why should we practically strike out words, rather than give them the only meaning they could reasonably have? The first and great rule in the exposition of wills, to which all other rules must yield, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. *Smith v. Bell,* 6 Peters, (U. S.), 68, and in seeking for the intention of the testator as to the construction or interpretation that should be placed upon ambiguous terms or clauses in a will, the relation of the parties, the nature and situation of the subject-matter, the purpose of the instrument, and the motives which might reasonably be supposed to influence him in the disposition of his property, may properly be considered. *Smith v. Bell, supra,* 17 A. & E. Enc. (2 Ed.), 21; 17 Cyc., 673, and cases cited in each.

In this case it appears that the testator owned the land, which was sold to the defendant, John H. Green, and a mule and wagon and, perhaps, a cart—things not consumed in their use. He gives, devises,

and bequeaths all his property, real, personal, and mixed, of every kind, to his wife during her life, and at her death *the property,* or as much *thereof* as may then be *in her possession,* to Bettie Melton. It is evident from the words used that the testator intended to give his (16) widow the same use and benefit of all his property. There is nothing in his will or in the character and condition of his estate, or the state of his family, which authorizes the construction that he intended to restrict the words of limitation over to the personalty or the consumable part thereof, any more than to the real property, for his words are, "the said property (that is, real, personal, and mixed), or as much thereof (that is, the same property just described, it being the only meaning of this adverb) as may be *in her possession* at the time of her death, is to go to Bettie Melton." Is that not the only natural and reasonable construction of his language? He had the undoubted right to give her a life estate with the general power of disposal, and how more clearly could he have expressed such a purpose? When he says *"the said property,* or as much *thereof* as may be in her possession," how can we say that he did not mean all of the property, though he said so, but only a part? Suppose, as here, he had no consumable property by which she could support herself, such as crops or provisions, as she had no funds with which to make the other property available for her support and maintenance, must she starve for the want of power under the will to convert what he did give her into productive or consumable property? Was it intended by the testator to give his widow, who was entirely dependent upon his bounty, a stone when she needed bread? He must be supposed to have understood the situation and to have provided for her with reference to it. The plaintiff's own witness, F. G. Ward, testified that the property was "in such shape" that she could not make a living upon it, or it seemed to him that way. Any construction that prevents her from disposing of all the property would lead to the conclusion that her husband intended to give her something which, instead of being a benefit, would be a burden to her. It was held in *Hemingway v. Hemingway,* 22 Conn., 462, that the word "possessed" denotes ownership and not merely personal or corporal occupation. When the testator limited over the property—real, personal, and mixed —"in her possession at the time of her death," he clearly meant such as she had disposed of by sale or otherwise, for property which was in her actual possession, and under her control, would go to (17) the remainderman anyhow.

It is better and safer to give effect to the words of the testator, and all of them, according to their natural sense and their accepted meaning, than to surmise that while he expressed himself broadly and compre-

hensively in favor of his dependent wife, so that his gift to her could take effect beneficially, he did not mean it, but something else that favors a remainderman, who was not his child, or even a blood relation, so far as appears; the first object of his care and bounty, it would seem, must be less considered than the second, so that the latter may enjoy the substantial benefit of the gift. The language of the Court in *Clark v. Middlesworth,* 82 Ind., 240, in construing a testamentary clause substantially like this one, is very significant in this connection: "We think it quite clear that the will of A. B. Clark gave to his widow, Mary A. Clark, a life estate in said lot, and that it also gave her, by the clearest implication, a power to dispose of the same. The words, 'and at her death, should anything remain,' are senseless and without meaning unless the testator intended that the tenant for life might, prior to her death, dispose of the property devised to her for life. The words show that he must have contemplated this at the time, and therefore have intended it." And so are the words of *Justice Connor* in *Parks v. Robinson,* 138 N. C., 269: "To restrict the power of disposal of her life estate would be to nullify its effect. She had such power incident to her life estate. To confine the power of disposal to such life estate would do violence to the rule of construction that every word used by the testator should be given force." That was held to be law by this Court, contrary to some of the authorities cited in support of the impending ruling, and, too, where there was no ulterior limitation. How much more does the construction now placed upon this will neutralize their meaning, if it does not literally excise the words used by the testator to express his desire in respect to his wife, who needed his help far more than the *feme* plaintiff. It has the effect of reading out of the will something that
(18) we would expect him instinctively to put into it, and reading into it something that it would be unnatural for him to have willed, considering the admitted facts and circumstances. The difference between a gift for life with a power of disposal, express or implied, and without an ulterior limitation, and one with such a limitation, is stated in 30 A. and E. Enc., pp. 737, 738, which is quoted by the Court in its opinion. In the latter case the estate is for life, and the remainder will take effect as to all property not disposed of, and as to this, the fee passes to the purchaser, the same as if the property had been given in fee, instead of for life, to the devisee and legatee; in other words, as said by *Judge Pearson* in *Troy v. Troy,* 60 N. C., 624, "the power is appurtenant to the life estate; and the estate created by its exercise will take effect out of the life estate, as well as out of the remainder." But it is useless to continue the argument in favor of the correctness of our former decision, as it is so fully sustained by cases decided by courts

of the highest authority, whose opinions are respected and followed everywhere, and by text-writers. "Although a devise be expressly for life of a devisee, yet if the devisee be, by other clauses of the will, permitted to use and dispose of the subject absolutely at his pleasure, or if so much as may remain undisposed of by him at his death (which implies a power of unqualified disposition) be given over at his decease, the devisee is construed, by a necessary implication of the testator's intention, to take a fee simple." 2 Minor's Insts., 969, 970. So in *Madden v. Madden,* 2 Leigh, 377, in an able and exhaustive review of the cases on the subject, it was ruled to be settled law that, "Whenever there is an interest given, coupled with an absolute power of disposition in respect to all property of every description, real and personal, the first taker would have the absolute property, and that there was no distinction between a case of a gift for life, with a power of disposition added, and a gift to one indefinitely, with a superadded power to dispose of by deed or will."

In *Farish v. Wayman,* 91 Va., 430, the estate was to Agnes Redd for life, with this provision, "Should she die without leaving a child, in that case the property, or what remains of the same, to go to Nancy Massie," and it was held that she could dispose of it absolutely (19) in fee, the Court saying: "This language cannot be reasonably construed otherwise than that the devisee under it has not only the power to use this property, but to consume it, if she will. The gift over at her death of what 'may remain of the same' shows that the testator intended, notwithstanding the direction that the property was to be held by the trustees named, during her natural life, that she should have the power to dispose of, consume, or spend it in her lifetime, which she could only do by being invested with the fee simple. What might remain of the same was all that was to go over. The language forcibly implies an unlimited and unqualified power of disposition. The devisee could acquire no greater estate, nor exercise greater power over it. To put any restriction upon her absolute dominion over it would be to say that the whole, or some part of it, should go over to the second taker, when the will expressly says that only 'what may remain of the same' shall pass to the second taker." To the same effect is *Clark v. Middlesworth,* 82 Ind., 240, in which the testator gave all his real and personal estate to his wife for life, and at her death, if anything remained, the same to be divided among his heirs at law. The same Court followed this decision in *Silvers v. Canary,* 109 Ind., 267, where the clause of the will was substantially like that we are construing in this case. It was held that the wife, to whom the real and personal property were given for her life, had power to convey the fee in the land, and might do so without referring to the will.

It seems to me that the reasoning in *Pannill v. Barnes,* 100 Mass., 470, is directly applicable to this case. The property willed was real and personal, and the Court said that, upon the authorities, the meaning of the phrase, if anything should remain, in connection with the devise of a remainder of real property after an estate for life, would imply a power to convey, as otherwise there could be no reason for the doubt whether the estate would remain. There are many other cases of the same purport, but as a number of them are reviewed in the former opinion of the Court, it is not necessary to comment upon them. It seems to me, also, that this case may be distinguished from those cited in the opinion of the Court by the fact that the testator uses the
(20) word "possessed" or "in her possession," thereby necessarily implying, not as the word "remain" or "remaining" may, perhaps, be construed, that she might dispose of some, if not all, of the property, real and personal, and it might not, at her death, be "in her possession" —that is, owned and held by her. I do not find that word used in any will construed in the cases on this subject.

If I were at liberty to discuss the evidence to be found in the record, the intention of the testator, as it was adjudged to be at the former hearing, would be made manifest. *Williams v. Parker,* 84 N. C., 90, and *Brawley v. Collins,* 88 N. C., 605, have no bearing at all upon the question in this case. They only decide that "personal property" was intended, where the word "property" was used, because of the association of the latter with other words which clearly indicated such a purpose, and in *Brawley v. Collins, Chief Justice Smith* said that the word "property" would embrace all kinds—real and personal and mixed—unless its meaning is restricted by the context, citing *Foster v. Craig,* 22 N. C., 199. The words in this will are more indicative of a purpose to include all kinds of property, real, personal and mixed, for those very words are used, and they are followed by these: "the said *property* or as much *thereof* as may be in her possesssion at the time of her death." The word "property," as thus used, manifestly refers to the kinds just above enumerated, and this interpretation is directly warranted by what is said in the cases just cited. So that they are authorities, in my judgment, against the present conclusion of the Court. Each case must be determined by its own facts. Where, therefore, it appears from the context of the will under construction that the testator, in using the word "property," referred to both kinds, real and personal, the word, as this Court said, *must* have that meaning. That is our case exactly. If the words of the will, when considered with the context, or with the circumstances surrounding the testator at the time it was written, show that he must have intended to include real estate in

the term "property," it must have that meaning, and this should be so even though there are consumable things.

I may be permitted to add to the authorities above cited, the recent case of *Underwood v. Cave,* 179 Mo., 1, decided by one of (21) the ablest courts of the Union, and in which I find the following: "It is my will that the property, real and personal, hereby bequeathed to my wife, shall be hers absolutely during her natural life, to use and enjoy as she may see proper, and at her death, if there should be anything left, my will is that it be vested and applied to the use of the Lone Jack Baptist Church, used as may be thought most conducive to the advancement of the Christian religion." It was held that the wife took a life estate, with superadded power to dispose of the fee, and that the exercise of the power by her cut out the remainderman. So in *Burford v. Aldridge,* 165 Mo., 419, we find a still stronger authority and a case more like ours. The clause of the will was as follows: "I will, devise, and bequeath to my beloved wife, Sarah, all of my property, personal, real, and mixed, that may be left after paying the above bequests, to use and manage as she may deem best as long as she may live; and at her death, I desire and so will, that what may be left of my estate after her death shall be divided equally between my two brothers, Emsley Wharton and John G. Wharton, and my sister, Eliza Plummer, and my brother-in-law, D. W. Burford." In commenting on this language in the will, *Judge Valiant* says. "But under this will the widow was entitled to consume as much of the estate as she desired, the body as well as the product. And, on the other hand, if she lived within the rents and interest and left a surplus of that, there is at least room for contention that such surplus would not have gone to her administrator on her death, but to the remainderman under the will. Therefore, whilst she was in a sense a trustee of the property for the use of the remaindermen, yet she had a very substantial interest in it, and the remaindermen could not call her to account or restrict her in amount in what she chose to expend for her own gratification, even though it consumed the whole estate, as long as good faith was preserved." "If we seek admittance into the family circle and learn the relations and feelings of the testator towards each of the beneficiaries of his bounty" and follow the controlling rule in the construction of wills, to which all technical rules should give way, and give effect to the true intention of the testator, as the words may be gathered from the whole instrument, if not violative (22) of some established rule of law, and in arriving at that intention, if we take into account the relation of the testator, not only, as we have said, his relations to the beneficiaries, but also the conditions and circumstances surrounding him at the time of the execution of his will, reading

it, as near as may be, from his standpoint, and giving full effect, if possible, to every clause and portion of it, we cannot conclude otherwise than that he intended his wife to be the first object of his bounty and to provide for her a comfortable and sufficient support, without hampering her in the use and enjoyment of the property, but allowing her to deal with it, in her own way, as her necessities might require, and leaving only what might be left of it to the remaindermen.

It is said, though, that there was error in the former decision, because we overlooked the fact that the deed to Green did not refer to the will or the power. This is a misapprehension as to the nature of this power of disposal. "It has repeatedly been held that where a person having power to convey the fee simple estate, and also having a life estate or other interest, executed a conveyance of the fee, the deed will be referred to the execution of the power (or *jus disponendi*), because otherwise it cannot take full effect according to its terms." 31 Cyc., 1125. The case referred to in the opinion of the Court is presented where there is an estate which is coupled with a power disconnected therewith, in which the donee has no beneficial interest. In such a case it will be presumed that the deed is intended to pass the interest and not to execute the power, unless the latter is in some way referred to in it. Besides, in this case, we are dealing with the *jus disponendi,* and not with a technical power, or a naked power of appointment. The case of *Grace v. Perry,* 197 Mo., 550, is directly in point and holds that no reference to the will was necessary to constitute a good and valid exercise of the power. See, also, *Underwood v. Cave, supra.*

(23) It is suggested that *Towles v. Fisher,* 77 N. C., 437, is an authority for the position that the deed of the testator's widow conveys only a life estate, because it does not refer to the power contained in the will. That case is in perfect accord with the law, as I have before stated it to be. In *Towles v. Fisher* the testator conferred upon his wife, Priscilla, the power of appointment to "charitable or religious" uses and, by a codicil, the power to sell and dispose of any part of the land by and with the consent and advice of his executors, and the Court very correctly held that it was necessary to have the consent of the executors and to refer to the power in her deed, for otherwise it would only pass the life estate. But it cannot be successfully argued from the construction of the provision of *that* will, that a reference to the will in her deed was required in order to a valid exercise of Mrs. Williams' right of alienation or *jus disponendi,* for that is what it is, and all that it is. If we hold otherwise, it seems to me, with all due deference, that we will be out of line with the controlling authorities upon the subject, both text-writers and cases. But it is very evident from the

language of the Court in *Towles v. Fisher* that the words, "all the property, real and personal, belonging to my estate, which may be in her possession at the time of her decease (shall go over) and be equally divided between James and Mary Callum," would have conferred upon his wife, Priscilla, the absolute right of alienation in fee, but for the other provisions which are inconsistent with the existence of such a right and which are not in the will of W. B. Williams, the testator in this case. It would not have been necessary, in order to meet the contention of the plaintiffs in that case, to have referred to the express and inconsistent power given by the will to be exercised only with the consent of the executors, if the Court had thought that she did not have the right of disposal under the words of the will which we have quoted. The clear inference from the course of *Justice Rodman's* reasoning is that such words would confer the right to sell and convey in fee; otherwise he would have sufficiently answered the argument of the plaintiffs by simply stating that it did not, irrespective of any other clauses of the will.

We have not adverted to the fact, which was mentioned in our former opinion, that this is an action of waste, alleged to have (24) been committed on the land devised, and is not one for the recovery of the tract of land which was received by the widow in exchange, or as the consideration for the land she conveyed. Surely, the testator did not intend to subject her to an action for waste.

My conclusion is that the former decision, being right, should be approved, and that the petition should be dismissed.

HOKE, J., concurs in the dissenting opinion of WALKER, J.

Cited: *Chewning v. Mason, post,* 583; *Mabrey v. Brown,* 162 N. C., 221; *Taylor v. Brown,* 165 N. C., 162.

Z. A. REA v. STANDARD MIRROR COMPANY AND FRANK WINESKIE.

(Filed 23 December, 1911.)

1. Removal of Causes — Federal Courts — Pleadings — Fraudulent Joinder — Jurisdiction.

When a complaint in an action for damages alleged to have been negligently inflicted by a nonresident corporation and its resident gen-

eral manager, alleges in good faith a joint wrong, the allegations must be considered and passed upon as the complaint presents them, and no several controversy being presented which requires or permits a removal to the Federal courts, the cause should be determined in the courts of the State where it was brought.

2. Same—Allegations of Petition.

When the complaint in an action for damages against a nonresident corporation and its resident general manager alleges in good faith a joint wrong for which the corporation and its general manager are responsible, the position that the cause is properly determinable in the State court, when a proper motion with sufficient bond for removal to the Federal court is made and presented by the defendant, is not altered or affected by an allegation of the petition that the resident defendant was joined for the mere purpose of avoiding removal, or with no honest intent of seeking relief against such resident, or the like or by general allegations of fraudulent joinder.

3. Same—Motion to Remand—Practice.

When a petition for the removal of a cause from the State to the Federal court, properly verified and accompanied by a proper and sufficient bond, has been filed in the State court in apt time, in an action brought against a nonresident corporation and its resident manager alleging a joint wrong, and the petition contains allegations of fraudulent joinder, together with full and direct statement of the facts and circumstances sufficient, if true, to demonstrate that there has been such fraudulent joinder of the resident defendant, the jurisdiction of the State court is at an end and the order should be made removing the cause, leaving the remedy for the opposing party in the Federal court upon motion to remand the cause or other proper procedure therein.

4. Removal of Causes—Petition—Verification—Practice.

The petition upon which a removal of a cause from the State to the Federal court is based, which alleges a fraudulent joinder of a resident with a nonresident defendant for the purpose of retaining jurisdiction in the State courts, should be properly verified.

(25) APPEAL from *Lyon, J.*, at April Term, 1911, of DAVIDSON.

Motion to remove the cause to Circuit Court of United States for Western District of North Carolina. There was judgment that the cause be removed, and plaintiff excepted and appealed.

Walser & Walser and Bryant & Brogden for plaintiff.
Roberson & Barnhardt, Craige & Craige for defendant.

HOKE, J. At April Term, 1911, of said court plaintiff, a citizen and resident of Davidson County, N. C., having entered suit, filed his complaint in the Superior Court of Davidson County, alleging liability for

physical injuries received by reason of the joint negligence on the part of the defendant, the Standard Mirror Company, a corporation, citizen and resident of the State of Pennsylvania, doing business at High Point, N. C., and Frank Wineskie, a resident of this State and secretary and general manager of the company's plant in this State, having direct charge and control of the work and the laborers employed therein, including the plaintiff. The wrong alleged being in part the negligent provision made and directions given by said Wineskie when engaged in his duties as defendant's general manager, etc.

The defendant in apt time, and accompained by proper bond, with good and sufficient sureties, filed his duly verified petition (26) for removal, setting forth the position and duties of defendant Wineskie in reference to his codefendant's plant at the time of the injury, with detailed and special averment that said Wineskie was not charged with the supervision and control of plaintiff or other laborers employed in the work or of supplying them with safe and suitable machinery or placing, etc.; that his duties were entirely in the office of defendant company, disconnected with any direction or supervision of laborers, machinery, etc., and the petition further proceeds as follows: "That he was not present or in the factory when the plaintiff was injured; that the injury received was neither the direct or proximate cause or result of any negligence of defendant Wineskie, nor of any duty imposed upon him, nor of the failure on his part to use due care, caution, or prudence, and properly discharge his duties, which are and were at and before the alleged injury of plaintiff, in the office of said company, as above set forth. That the rights of the real parties in interest to this controversy can be finally adjudicated without the presence of the defendant Wineskie; that the defendant Wineskie is an improper party to this proceeding; that he has no connection therewith, and that he is an unnecessary party. That defendant Wineskie has been improperly and fraudulently joined as a defendant in this suit for the purpose of fraudulently and improperly preventing or attempting to prevent this defendant from removing this cause to the United States Circuit Court, and that the plaintiff well knew, at the time of the beginning of this suit, that Wineskie was not charged with the duties aforesaid, as alleged in the complaint, and that he was joined as a party defendant for the sole and only purpose of preventing the removal of this cause, and not in good faith."

Upon these the controlling facts relevant to the question presented, we are of opinion that the order for removal was properly made. It is now very generally held that on the facts stated in the complaint the cause of action may be considered and dealt with as a joint wrong, and

that when such allegations are made in good faith, they must be considered and passed upon as the complaint presents them, and that when viewed as a legal proposition, no severable controversy is pre-
(27) sented which requires or permits a removal to the Federal courts. *R. R. v. Miller,* 217 U. S., 209; *R. R. v. Thompson,* 200 U. S., 206; *Dougherty v. R. R.,* 126 Fed., 239. And it is held, further, that the position as stated is not altered or in any way affected by allegation of the petition that the resident defendant was joined for the mere purpose of avoiding removal or with no honest intent of seeking relief against such resident, or the like, or by general allegations of fraudulent joinder. *R. R. v. Herman,* 187 U. S., 63; *Foster v. Gas Co.,* 185 Fed., 979; *Shane v. Electric Ry.,* 150 Fed., 801; *Knutts v. Electric R. R.,* 148 Fed., 73; *Thomas v. R. R.,* 147 Fed., 83; *Hough v. R. R.,* 144 N. C., 701; *Tobacco Co. v. Tobacco Co.,* 144 N. C., 352; *R. R. v. Houchins,* 121 Ky., 562; *R. R. v. Gruzzle,* 124 Ga., 735.

To cite from one or two of the cases: In *R. R. v. Miller, supra,* it was held: "For the purposes of determining the removability of a cause, the case must be deemed to be such as the plaintiff has made it, in good faith in his pleadings; and if a plaintiff in a suit for personal injuries joined with the foreign corporation one or more of its employees residents of plaintiff's State as defendants, and the State court holds that the joinder is not improper, the cause is not separable and cannot be removed into the Federal court. *R. R. v. Thompson,* 200 U. S., 206; *R. R. v. Bohun,* 200 U. S., 221." And in *R. R. v. Herman,* the Court held: "While an action commenced in a State court against two defendants, one of whom is a resident and the other a nonresident, may be removed to the Circuit Court of the United States by the nonresident defendant, if it can be shown that the cause of action is separable and the resident defendant is joined fraudulently for the purpose of preventing the removal of the cause to the Federal court, such removal cannot be had if it does not appear that the resident defendant is fraudulently joined for such purpose. This rule will be adhered to even if on the trial of the action the lower court holds that no evidence was given by the plaintiff tending to show liability of the resident defendant, and a second application for a removal from the State to the Federal
(28) court has been made and denied after a trial and the trial court has sustained a demurrer to the evidence as to the resident defendant, and where it appears that the ruling was on the merits and *in invitum. Powers v. R. R.,* 169 U. S., 92, distinguished, and *Whitcomb v. Smithson,* 175 U. S., 635, followed. Where a fraudulent joinder of defendants is averred by the party petitioning for removal and is specifically denied, the petitioner has the affirmative of the issue."

These and other authorities are also to the effect that where the petition for removal, properly verified, as in this case, and accompanied by proper and sufficient bond has been filed in the State court, and the same contains allegation of fraudulent joinder, together with full and direct statement of the facts and circumstances of the transaction, sufficient if true to demonstrate that there has been such fraudulent joinder of the resident defendant, in such case the order for removal should be made, and the jurisdiction of the State court is at an end. If the plaintiff desires to challenge the truth of these averments, he must do so on motion to remand or other proper procedure in the Federal court. That court being charged with the duty of exercising jurisdiction in such case, must have the power to consider and determine the facts upon which the jurisdiction rests. *R. R. v. McCabe,* 213 U. S., 207; *Wecker v. Enameling Co.,* 204 U. S., 176; *R. R. v. Daugherty,* 138 U. S., 298; *Bank v. Hootzlar,* 75 Kan., 479; *McAlister v. R. R.,* 157 Fed., 740; *R. R. v. Bailey,* 151 Fed., 890; *R. R. v. Hudgins,* 107 Ga., 334; *Bryson v. McPherson,* 71 Iowa, 437.

As we have heretofore intimated, we think a petition in cases like the present should be verified. Ordinarily, in causes coming within the direct provisions of the statute such verification is not absolutely required, though it is usual to have it, and in these petitions alleging fraudulent joinder there are one or two cases in the lower Federal courts which hold that no verification is necessary. But this is not a case coming directly within the terms of the statute, but rather a corollary which arises from the necessit yof the case, and the procedure therein should be to some extent the subject of judicial regulation and control. As it would be inexpedient and to some extent an idle thing to confer (29) jurisdiction of a cause on the Circuit of the United States and allow to some other tribunal the power to determine the facts upon which the jurisdiction rests, so it would be to seriously inconvenience and threaten the proper and timely exercise of jurisdiction on the part of the State courts to require them to stay their procedure, on simple allegations which can be made without consideration or any sense of responsibility, and we think it rests on sound reason and is a fair deduction from the authoritative cases that the petition for removal by reason of fraudulent joinder should be duly verified. *R. R. v. Wangelin,* 132 N. C., 599; *Welch v. R. R.,* 177 Fed., 760; *Kelly v. R. R.,* 122 Fed., 286; *Ross v. R. R.,* 120 Fed., 703; *Union Terminal v. R. R.,* 119 Fed., 209. In *Wangelin's case, supra,* the affidavit of the vice president of the road as to the truth of the facts contained therein accompanied the petition of removal. In *Ross's case* it appears that the petition was duly and properly verified by defendant company. This is certainly the prevalent

custom, and should always be required. There is no error, and the judgment directing removal of the cause is

Affirmed.

Cited: Herrick v. R. R., post, 311; *Hurst v. R. R.,* 162 N. C., 379; *Lloyd v. R. R., ib.,* 494; *Smith v. Quarries Co.,* 164 N. C., 352; *Pruitt v. Power Co.,* 165 N. C., 420; *Lloyd v. R. R.,* 166 N. C., 37; *Cox v. R. R., ib.,* 662; *Cogdill v. Clayton,* 170 N. C., 528.

AARON T. PENN v. STANDARD LIFE AND ACCIDENT INSURANCE COMPANY.

(Filed 23 December, 1911.)

1. Insurance—Policy Contracts—Meaning Plain—Ambiguity—Interpretation.

When the terms of a policy of insurance are expressed in language free from ambiguity or doubt as to their meaning, there is nothing left to construction, and the policy will be enforced against the insured in accordance with its plain meaning and intent, as it is written, unless fraud or public policy should intervene.

2. Insurance—Accident—Policy Contracts—Independent and Direct Cause—"Proximate Cause"—Interpretation of Contracts.

When under the express terms of a policy of insurance the insurer is only liable when an injury results from accidental means "directly and independently of all other causes," the rule of proximate cause, as applied to actions of negligence, will not apply, and the plaintiff, in his action on the policy, cannot recover, under the contract, if some other cause than the policy specifies is also and independently instrumental in producing the injury complained of.

3. Same—Instructions.

In an action upon an accident insurance policy for the loss of an eye, the policy provided that the insurance should only be "against bodily injuries effected, directly and independently of all other causes, through external, accidental, and violent means." There was evidence tending to show the loss of the eye was through an accident to plaintiff in falling from a train, and, also, that the plaintiff, at the time of the alleged injury, has a cataract on that eye which would have resulted eventually in destroying it. A charge held correct, that if the jury find that the plaintiff fell from the car and was thereby injured, and that this injury was soon thereafter followed by loss of sight, and that the condition of the plaintiff's eye at that time was such that, independent of the injury, he would have ultimately lost his sight, which falling from the car merely hastened, he could not recover.

PENN *v.* INSURANCE CO.

APPEAL by plaintiff from *W. J.* Adams, J., at March Term, (30) 1911, of ROCKINGHAM.

The facts are sufficiently stated in the opinion of the Court by *Walker, J.*

Morehead & Morehead and Sapp & Williams for plaintiff.
G. S. Bradshaw and T. H. Calvert for defendant.

WALKER, J. The defendant issued to the plaintiff an accident policy which insured him against "the irrecoverable and entire loss of one eye," in the sum of $2,500, with the proviso that the insurance should only be "against bodily injuries effected, directly and independently of all other causes, through external, accidental, and violent means."

Plaintiff alleged that he fell from a train and was so injured that he lost the sight of one eye. There was evidence tending to cast some suspicion on his statement that he had accidentally fallen, but, in the view we take of the case, it is not necessary to further refer to it or make any comment upon it. There was also evidence tending to show that at the time of the fall he had a cataract on the eye that he alleges was injured, which would have resulted eventually in destroying it, and the plaintiff introduced evidence to the contrary. (31)

The case turns upon the construction of the language in the policy which we have quoted, and with reference to it and the evidence as to the cataract, the court charged the jury as follows:

"The court charges you that if you find that the plaintiff fell from the car and was thereby injured, and that this injury was soon thereafter followed by a loss of sight, and you further find that the condition of the plaintiff's eye at that time was such that, independent of that injury, he would ultimately have lost his sight, and that this injury, falling from the car, merely hastened the loss of his sight, in that event you will not find that the injury was caused directly and independently of all other causes through external, accidental, and violent means; but if you find from the evidence, and by the greater weight of it, that the plaintiff has suffered the entire loss of sight of his eye; that the loss of his sight is irrecoverable; that the loss was caused directly and independently of all other causes, through external, accidental, and violent means, your answer to the second issue will be 'Yes.' If you do not so find, your answer will be 'No.'"

The plaintiff excepted to this instruction. There was a verdict for the defendant, and judgment having been entered thereon, the plaintiff appealed.

If the instruction was a correct one, and we think it was, the rule for a new trial was properly discharged. When the terms of a policy are

free from uncerainty or ambiguity, they "should be understood in their plain, ordinary, and popular sense," and it is only when "any provision, condition, or exception" is "uncertain or ambiguous in its meaning or is capable of two constructions" that it "should receive that construction which is most favorable to the insured." 1 Cyc., 243, 244; May on Insurance, sec. 172. As long as parties who are capable of so doing shall be permitted to make their own contracts, it is the plain duty of the court to enforce them as they are written, unless fraud or public policy shall intervene. *Binder v. Accident Association,* 127 Iowa, 25 (35). While the rule is thoroughly settled that policies of this (32) and like character are to be construed liberally, and that ambiguous provisions, or those capable of two constructions, should be construed favorably to the insured and most strongly against the insurer, plain, explicit language cannot be disregarded, nor an interpretation given the policy at variance with the clearly disclosed intent of the parties. Taking the policy in the case at bar by its four corners, it will admit of but one construction. *White v. Insurance* Co., 95 Minn., 77. In *Carr v. Insurance Co.,* 100 Mo., App., 602, the Court said that the question of proximate and immediate cause is not raised under the conditions of a policy which in terms excludes disease or bodily infirmity, and which could have no more force than the general provision, "independent of all other causes." See, also, *Mut. Association v. Fulton,* 79 Fed., 423. If the jury had found that the injury was caused by the sum of two causes, that is, that the accident and the preëxisting cataract and diseased condition of the eye were together responsible for the subsequent blindness, the plaintiff could not have recovered, as the injury must have resulted from the accident, "independent of all other causes."

In *White v. Insurance Co.,* 95 Minn., 77, the policy, in terms, had reference to injuries or death resulting "solely from such injuries as the proximate cause thereof," and provided that the insurance did not cover accident or death "resulting wholly, or partly, directly or indirectly, from bodily or mental infirmity, or disorder, or disease in any form." In that case, the Court said: "Similar policies have been before both the State and Federal courts, and the consensus of judicial opinion is that, subject to the exceptions contained in the policy, if the injury be the proximate cause of death, the company is liable, but if an injury and an existing bodily disease or infirmity concur and coöperate to that end, no liability exists. If, however, the injury be the cause of the infirmity or disease—if the disease results and springs from the injury—the company is liable, though both coöperate in causing death. The distinction made in this particular is found in that class of cases where the infirmity or disease existed in the insured at the time of the injury,

and, on the other hand, that class of cases where the disease was (33) caused and brought about by the injury. And even in cases where the insured is afflicted at the time of the accident with some bodily disease, if the accidental injury be of such a nature as to cause death solely and independently of the disease, liability exists. The rule of proximate cause, as applied to actions of negligence, cannot be applied in its full scope to contracts of this nature." See, also, *M. C. Co. v. Glass*, 29 Texas Civ. App., 159.

Ward v. Insurance Co., 85 Neb., 471, was an action on a policy which permitted recovery only when the injury or death resulted from accidental means "independently of all other causes," and the Court said: "Plaintiff was not entitled to recover if death was caused by the sum of these two causes."

We may thus summarize another case:

"It is conceded that the disease of appendicitis, with its consequences and complications, caused the death of the insured, but the real question of fact lies further back, and is, whether the fall against the dashboard, acting independently of any other cause, produced this disease. If the insured recovered from his former attacks of this disease, so that it no longer existed in his body, and there was only a susceptibility to have it in case a proper exciting cause should arise, and in this case the fall against the dashboard proved to be such exciting cause, the case would be one for recovery under the policy; but if because of the former attacks there was not merely a susceptibility to a further attack, but the actual disease itself existed, liable to be rendered active and virulent by an injury such as that suffered by the insured, in that event the active disease which resulted in death would not be regarded as the result of the fall alone, but as the joint result of the fall and the latent disease, and hence there could be no recovery under the policy." *Casualty Co. v. Shields*, 155 Fed., 54.

In still another important case a similar ruling was made: "If Shyrock suffered an accident and his death was caused by that alone, the association agreed by its certificate to pay the promised indemnity. But if he was affected with a disease or bodily infirmity which caused his death, the association was not liable under this certificate, (34) whether he also suffered an accident or not. If he sustained an accident, but at the time it occurred he was suffering from a preëxisting disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected with the disease or infirmity, but he died because the accident aggravated the effects of the disease, or the disease aggravated the effects of the accident, the express contract was that the association should not be liable for the amount of this insurance.

The death in such case would not be the result of the accident alone, but it would be caused partly by the disease and partly by the accident, and the contract exempted the association from liability therefor." *Accident Association v. Shyrock,* 73 Fed., 774. The policy in that case contained a clause similar to the one we have quoted from the policy upon which this suit was brought.

In *Binder v. Accident Association, supra,* the policy provided that it must appear that the death or disability was "purely accidental and the direct result of an accident, and that the accident was the sole and only cause of the said member's death or disability." The Court said: "If it be true, as the jury might have found under the evidence, that the diseased condition of the arteries aggravated the effect of the accident, if there was one, and contributed to the disability occasioned thereby, then, under the express terms of the contract, there was no liability on the part of the association." If two causes, disease and accident, coexist and concur, though unequally, in causing a loss, it could not well be said that either the one or the other of them was the sole and independent cause. This, of course, would not be so if the accident itself was the cause of the disease. *Freeman v. Accident Association,* 156 Mass., 351, 17 L. R. A., 73, was an action on a policy containing a provision similar to the one in the policy upon which this suit was brought. Speaking to the question now under discussion, the Court said: "The question as to whether peritonitis, if that caused his death, is to be deemed a disease within the meaning of this policy, so far as to prevent a recovery, depends upon the question whether or not, before the time of the fall, and at the time of the fall, he had then the disease
(35) —was then suffering with the disease. If he was, then, in the sense of the policy, although the disease was aggravated and made fatal by the fall, he cannot recover." See *C. T. Accident Association v. Fulton,* 79 Fed., 423.

There is some conflict in the authorities, but we believe that those best considered hold with the courts whose decisions we have cited.

The charge of the court placed the vital issue fairly and squarely before the jury and they have found the facts against the plaintiff, which means that he had a cataract at the time he fell, if he did fall, and that it united actively and efficiently with the fall in producing the unfortunate result.

In some cases, where the words "proximate cause" have been used in the policy to describe the causal connection between the accident and the resultant injury, some courts have held that the words thus employed to express the nature of the risk should be construed according to their common and accepted meaning, as adopted and approved in law under

like conditions and circumstances, and as thus interpreted they refer to the efficient cause from which the injury results, whether such cause produces the injury directly or through the medium of an intervening cause or agency, which it sets in motion, and which are then united by close causal relation to each other; and this rule was applied to a case in which it appeared that the insured sustained an accidental fall which caused an abrasion of the skin of his leg, with the result that blood poisoning set in and death ensued, and it was very correctly held that the evidence should be submitted to the jury to find whether the death resulted proximately and solely from the fall. And some, at least, of the cases cited by appellant's counsel may be harmonized with our decision in this case by adverting to the distinction pointed out in those cases. *Cary v. Insurance Co.*, 127 Wis., 67; 7 Am. & Eng., Anno. Cases, 484. No such words are to be found in this policy. The case we have just put was somewhat like the one cited by us from the Massachusetts Court, and in the latter case it was held that where the accident itself causes the disease which then unites with it in producing the injury, the insurer is liable, but not where the disease preëxisted and contributed proximately to the injury. If this distinction is kept (36) clearly in view, many of the authorities, which apparently conflict, may be reconciled. In our case there is no question of proximate cause. The parties have solemnly contracted, the plaintiff to be protected and the defendant to insure him against loss, under well-defined conditions, and the contract must be construed, being unambiguous, as it is written, under the maxim of the law which prohibits us to make a contract for the parties, but allows us only to construe the contract which they have made (*in haec federa non veni*).

The other exceptions do not suggest to us any reversible error.

A careful consideration of this case discloses nothing that should induce us to reverse the judgment.

No error.

Cited: *S. c.*, 160 N. C., 399.

D. E. WILLIAMS ET AL., SCHOOL COMMITTEE, v. D. B. BRADFORD.

(Filed 23 December, 1911.)

1. Legislative Powers—School Districts—Bond Issues—Interpretation of Statutes—Constitutional Law.

In interpreting a statute with reference to its constitutionality, all doubts should be resolved in favor of its validity, and the courts will assume that the Legislature acted with integrity and with an honest purpose to observe the restrictions and limitations imposed by the Constitution.

2. Same—Racial Discrimination—Unconstitutional Act—Rights of Purchaser.

An act of the Legislature which provides for the erection of a schoolhouse in a certain school district from the proceeds of a bond issue to be voted upon therein, "for the whites" in that district, violates the plain mandate of the Constitution, Art. IX, sec. 2, that "there shall be no discrimination in favor of, or to the prejudice of, either race," leaving nothing for interpretation, and a purchaser of these bonds, though issued according to all other legal requirements, may refuse to accept them on the ground of their being invalid. *Lowery v. School Trustees*, 140 N. C., 39; *Bonitz v. School Trustees*, 154 N. C., 379, where discretion was conferred upon the local board of administration to apportion the funds raised by the sale of the bonds without racial discrimination, cited and distinguished.

BROWN, J., dissenting.

(37) APPEAL from *Cline, J.*, at Fall Term, 1911, of CAMDEN.

This case was heard in the court below upon the following case agreed:

Chapter 345, Private Laws 1911, provides for the submitting to a vote of the people of the district the question of additional school tax, and the borrowing a sufficient amount to erect a building, not to exceed $5,000, "for the whites in the School District No. 19." The patrons of School District No. 19, as set out in said chapter, applied to the Board of County Commissioners of Camden County asking for an additional tax, as provided in said chapter, for the purpose of erecting a school building for the whites in said district. There was an election held and all requirements provided for in chapter 345 were carried out and complied with in every respect, and the majority of the qualified voters of said district voted for the additional school tax. The school committee contracted to erect a building to cost about $10,000, $5,000 of which was given by public subscription, and the committee issued bonds to the amount of $5,000 and advertised them for sale. The defendant, D. B. Bradford, was the highest bidder, at $1.01 and agreed to take the bonds at the price, but now refuses to accept them and pay the money for them,

upon the ground that the committee had no right to issue them, for the reason that the act is unconstitutional and the bonds are not valid. Chapter 345 is made a part of this statement of the case. The above facts are submitted to the court for its opinion and judgment.

The court held the bonds to be invalid and that the defendant, therefore, is not required to accept them. Judgment was accordingly entered, and the plaintiffs excepted and appealed.

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

WALKER, J., after stating the facts: This case presents but a single question and one which we think, in view of recent decisions of this Court, is not difficult of solution. Our Constitution, Art. IX, sec. 2, provides as follows: "The General Assembly, at its first (38) session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race." There is nothing in the act to indicate that any discretion whatever is left with the local board of administration as to the apportionment of the fund which will be raised by a sale of the bonds among the two races without discrimination, as was the case in *Lowery v. School Trustees,* 140 N. C., 39, and *Bonitz v. School Trustees,* 154 N. C., 379. The provision of the act in regard to the application of the fund to be raised by taxation requires that it shall be applied to the erection of a school building for the white people, and is as mandatory in this respect as it could not have been expressed.

Every presumption is to be indulged in favor of the validity of a statute, and all doubts should be resolved in support of it. We must always assume, when passing upon the constitutionality of a statute, that the Legislature acted with integrity and with an honest purpose to observe the restrictions and limitations imposed by law. 2 Lewis's Suth. Stat. Constr. (2 Ed.), sec. 82. It is also true that where a duty is imposed or a power conferred upon a public agency, the necessary implication is that the duty should be performed and the power exercised in the manner prescribed in the Constitution. With every disposition to uphold this act, and inclining most favorably to every reasonable construction of it which would execute the legislative will and at the same time conform to the mandate of the Constitution, we are unable to

sustain it, but must declare it to be void, as being in direct conflict with the plain requirements of the fundamental law.

The act provides for only one thing, the levying of a tax for the purpose of erecting a school building "for the whites," and only for that purpose. The other provisions of the act relate to the machinery for levying and collecting the tax, but the proceeds of such tax, (39) when collected, are to be applied entirely to the purpose thus clearly indicated, and to no other. There is no room whatever for the exercise of any judgment or discretion by the local authorities themselves in the application or appropriation of the tax fund, according to the mandate of the Constitution, that is, without racial discrimination. In this respect, our case differs essentially from *Lowery v. School Trustees* and *Bonitz v. School Trustees,* already cited. In each of these cases there were expressions in the statute which this Court construed to mean that it was not the purpose to tax the people of the school district for the exclusive benefit of the one race or the other, and that while language was used which, if considered by itself, might lead to the conclusion that only one of the races was intended to receive the full and exclusive benefit of the tax, it was explained and its meaning so enlarged by other parts of the act as to avoid any discrimination between the races, and that, by a fair and reasonable construction of the whole act, reading and interpreting each provision with proper reference to the context, the true intent of the Legislature to apportion the fund between the two races fairly and reasonably and in accordance with the constitutional requirement, was made apparent.

When we bring this act to the test of our decision in *Bonitz v. School Trustees,* 154 N. C., 375, we can have no reasonable doubt as to its invalidity. *Justice Hoke* thus speaks for the entire Court in that case: "The Constitution of this State, Art. IX, sec. 2, in providing for a 'uniform system of public schools wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years,' contains the requirement, 'That the children of the white race and the children of the colored race shall be taught in separate schools,' and further, 'but there shall be no discrimination in favor of or to the prejudice of either race.' In numerous and well-considered decisions this Court has held that these provisions of our Constitution, in regard to the two races, are mandatory, and may be disregarded neither by Legislature nor by officials charged with the duty of administering a given law. *Smith v. School Trustees,* 141 N. C., pp. 143-159; *Lowery v. School Trustees,* 140 N. C., 33; *Puitt v. Commissioners,* 94 N. C., 709; (40) *Riggsbee v. Durham,* 94 N. C., 800. If, therefore, the act in question here, in designating a certain boundary as a 'school

district for the white race,' can only be construed as requiring that the funds to be raised under its provisions should be applied exclusively to the white schools within such boundary and the additional facilities afforded only enjoyed by the white children attending such schools, it would be clearly unconstitutional."

The statute we now have under consideration manifestly falls under the condemnation of the law, as stated in that case, and, therefore, we are of the opinion that it is void, and so are the bonds which have been issued and sold under the supposed authority therein conferred.

This decision has nothing to do with the requirements of the Constitution that the two races shall be taught in separate schools. We will maintain that provision inviolate and in its full integrity. It is not a question in this case whether there shall be such a separation, but whether the Constitution shall be obeyed when it commands that there shall be no discrimination.

Affirmed.

BROWN, J., dissenting: The question presented by this appeal is the validity of the bonds issued under chapter 345, Private Laws of 1911. This act of the General Assembly provides for the levying of an annual tax for the purpose of building a school building for the whites, and authorizes borrowing the money necessary to construct such building and directs that the special annual tax be applied to the payment of such debt. It is very important to bear in mind that there is no tax levied or debt authorized to be contracted for the maintenance of any schools, white or colored.

Nor does the act provide for the building of a colored schoolhouse, for none is needed. So far as the record shows, the colored race is already provided with a suitable and sufficient school building, but the whites are not.

This point has never before been decided in this State, and I think the Court has misapplied the former decisions of this (41) Court. If the act provided for the levying of a special tax for the sole maintenance and support of the white schools to the exclusion of the colored, then I should say it discriminated against the colored race, and would be a violation of Art. IX, sec. 2, of our State Constitution.

This section reads as follows: "The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years. And the children of the white race and the

children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of or to the prejudice of either race." We find in this section the peremptory mandate of the Constitution that the children of the white race and the children of the colored race shall be taught in separate public schools.

How is this to be accomplished unless separate school buildings can be provided necessary for the accommodation of each race?

When the General Assembly is commanded to see to it that the two races are taught in separate public schools, it is certainly invested by necessary implication with the power to give effect to that command by providing for the erection of suitable buildings for each race.

It is not obliged to provide for buildings for each race at the same time and in the same enactment. It may provide for a building at one session for the white race and at its next session for the colored race, or the latter may be already provided for.

Certainly there is no discrimination apparent in the act, because a white school building is a constitutional necessity in which the colored race can have no share or interest.

It surely cannot be contended that every time a white schoolhouse is built a colored schoolhouse must also be erected, regardless of the needs of the two races. We have repeatedly affirmed the doctrine that "Courts will not adjudge an act of the Legislature invalid unless its violation of the Constitution is clear, complete, and unmistakable." This is (42) the language of Mr. Black quoted with approval in *Bonitz v. School Trustees,* 154 N. C., 379.

As the colored race in South Mills Township, Camden County, to which this act applies, is doubtless already provided with a school building suitable to its needs (no complaint is made that they are not), and as the white race evidently is not so provided, I think it was the duty of the General Assembly to provide for the erection of a suitable building. That is all that this legislation undertakes to do, and there is nothing discriminatory on its face. The fact that the Legislature did not provide the means in the same enactment for the erection at same time of a colored school building should be conclusive that none is needed for that race.

Cited: Whitford v. Comrs., 159 N. C., 161.

L. C. CAMPBELL v. JOHN G. FARLEY ET AL.

(Filed December 23, 1916.)

1. Judicial Sales—Courts—Death of Commissioner—Deeds and Conveyances—Custodia Legis—Motion in Cause—Procedure.

When a commissioner appointed by the court to sell land has done so in accordance with the order, and has since died without making a deed thereof to the purchaser at the sale who has paid the purchase money, the lands remain *in custodia legis*, and the remedy of an assignee of the purchaser in possession under the sale is by motion in the original cause for the appointment of a commissioner to complete the transaction by making a proper deed.

2. Judicial Sales—Order as to Payment—Directory—Time Not of the Essence—Irregularities.

When a sale of lands has been made by a commissioner appointed by the court under an order that the purchaser at the sale pay the purchase money by a certain time, and the purchase money has either been paid and accepted by the court or the proper parties in interest at a different or later date, it is immaterial that it was not paid *ad diem*, the order being merely directory, and time not being of the essence of the contract, but the matter being within the discretion and control of the court.

3. Judicial Sales—Courts—Confirmation—Nunc Pro Tunc.

When it appears that a purchaser at a judicial sale is entitled, under his motion in the cause, to have another commissioner appointed to make him a deed, which had not been done, owing to the death of a former commissioner and it also appears that the sale has not been confirmed by the court, the confirmation may be made *nunc pro tunc*, if it is not dispensed with by an agreement of the parties.

APPEAL by defendant from *Cline, J.*, at Spring Term, 1911, of (43) GRAHAM.

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

Morphew & Phillips for appellees.
J. S. Adams and James H. Merrimon for appellants.

WALKER, J. This is a motion in the original cause by the assignee of the purchaser at a judicial sale for the appointment of a commissioner to complete the sale, left unfinished by a former commissioner who has died, by executing a deed to the purchaser. Those who claim under the sale have had possession of the land ever since it was made. The court found as facts that the sale was made by the commissioner and reported to the court, and that the purchase price had been paid. A

motion in this cause is the proper remedy. "There is no pretense that any deed has been executed to the purchaser of the land, sold under the order of the court, by an authorized servant of the court, and under its permission; and until that is done the land continues to be *in custodia legis,* and any relief which may be had in reference to it or the purchase money must be sought in the original proceeding." *Kemp v. Kemp,* 85 N. C., 496. This doctrine is approved in *Wilson v. Chichester,* 107 N. C., 386. See, also, *Lord v. Beard,* 79 N. C., 9; *Mauney v. Pemberton,* 75 N. C., 221; *Long v. Jarrett,* 94 N. C., 445. It is true that the order of sale provided for the payment of the purchase money, either the whole thereof or by installments, at a certain time, but this was not mandatory; it was merely directory, as time was not of the essence of the transaction, and if the purchase money has since been paid and the court or the plaintiff has accepted it, it is immaterial that it was not paid *ad diem,* and this is so as to any other irregularity, not (44) affecting the substance or prejudical to the rights of the parties, as is the case here. The court finds that the purchaser, R. L. Cooper, assigned his bid to W. P. Rose, and the latter assigned to the Union Development Company, by which this motion is made. It is also found as a fact that Earl P. Tatham, to whom Campbell conveyed his interest by deed, acquired his interest with full notice of the appellee's rights, if the adverse possession of the land by the purchaser and those claiming under him by assignment did not constitute notice in law. *Tankard v. Tankard,* 79 N. C., 54; *Edwards v. Thompson,* 71 N. C., 177.

There does not seem to be much stress laid upon the point as to the necessity for a confirmation of the sale by the court upon the report of the commissioner, but this can be done now by the court, *nunc pro tunc,* if it is not dispensed with by agreement of the parties. *Joyner v. Futrell,* 136 N. C., 301. A fair construction of the proceedings of the court and the facts in the case as found or admitted leads us to the conclusion that there was no error committed by his Honor in deciding this case.

No error.

Cited: Grimes v. Andrews, 170 N. C., 524.

A. E. BROWN, TREASURER, SCHOOL BOARD OF THE TOWN OF CANTON, v. H. W. SPRAY, TREASURER OF THE TOWN AND TAX COLLECTOR, ET AL.

(Filed 23 December, 1911.)

1. Statutes—Amendments—Interpretation—Construed as a Whole.

An amendment to a legislative act will be construed with the original act as one and the same act, in its application to an action brought subsequent to the time the amendment went into effect.

2. Same—School Trustees—Bond Issues—Taxes—Special Treasurer—Control of School Affairs.

Private Laws 1907, ch. 237, authorized the town of Canton to issue bonds for various purposes, on approval of the voters of the town, among them being the erection of a school building, also a special tax levied for the maintenance of the school to be collected by the tax collector and paid to the town treasurer, to be kept separate and apart and paid out under the order of the school board. A finance committee was established by the act and was designated by name, to which large powers of supervision and control were given in reference to contracts entered into by the governing agencies of the town, the disposition of the proceeds of the special-tax bonds, the establishment of graded schools and the purchase of sites and the erection of buildings thereon, etc. This act was amended by chapter 27, Private Laws 1909, which in effect struck out all the provisions giving control to the finance committee of matters pertaining to education, etc., and authorized the board of school trustees to select their own treasurer, etc., "who shall have charge of the proceeds to be derived from the sale of said school bonds. . . . and charge of all school money collected under the provisions of this act": *Held*, (1) the entire management, guidance, and control of these school matters, financial and otherwise, was with the board of school trustees, its officers and agents; (2) taxes levied for school purposes should be paid by the tax collector direct to the treasurer selected by the school board, and the contracts of this board and the disposition of the school funds arising from the sale of the bonds or otherwise are not subject to the supervision or control of the finance committee.

3. School Trustees—Bond Issue—Validity—Collateral Matters.

In this action, the validity of the bond issue not being questioned, but only as to which treasurer the proceeds of the sale of the bonds and the money arising from the tax levy should be paid, the determination of the court is not affected by the fact that the amendatory act authorizes the commissioners to issue a portion of the bonds at a higher rate of interest than was authorized in the proposition submitted to the vote of the citizens of the town, especially as the bonds in question were not of a higher rate than thus authorized.

APPEAL from *Webb, J.*, from HAYWOOD, and by consent heard (45) and determined at Bryson City, 23 October, 1911.

Mandamus directing tax collector, etc., to pay moneys realized by sale

of bonds, etc., collected for school purposes, to plaintiff as treasurer of board of graded-school trustees.

There was judgment for plaintiff, and defendant excepted and appealed.

W. T. Crawford for plaintiff.
J. Bat Smathers, Smathers & Morgan for defendant.

(46) HOKE, J. By statute, Private Laws 1907, ch. 237, the General Assembly authorized the town of Canton, Haywood County, on approval of voters of the town, to issue bonds in the sum of $65,000 for water supply, sewerage, electric lights, a graded-school building, and street improvements, and to lay a special tax to pay accruing interest, etc. By section 11 of the act, the town is constituted the "Canton Graded-school District for White and Colored Children," and in subsequent sections a school board is created, having general management and control of the schools therein; a special tax is levied for the maintenance of the school, to be collected by the tax collector and paid to the town treasurer, to be kept separate and apart, etc., and paid out under order of the school board, etc. Provision is also made for purchase of sites and erecting suitable buildings, etc., for school purposes. By section 7 of the act in question a finance committee is established and designated by name, and this committee is given large powers of supervision and control in reference to the contracts entered into by the governing agencies of the town, the disposition of the proceeds of the special-tax bonds, etc., the establishment of the graded schools and purchase of sites and erection of buildings therefor, etc.

By a subsequent act, Private Laws, 1909, ch. 27, this former statute was amended, and in reference to the question presented, the last statute provides as follows:

"SEC. 4. That section 7 of said chapter 237 be and the same is hereby amended by striking out all after the word 'act,' in line four, down to and including the word 'school,' in line six, it being the purpose of this section to provide that said finance committee shall have no control or authority over the money to be issued for erecting said graded-school buildings, nor shall said finance committee have any control or authority whatever over said graded schools or any taxes levied or collected for said graded schools to be expended in their behalf.

"SEC. 5. That section 19 of said chapter be amended by striking out, in line fourteen, the words 'subject to the approval of the finance committee, as aforesaid.'" (This section 19 being the section of the
(47) former act referring to the portions of the proceeds from sale of said bonds available for school purposes).

"SEC. 6. That section 20 is hereby amended by striking out, in line two, the words 'subject to the approval of the finance committee.'" (Section 20, requiring approval of finance committee as to purchase of school sites).

"SEC. 7. That the said board of graded-school trustees shall have the power and they are hereby authorized to select a treasurer of said board, who shall have charge of the proceeds to be derived from the sale of said school bonds and who shall also have charge of all school money collected under the provisions of this act. Said treasurer shall be elected by said board of school trutees and shall hold his office for a term of two years, until his successor is elected and qualifies. He shall receive as compensation for his services the same commission as is paid to the treasurer of the town of Canton for his services. He shall give such bond for the faithful performance of his services as said board may determine, and shall only pay out moneys which may come into his hands upon the order of the board of trustees."

It is familiar doctrine that an original act and an amendment to it shall be considered as one act, and, so far as regards a cause of action after the amendment is adopted, shall be construed as if it had read from the beginning as it does with the amendment added to it or incorporated in it (Black on Interpretation of Laws, pp. 356, 357), and on perusal of the original act and the amendment, it is clear that the Legislature intended to place the entire management, guidance, and control of these graded-school matters, financial and otherwise, with the board of school trustees and its officers and agents; that the taxes levied for school purposes shall be paid direct from the town tax collecter to the treasurer selected by the school board, and that the contracts of this board and the disposition of the school funds, arising from the sale of bonds or otherwise are to be no longer subject to the finance committee.

The application of $1,178.57, the portion of the school tax paid by the Champion Fiber Company for 1911, to the general bonded (48) indebtedness of the town, was without warrant of law, and the judgment very properly directs that this same shall be paid to the treasurer of the school board, together with any and all other sums devoted to school purposes. By the terms of the statute the tax was levied for school purposes and is to be kept separate and applied to the purposes designated. 3 Abbott Municipal Corporations, secs. 1069-70-71.

Our conclusion is not affected because the amendatory act in the first section authorizes the commissioners to issue a portion of the bonds at a higher rate of interest than was specified, when the proposition was submitted to the people. We do not see that the validity of these bonds is in any way presented, and if it were otherwise, this provision for the

enhancement of interest does not extend to the portion of the bonds applicable to school purposes.

The judgment of the court will be so modified that the town tax collector shall pay the taxes levied and collected for school purposes directly to the treasurer of the school board, and with this modification the judgment of his Honor is

Affirmed.

Cited: *Burwell v. Lillington,* 171 N. C., 97.

MARY H. FOWLER ET AL. v. THE UNION DEVELOPMENT COMPANY.

(Filed 23 December, 1911.)

1. Grants of Land—Countersignature—Deputy Clerk—Invalidity.

A countersignature by the chief clerk to the Secretary of State on a grant for lands held void under the doctrine of *Richards v. Lumber Co., post,* 54.

2. Same—Correction—Validity.

When the countersignature of the Secretary of State correctly appears on a grant in all respects regular in form, the validity of the grant will not be affected because a void attempted countersignature of the Secretary appears thereon as having been made by the chief clerk in his office.

3. Grant of Land—Regular in Form—Countersignature—Seal—Entry—Presumptions.

A grant of land under the great seal of the State, regular in substance and form, had thereon the following countersignature by the Secretary of State: "Secretary's office, May 21, 1869, H. J. Menninger, Secretary of State." The countersignature held sufficient, and the reference to the Secretary of State's office, with the entry plat as well as the great seal affixed to the grant, shows that the grant was duly issued upon the payment of the money.

ALLEN, J., dissenting; WALKER, J., concurs in the dissenting opinion.

(49) APPEAL by plaintiff from *Cline, J.,* at Spring Term, 1911, of CLAY.

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

A. W. Horne, J. Frank Ray, and O. L. Anderson for plaintiffs.
F. S. Johnston, G. L. Jones, and J. H. Dillard for defendant.

CLARK, C. J. The only question presented is whether Grant No. 3075 is valid. The original is sent up in the record, and shows:

1. The grant purports to be countersigned as follows: "By command, H. J. Menninger, Secretary of State, per T. J. Menninger, chief clerk." This is invalid. *Beam v. Jennings,* 96 N. C., 83; *Richards v. Lumber Co., post,* 54.

2. The Secretary of State himself seems to have been of this opinion and duly countersigned it himself by writing on the opposite side of the sheet the following: "Secretary's office, May 21, 1869. H. J. Menninger, Secretary of State." This is sufficient countersigning, as is held in *Richards v. Lumber Co., post,* 54. The abortive countersigning by the chief clerk does not vitiate the proper countersigning by the Secretary of State himself. *Utile per inutile non vitiatur.* The genuineness of the signature of the Secretary of State and that of the Governor is presumed from the great seal being affixed, and there is no attack made upon it. Reference to the Secretary of State's office shows that this grant was duly issued, and upon payment of the purchase money. (50) The entry and plat as well as the great seal are affixed to the grant. In rejecting it there was

Error.

ALLEN, J., dissenting: The question involved in this appeal is similar to the one considered on the plaintiff's appeal in *Richards v. Lumber Co.,* but the facts differ in one particular.

The paper, purporting to be a grant, offered in evidence in this case, in addition to a countersigning, "H. J. Menninger, Secretary of State, per T. J. Menninger, Chief Clerk," had indorsed on it, "Secretary's office, May 21, 1869. H. J. Menninger, Secretary of State."

There was no evidence as to handwriting, or that this indorsement was on the paper when it left the office of Secretary of State.

For the reasons assigned in the opinion in *Richards v. Lumber Co.,* I think the paper was properly excluded and that the judgment ought to be affirmed.

JUSTICE WALKER concurs in this opinion.

GRACE ROBERTS v. W. M. PRATT.

(Filed 23 December, 1911.)

1. Judgments of Other States—Fraud—Res Judicata—Second Appeal—Common Law—Presumptions—Evidence.

A motion to set aside a judgment in an action brought in South Dakota on the grounds of fraud, having been held in this Court, on a former appeal, to preclude an action brought here involving the same question, upon the presumption, in the absence of evidence to the contrary, that the common law prevailed there, as adjudicated here, and the only additional evidence on this appeal being of a statute in South Dakota practically enacting the law as held on the former appeal, the matter is held *res judicata.*

2. Judgments of Other States—Counterclaim—Subsequent Credits—Res Judicata.

Matters alleged in counterclaim to an action brought on a judgment of another State in the courts of this State, and which arose since that judgment was rendered on the question of credits thereon of rents of lands in that other State, bearing a proper relation to the judgment sued on, are not *res judicata* in the former action. *Tyler v. Capehart*, 125 N. C., 64, cited and applied.

(51) APPEAL from *Long, J.*, and a jury, at July Term, 1911, of McDOWELL.

Action to recover on a judgment rendered in favor of plaintiff against defendant in the courts of South Dakota.

Plaintiff declared on a judgment in her favor, rendered in the courts of South Dakota, said courts having at the time jurisdiction of the cause and of the parties by personal service within that jurisdiction. Defendant answered, alleging fraud in the procurement of the judgment, and pleading a counterclaim by reason of payments and receipts bearing date since the rendition of the judgments and receipts bearing date since the rendition of the judgment.

The following issues were submitted and answered by the jury:

1. Is section No. 151 on pages 594-5 of the Revised Code of South Dakota the only statutory law of that State relating to remedies for setting aside judgments after the term? (Answer dictated to stenographer. See record).

2. Was the judgment described in the complaint obtained by the fraud of the plaintiff, as alleged in the answer? Answer: Yes.

3. What amount, if any, has the defendant paid to plaintiff upon the judgment since the rendition thereof? Answer: $320.73.

4. What amount, if anything, has the defendant paid on note declared on in the South Dakota suit and not included in the inquiry and plead-

ings in that suit, and now set up as a counterclaim in this action? Answer: $642.25.

The court being of opinion that the matters involved on the issues of fraud had been determined by the judgment in a former appeal in the cause, set the verdict aside as to that issue and entered judgment according to the facts as established by the verdict on the remain- (52) ing issues. Defendant and plaintiff having duly excepted, appealed to this Court.

W. T. Morgan for plaintiff.
Pless & Winborne for defendant.

DEFENDANT'S APPEAL.

HOKE, J., after stating the case: The questions presented in this record have all been practically decided on a former appeal in the cause and reported, 152 N. C., p. 731. On that appeal it was held that the issue of fraud, having been decided against defendant on a motion made in the South Dakota court to set the judgment aside on that ground, defendant was precluded from raising a like question here. On this subject the former opinion is as follows:

"This being the doctrine applicable on the facts as they now appear, the judgment of the Dakota court, as heretofore stated, denying the defendant's application to set aside the original judgment on the ground of fraud, will preclude all further inquiry on that question and render said judgment an estoppel of record as to all matters embraced in the pleadings which may be considered as material to its rendition," citing *Turnage v. Joyner,* 145 N. C., 81; *Manufacturing Co. v. Moore,* 144 N. C., 527; *Tuttle v. Harrell,* 85 N. C., 456.

There are no new facts in any way bearing on this position except the fact established that the statutes of South Dakota make provision substantially similar to our own in reference to setting aside a judgment for "mistake, surprise, or excusable neglect." As we endeavored to show on a former appeal, a motion to set aside a judgment by reason of facts alleged in this application would have been entertained at common law, and the statute puts no restrictions certainly on this power as formerly exercised in the common-law courts, except to require that the motion should be made within twelve months from the rendition of the judgment. In other respects the statutory provision contemplates and includes a motion on facts of the character presented in this hearing. *Bronson v. Shulton,* 104 U. S., 410; *Bennett v. Jackson,* 34 W. Va., 62; *Craig v. Wroth,* 47 Md., 281.

There is no error and the judgment must be affirmed. (53)

No error.

PLAINTIFF'S APPEAL.

HOKE, J. The plaintiff appeals, alleging errors in awarding the amounts allowed defendant in his counterclaim. These amounts consisted of alleged payments by defendant made since the rendition of the judgment as indicated in the verdict on the third issue, and amounts received by defendant or his agent from rents of property in South Dakota, for which plaintiff was accountable, as ascertained and determined in the fourth issue. These amounts were largely dependent on disputed matters of fact. They were not allowed or considered in the proceedings in South Dakota by which the original judgment was obtained. On the facts as now presented, they come clearly within the principle sustained in the case of *Tyler v. Capeheart,* 125 N. C., 64, stated as follows:

"1. A judgment is decisive of the points raised by the pleadings, or which might be properly predicated upon them; but does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings.

"2. Although the present cause of action might have been set up as a second cause of action in a former suit, but was not, and was not actually litigated, and was not 'such matter as was necessarily implied therein, the plea of *res judicata* will not avail.' "

We find no error that would justify us in disturbing the judgment, and the same is in all respects affirmed.

No error.

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(54)

D. J. RICHARDS v. W. M. RITTER LUMBER COMPANY.

(Filed 23 December, 1911.)

1. Words and Phrases—"Countersign."

The verb "countersign" means "to sign on the opposite side" or in addition to the signature of another, and the noun means "the signature of a secretary or other officer to a writing, or writings, added to that by the principal or superior to attest its authenticity."

2. Same—Grants of Land—Secretary of State.

Within the intent and meaning of our Constitution, Art. III, sec. 16, it is not required that the Secretary of State "countersign" grants of lands and commissions in any particular place or position thereon, and when a grant to the land in controversy is put in evidence by one of the parties and in all respects appears to be regular and authentic upon its face,

it will not be held to be defective because the countersignature of the Secretary of State appears on the opposite side of the sheet from the signature of the Governor.

3. Same—"By Command"—Blanks Left in Grant.

When a grant from the State to the land in controversy is relied on by one of the parties, in his chain of title, and the words appear on the grant as follows, "By command," and a blank space followed by the words "Secretary of State," and it further appears that the Secretary of State did not use the blank space evidently left for the purpose, but countersigned properly on the "opposite side" from the signature of the Governor, the countersignature will be held valid, in the absence of evidence to the contrary, it not being required that the words "by command" be used at all in this connection.

4. Same—Evidence of Authenticity.

A countersignature appearing to be that of the Secretary of State, on a grant for lands, as follows, "Secretary's office, February 3, 1869, H. J. Menninger, Secretary of State," by the use of the words which show not only that the grant was signed by the "Secretary of State," but in his office, gives evidence of the intent to authenticate, and without more, will be held valid.

5. Grants—Countersignature—Deputy—Interpretation of Statutes.

A deputy clerk of the Secretary of State is not authorized by statute to countersign, in the name of the Secretary, a grant to lands, and his attempt to do so is void; and chapter 512, Laws of 1905, validating all grants thus defectively authenticated does not, by its express terms, interfere with vested rights, and therefore not available to the defendants in this case.

6. Grants—Evidence—Certified—Copies — Registered Copies — Questions for Jury.

Certified copies by the Secretary of State of abstract of grants filed in his office, may be used in evidence, and "shall be as good evidence in any court as the original" (Revisal, 1596); but this does not make them better evidence than the registration of the original (Revisal, sec. 1596); and where there is a material discrepancy, it is for the jury to find as a fact which one is correct.

APPEAL by both parties from *Cline, J.*, at Spring Term, 1911, (55) of MACON.

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

Robertson & Benbow, J. Frank Ray, and George L. Jones for plaintiff.
L. C. Bell for defendant.

CLARK, C. J. Both sides appealed. The plaintiff offered Grant No. 3050. This grant was duly sealed with the great seal of the State with

a plat of the land attached, and is signed "W. W. Holden, Governor," and on the opposite side of the sheet are the words, "Secretary's Office, 3 February, 1869. H. J. Menninger, Secretary of State," which bears the same date as the grant.

The judge rejected the deed on the ground that it was not "countersigned." In this there was error. There is no decision in the courts of this State, or in any other that we have been able to find, which authorizes this ruling. The word "countersign" comes from the French *"contresigne,"* and the Latin *"contra signum."* Webster's International Dictionary gives this derivation and says the meaning of the verb "countersign" is to "sign on the opposite side," and it has, secondarily, the meaning "to sign in addition to the signature of another." Worcester's, the Century, and Clarkson's Standard Dictionaries all give exactly the same meaning. The Century further says that it means "to superadd a signature." All four dictionaries give the meaning of the noun as follows: "The signature of a secretary or other officer to a writ-
(56) ing, or writings, signed by the principal or superior to attest its authenticity." Words and Phrases gives the same definition.

It is well settled in this State that when a signature is essential to the validity of an instrument it is not necessary that the signature appear at the end, unless the statute uses the word "subscribe." *Devereux v. McMahon,* 108 N. C., 134. This has always been ruled in this State in regard to wills, as to which the signature may appear anywhere. If this is true of a "signature," it must also be true of the word "countersign." It has been often held that the place of signing is a matter of taste. *Adams v. Field,* 21 Vermont, 264; *Attorney-General v. Clark,* 26 R. I., 474; 9 A. & E. Enc., 143; 36 Cyc., 441.

The Constitution, Art. III, sec. 16, provides that there shall be a great seal of the State, and adds: "All grants and commissions shall be sealed with 'the Great Seal of the State,' signed by the Governor, and countersigned by the Secretary of State." But there is nothing in this or in any statute which changes the original meaning of the word, which is to "sign on the opposite side" of the sheet, or its derivative meaning which is to superadd another signature as "additional evidence of authenticity." Mr. Menninger, the then Secretary of State, evidently construed the word in its historical sense, to sign on the opposite side of the sheet. He did this, not at random, but officially, because the words used are "Secretary's Office, 3 February, 1869. H. J. Menninger, Secretary of State." He also came within the derivative meaning as set out in all the dictionaries, because he thus superadded his signature as proof of the authenticity of the paper. Originally, a grant or order was signed by the King and authenticated by the great seal merely, but subsequently,

especially after the advent of responsible government, "countersigning" by a minister was required, and this was usually done on "the other side of the sheet," as the word signifies.

The original grant is filed in the record. There is no question made by any one but that it is genuine. This is shown by the great seal of State. When that appears, the signatures of the Governor and Secretary of State on an instrument, thus issued from the Secre- (57) tary's office, are presumed to be genuine. They are protected by the statute against forgery and by the presumption of genuineness of the signatures upon an official document thus issued. The register of deeds of the county acts upon such instrument, without any probate, and records it, as was done in this case. A reference to the office of the Secretary of State shows that this grant was duly entered, and that the grant was issued in payment of the sum therein recited. An instrument, unquestionably genuine and authenticated, and issued in consideration of the money duly received by the State therefor, should not be set aside upon any controversy as to where a signature should be placed. The presumption is that the official act of the Secretary was correct, when acting on his own judgment he placed the signature on the opposite side of the sheet and when there is no statute, or decision, requiring it to be placed elsewhere.

The defendant contends that the word "countersign" means to sign on the opposite side of the same page. But there is no statute or decision which provides this, and the place where the defendant says the Secretary should sign is not on the opposite side of the page, but in immediate juxtaposition to the Governor's signature. It is true that there does appear printed at that place the words "By command" and a blank space followed by the words "Secretary of State," but there is no statute requiring this, and all that we know is that the words were put there by the printer. The Secretary of State himself construed the meaning of the word "countersign" to be "to sign on the opposite side" of the sheet, and wrote his name with more formality, "Secretary's office, 3 February, 1869. H. J. Menninger, Secretary of State." There is no authority anywhere for the use of the words "By command."

The grant being undeniably genuine, and duly issued upon payment of the consideration, authenticated by the great seal, signed by the Governor and by the Secretary of State, both officially, we cannot hold that it was not "countersigned" because the place where the Secretary added his signature with the title of his office was not at the particular spot on the grant which the defendant contends for. The essential thing is the additional signature, not its location, with the evidence of the intent to authenticate, which is here shown by (58)

the use of the words which show not only that the grant was signed by "the Secretary of State," but in his office.

The defendant offered Grant 3083. The plaintiff objected to this grant because the grant as recorded in Macon County shows that the only indication of countersigning is as follows: "By command. H. J. Menninger, Secretary of State, per T. J. Menninger, Chief Clerk." In *Beam v. Jennings,* 96 N. C., 82, this very point was presented, and the Court held that the statute did not authorize the countersigning of a grant to be done by a deputy or clerk, and therefore that such grant was void. The Legislature of 1905, ch. 512, accepted that view and validated all grants thus defectively authenticated, adding "that nothing herein shall interfere with vested rights." Therefore, as to the plaintiff, this grant 3083 was void and should have been rejected.

It is true that Revisal, 1596, provides that "All abstracts of grants which may be filed in the office of Secretary of State, certified by him as true copies, shall be as good evidence in any court as the original." The defendant, instead of the original, offered an abstract which did not contain the defective countersigning by the chief clerk. The statute does not make the abstract any better evidence than the registration of the original (Revisal, 1598), and the inherent probability is that the words "per T. J. Menninger, Chief Clerk," were copied by the register of deeds in Macon County from the grant as actually issued. It is not probable that it would have ever occurred to him, out of his own head, to transcribe those words if not in the grant. Whereas, the abstract might have been made in the Secretary of State's office with the careless omission of those words. As the abstract is no better evidence under the statute than the record in Macon County, the case should go back, that the jury may find which is the better evidence. The plaintiff may serve notice on the defendant to produce the original grant, and if found, of course it will settle the controversy, as that is the best evidence.

On account of these errors, there must be a new trial, and it is unnecessary to consider the other exceptions in the record.

In defendant's appeal, affirmed.

(59) In plaintiff's appeal, new trial.

HOKE, J., concurring in the result: I concur in the disposition made of the case, being of opinion that, on the testimony, there was a sufficient countersigning of the grants in question, within the meaning of the Constitution and statutes. I am of opinion, further, that under the conditions and careful methods known to exist in the office of the Secretary of State, and of which we may, to this extent, take judicial notice, *Furniture Co. v. Express Co.,* 144 N. C., 639, where a grant, under the

seal of the State, has been attested by the Governor and countersigned in the name of the Secretary of State, per his chief clerk, and to the issuance of which no suspicion has attached, and no reason for such suspicion is suggested or shown, the same should be held a valid grant. It should be presumed that such a grant was countersigned in the presence of the Secretary of State and by his direction, and that the case of *Beam v. Jennings,* 96 N. C., 82, to the extent that it contravenes this position, was not well decided, and should be overruled.

ALLEN, J. I dissent from the opinion of the Court on the plaintiff's appeal, and concur on the defendant's appeal, but do not care to do more than note the difference in the facts, and to state, without discussion, my view of the law.

On the plaintiff's appeal, the question is presented of the admissibility of a paper, purporting to be a grant, which was signed by the Governor and the great seal attached, but which had no signature of any officer or clerk on the page which the Governor signed. On the back of this paper appear the words, "Secretary's office, 3 February, 1869. H. J. Menninger, Secretary of State," but no evidence was introduced that this indorsement was in the handwriting of H. J. Menninger, or that it was on the paper when it came from the office of Secretary of State.

The Constitution, Art. III, sec. 16, says: "All grants and commissions shall be issued in the name and by the authority of the State of North Carolina, sealed with the great seal of the State, signed by the Governor and countersigned by the Secretary of State." (60) This language was construed in 1820 in *Hunter v. Williams,* 8 N. C., 221, a part of it, at that time, being in the Constitution, and a part in a legislative act, and the Court there says: "The Constitution, sec. 36, declares that all grants shall run in the name of the State and bear test and be signed by the Governor. The year after the adoption of the Constitution, the Legislature, at their November session, declares that the Secretary shall make out grants for all surveys returned to his office, which grants shall be authenticated by the Governor and *countersigned* by the Secretary. Laws 1777, ch. 1, sec. 11. This is the only mode pointed out by the Legislature whereby individuals can acquire a right to the unappropriated lands; and if it be not pursued, no right can be acquired in any other way, sooner than if no mode at all had been pointed out. Nothing, therefore, passed by this instrument, as it is not pretended that Mr. Martin had title individually."

When the Constitution says a grant shall be issued under the great seal, and shall be signed by the Governor, and countersigned by the Secretary of State, I think we may dispense with the seal or the signa-

ture of the Governor, if we can hold that it is not necessary for the Secretary of State to countersign.

If evidence of the handwriting on the back of the paper had been introduced, I do not think it would amount to more than an office entry, and it would not be countersigning; but the paper when offered at the trial did not come from the office of Secretary of State, but was produced by the plaintiff, and he offered no evidence of handwriting or as to the time when the indorsement first appeared on the paper. So far as we can see, it may have been written after the paper left the office of Secretary of State.

On the defendant's appeal, it appears that the defendant claimed under a paper purporting to be Grant No. 3083, under the great seal, which was signed by the Governor and countersigned, "H. J. Menninger, Secretary of State, per T. J. Menninger, Chief Clerk." The defendant also offered in evidence a certified copy, from the office of Secre-
(61) tary of State, of the abstract of Grant No. 3083, which was signed by the Governor and countersigned by the Secretary of State. I think the paper was incompetent under the authority of *Beam v. Jennings,* 96 N. C., 83, holding that "The clerk of the Secretary of State has no power to certify to and affix the great seal of the State to copies of grants and other papers from the Secretary of State's office, to be used in evidence. The statute contemplates that this officer should do all official acts himself, and does not permit any of them to be done by a deputy," and that the certified copy was competent by virtue of section 1596 of the Revisal, which reads as follows: "Copies of the plats and certificates of survey, or their accompanying warrants, and all abstracts of grants, which may be filed in the office of the Secretary of State, certified by him as true copies, shall be as good evidence in any court as the original."

I therefore conclude that the judgment ought to be affirmed on the plaintiff's appeal and reversed on the defendant's appeal.

JUSTICE WALKER concurs in this opinion.

Cited: Towler v. Development Co., ante, 49, 50; *Boger v. Lumber Co.,* 165 N. C., 559; *Burriss v. Starr, ib.,* 660; *Belk v. Vance, ib.,* 675; *Peace v. Edwards,* 170 N. C., 66; *Howell v. Hurley, ib.,* 800; *Alexander v. Johnston,* 171 N. C., 472.

D. G. FISHER v. ENGLISH LUMBER COMPANY.

(Filed 23 December, 1911.)

1. Contracts—Vendor and Vendee—Acceptance—Evidence.

In an action for the contract price of lumber sold and delivered by the plaintiff to the defendant, there was evidence tending to show that the defendant had accepted the lumber through its agent: *Held*, under the evidence in this case, with a proper charge from the court, the verdict of the jury finding for the plaintiff, and that there was an acceptance of the lumber by the defendant, without misrepresentation by the plaintiff, was without error.

2. Contracts—Vendor and Vendee—Unliquidated Damages—Instructions.

When the plaintiff is suing only upon a contract for lumber sold and delivered, the contract price, and not unliquidated damages, is to be ascertained by the jury, and defendant's prayer for special instruction presenting the latter question of damages is properly refused.

3. Principal and Agent—Evidence—Ratification.

When there is evidence of agency and of a ratification of the acts of an alleged agent, evidence is competent for the purpose of binding the principal by his agent's acts, which tends to show what occurred between plaintiff and the alleged agent relating to an acceptance by the latter of goods sold and delivered to the defendant, which the defendant claimed did not come up to representation made by the plaintiff to him.

APPEAL from *Cline, J.*, at March Term, 1911, of SWAIN. (62)

This action was brought to recover the purchase price of lumber sold by the plaintiff to the defendant, and the question to be decided is whether the sale was executed or executory. The contract, as plaintiff alleged, was for the sale of oak, chestnut, and poplar lumber, except the chestnut culls, the "cull lumber" having been theretofore sold to Mr. Wilbar, as explained to defendant, who was to pay for the lumber $12 per thousand feet. The plaintiff also alleged that the lumber "was sold pack run, and defendant was to take it just as it came to it, except the chestnut culls, which were to be thrown out." The stock was to run from 3 to 6 feet in length and was supposed to be one face clear, but with some culls in it.

The defendant denied that it made the contract as set out in the complaint, and alleged a different agreement. It also denied that Mac. English, an officer of defendant company, was authorized to contract for it.

The plaintiff introduced letters which passed between the parties, and other evidence which tended to show that English had such authority,

and stating that the company would send Mr. Hayes "to take the stock up," and, after receiving a letter from the plaintiff explaining the agreement with Mac. English, the defendant sent Mac. English and Hayes to inspect the lumber, or "to take it up," as expressed in the case, which we understand to mean that they were to inspect it and, if found to be according to the quantity and quality represented by plaintiff, to accept it. Plaintiff asked Mac. English if he had seen the lumber, and he said that he had seen it and "it was all right."

The defendant afterwards did accept one car-load of the lumber, and it was shipped by it from the place of delivery, and it refused
(63) to take the other part of the lot because it was not of the quality represented.

The court instructed the jury as to the bearing of the evidence, and the contentions of the parties, and the issues of fact and law.

The defendant requested the court to charge the jury as follows:

"If the jury should find from the evidence that there was a contract for the sale of lumber, as alleged in the complaint, and that the defendant failed and refused to comply with and perform the same, and refused to accept the lumber, then before the plaintiff could recover in this action, he must both allege and prove the damages he sustained by reason of such breaches of the contract on the part of the defendant before he would be entitled to recover judgment for any amount because of such breach."

The defendant excepted to some of the instructions, which will be noticed hereafter.

The jury returned the following verdict:

1. Did the defendant purchase from the plaintiff the lumber described in the complaint? Answer: Yes.

2. Did the defendant fail and refuse to take up and pay for the lumber covered by its contract with the plaintiff? Answer: Yes.

3. What amount, if any, is the plaintiff entitled to recover from the defendant? Answer: $504, with interest from 3 December, 1909.

Judgment was entered upon the verdict, and defendant appealed.

Bryson & Black for plaintiff.
J. G. Merrimon for defendant.

WALKER, J. There is not much in this case but a question of fact. Plaintiff contended that he had sold the lumber to the defendant, through its officer and agent, Mac. English, and that it was an executed sale and not a mere executory contract to sell and deliver, and, further, that it had performed the contract on its part. There can be no doubt

of the character of the agreement, if the jury accepted the plain- (64)
tiff's version of the contract, instead of the defendant's, which they seem to have done. The defense is that after inspecting and measuring the lumber and accepting it, through Mac. English and Hayes, the defendant, with the assistance of the plaintiff, loaded and shipped one car, and then discovered, as it alleges, that the balance of the lumber was not of the quality represented by the plaintiff. The jury passed upon this question, under the instructions of the court, and found against the defendant, so that there is nothing in the case left but the naked question as to the measure of damages.

The jury have found, under proper instructions and upon sufficient evidence, that plaintiff sold the lumber to the defendant, the identity of the lumber, the place of delivery, and the price being ascertained, and it appears that the only reason for the refusal was that a part of the lumber did not correspond in quality with what it was represented to be. If the jury had found this to be true, it may be that the defendant, under certain circumstances, would be entitled to a reduction of the price, or to reject the lumber. *Caldwell v. Smith,* 4 Dev. and Bat., 64. But there was some evidence to the effect that the defendant had the lumber inspected by English and Hayes and loaded and shipped a carload of it. This was at least evidence of the fact that it had elected to accept the lumber, and the court having submitted the question of sale to the jury and they having found upon all of the evidence, that there was a sale and that the quality of the lumber was not misrepresented, we do not perceive that there was any legal impediment to the plaintiff's recovery. The prayer for instruction was properly refused, as the plaintiff is suing for the price and not for unliquidated damages. If there was a sale, he is entitled to recover the price fixed by the contract, no fraud or any other vitiating fact having been shown.

The objection to what occurred between the plaintiff and Mac. English is not tenable. There was some evidence to show that he was authorized to represent the company, and, besides, the correspondence tended to show that he was recognized as defendant's agent, with authority to make the contract for it, or, at least, that the com- (65)
pany ratified what he did in its behalf.

We find nothing in the record to indicate that plaintiff was not ready, willing, and able to comply with its contract.

No error.

J. M. EDDLEMAN ET AL. v. H. C. LENTZ AND WIFE.

(Filed 27 November, 1911.)

1. Pleadings—Construction—Material Allegations.

A complaint under our Code practice, while liberally construed, should state the facts going to make up the cause of action as plainly and concisely as is consistent with reasonable accuracy, and no material allegations should be omitted.

2. Same—Defective Statement—Demurrer—Amendments.

A demurrer *ore tenus* to a defective statement of a good cause of action comes too late after answer, for the defect can be cured by amendment, and it is deemed to be waived when the answer is filed. The demurrer should, therefore, be overruled; but in this case the pleadings may be amended before final judgment, so as to remove the formal defect.

3. Same.

In an action brought by sureties, who had paid the judgment against themselves and their principal, and had the same assigned to one of them for the benefit of all, for the purpose of setting aside a fraudulent conveyance, the failure to state in the complaint that the sureties had paid the judgment is, at most, but a defective statement of a good cause of action, when there is an allegation that the judgment had been assigned "for value and without recourse" to a trustee for the sureties, which subrogated them to the rights of the creditor, the plaintiff in the judgment, to whom they had advanced the consideration, for the use and benefit of the defendant debtor.

4. Principal and Surety—Fraudulent Conveyance—Judgment—Assignment—Parties in Interest.

In an action to set aside a fraudulent conveyance of the principal, the sureties are beneficially interested, and are proper parties, although the judgment against them and their principal, which they had paid, had been assigned to one of the sureties for the benefit of all of them, and they may be made parties with the assignee, so that the entire controversy may be settled in one action.

5. Judgment—Satisfaction.

Where the judgment against the principal and his sureties had been paid by the latter and assigned for the benefit of the sureties to one of them, the latter holds as assignee for the benefit of himself and the other sureties, but the transaction does not satisfy the judgment as to the cosureties and prevent their suing on the same, though as to the surety to whom the assignment was made, the judgment may have been canceled by the payment of his share.

6. Principal and Surety—Judgment—Assignment—Implied Promise to Pay—Creditors' Bill.

Sureties who have paid a judgment against themselves and their principal may maintain an action against him upon his implied prom-

ise to reimburse them for the money they have paid on the judgment, and in the same action may ask for a cancellation of any fraudulent conveyance made by him.

7. Deeds and Conveyances—Husband and Wife—Fraud Upon Creditors—Evidence.

In an action to set aside a conveyance from the husband to his wife, alleged by his creditors to be fraudulent, there was evidence tending to show that the husband's creditors were pressing him, and one of them had secured a judgment against him for $5,000, after which the husband conveyed all of his real estate to his wife, and on the same day executed a bill of sale for a stock of goods and all his property to another person; the wife had no property except that which her husband had previously given to her, and when she took the deed to the property knew of the note on which the judgment had been obtained, and that it had not been paid; the consideration of the deed to the land was a certificate of stock, a gift theretofore made to her by her husband, without consideration. This evidence was held to be competent to show the fraudulent intent of the husband in making the conveyance of the land to his wife, and that she participated in the fraud or executed the deed with knowledge of it.

8. Fraudulent Conveyances—Consideration—Burden of Proof—Husband and Wife.

In a creditors' bill to set aside a deed of land from the husband to his wife there was evidence tending to show the intent of the husband to defraud his creditors, and that the wife participated in the fraudulent transaction, and there was also evidence to show that she was a purchaser for value. It was held correct to charge that if the *feme* defendant purchased the property for value from her husband it would shift the burden to the plaintiffs, and require of them to show that there was actual intent on the part of the husband to defraud his creditors, and that the wife either participated therein or took the deed from him with notice of his covinous purpose; and it was held further that if, before the husband became insolvent, he had, in good faith, transferred to her certain certificates of stock, it was a valid gift and could be considered by the jury in passing upon the question whether she had paid a valuable consideration for the land to her husband, there being evidence that the certificate had afterwards been transferred back to her husband, in consideration of the deed.

9. Judgment—Payment—Evidence—Proof of Payment of Note.

It is competent for the sureties on a note given to a bank to prove by the cashier that a judgment on the note against them and the principal had been paid by them, if the cashier had knowledge of the fact.

10. Fraudulent Intent—Evidence—Contemporaneous Transaction.

It was competent, in this case, to show a contemporaneous fraudulent conveyance by the defendant to a third party, as bearing upon the intent of the defendant to defraud his creditors in executing the conveyances which are sought to be set aside by them in this action.

(67) APPEAL from *Lyon, J.*, at April Special Term, 1911, of ROWAN.

This action was brought to set aside certain conveyances of real estate executed by the insolvent defendant, H. C. Lentz, to his wife, Mary A. Lentz, on the ground that they were made in fraud of creditors. On 7 May, 1904, defendant H. C. Lentz, as principal, with H. T. Graeber, J. L. Rendleman, J. M. Eddleman, W. G. Patterson, J. C. Lingle, F. E. Corriher, J. L. Holshouser, and G. A. Ramseur, as sureties, executed a note to the Davis & Wiley Bank of Salisbury, N. C., in the sum of $2,000, for value received. H. C. Lentz failing to pay said note, action was commenced by the bank, summons served 2 February, 1907, and judgment rendered in favor of the bank against Lentz and his sureties at May Term, 1907, of Rowan Superior Court. Execution was issued 6 July, 1907, against H. C. Lentz, and returned *nulla bona.*

(68) On 6 November, 1909, the bank, for value and without recourse, assigned said judgment, on the record, to one J. M. Eddleman as trustee for the sureties, who had paid the indebtedness. Defendant H. C. Lentz, having also been sued by the First National Bank of Salisbury, 31 January, 1907, on a note for $5,000, upon which judgment was obtained, executed the deeds for all his real estate to his wife, the *feme* defendant, Mary A. Lentz, dated 2 February, 1907, and on the same day executed a bill of sale to one Fesperman for a certain stock of goods, including all his personal property. The deeds to Mary A. Lentz and the bill of sale to Fesperman were recorded the day of their execution. The wife, Mary A. Lentz, grantee, had no separate estate, and no money or property of any kind except what her husband, defendant H. C. Lentz, gave her, and when the deeds were made to her she knew of the existence of the note to the bank, and that it had not been paid. The $1,229 note alleged to have been executed to her by her husband, which was a part of the consideration for the deeds, was given for stock in the J. A. Rose Company, which her husband had theretofore bought and paid for, and the certificate of stock was made to her without consideration.

The $1,000 mortgage, which it is alleged she assumed, and upon which it is alleged she paid $750, the proceeds from the sale of a house and lot in China Grove, was a valid encumbrance, but the $750 was indirectly paid by the husband, H. C. Lentz, who had bought and paid for the house and lot at China Grove, and had the title made to her, without consideration.

The jury returned the following verdict:

1. Did the defendant H. C. Lentz execute and deliver the deeds mentioned in the complaint with intent to hinder, delay, and defraud his creditors, as alleged in the complaint? Answer: Yes.

2. If so, did the defendant Mrs. Mary A. Lentz have knowledge of and participate in such fraudulent intent? Answer: Yes.

There was no objection to the issues by either party. Judgment, declaring the deeds void, was entered upon the verdict, and defendants appealed.

T. F. Kluttz & Son and John L. Rendleman for plaintiff. (69)
Jerome & Price and T. H. Hudson for defendant.

WALKER, J. The defendants demurred *ore tenus* to the complaint, upon the ground that the complaint did not state a good cause of action, plaintiffs having failed to allege therein that the judgment against H. C. Lentz and his sureties had been paid by the latter and assigned to a trustee for them. The pleading, it is true, was not drawn with that regard for technical precision and accuracy which even the liberal provisions of The Code require. It must not be supposed that because pleadings are now under The Code construed favorably to the pleader, to effectuate the main purpose of having cases tried upon their real merits, that it permits the pleader to disregard the ordinary and familiar rule requiring pleadings to be so drawn as to present clearly the issues in the case. The Code provides that the cause of action shall be plainly and concisely stated, but this does not mean that essential fullness of statement shall be sacrificed to conciseness, but that all the facts going to make up the cause of action must be stated as plainly and concisely as is consistent with perfect accuracy, and that no material allegation should be omitted. *Blackmore v. Winders,* 144 N. C., 212; *Bank v. Duffy,* 156 N. C., 83. Looseness in pleading and inadequacy of allegation are as much condemned by the present code of procedure as they were under the former strict and exacting system of the common law. It is form and fiction that have been abolished, but the essential principles of good pleading have been retained.

The defendants' demurrer comes too late. They passed the defective pleading by themselves answering to the merits, and thereby waived the defect, which is not a fatal one, but can be cured by amendment. It is the defective statement of a good cause of action, and not the statement of a defective cause. When the defect appears in the cause of action itself, no amendment can cure it, for it has no existence in fact; it is otherwise where the defect is merely in the statement, for in such a case it can be removed by amendment, and the cause of action will thus be perfected. *Garrett v. Trotter,* 65 N. C., 430; *Warner v. R. R.,* 94 N. C., 251; *Johnson v. Finch,* 93 N. C., 205; *McElwee v. Blackwell,* 94 N. C., 261, and cases *supra.*

(70) While the complaint does not allege, as good pleading perhaps required, that the sureties had paid the judgment, it does state that the judgment had been assigned "for value and without recourse" to a trustee for the sureties, which subrogated them in law and equity to the rights of the creditor, or plaintiff in the judgment, to whom they had advanced the consideration for the use and benefit of the debtor, H. C. Lentz, one of the defendants.

In any view of the complaint and the proceedings below, the demurrer *ore tenus* was properly overruled; but before final judgment is entered in the case the complaint should be amended by inserting the omitted allegation as to the payment by the sureties. The sureties should also be made parties, as plaintiffs, in their own right, and not merely as beneficiaries under the assignment of the judgment to the trustee, as they are the real parties in interest within the meaning of The Code, the trustee merely holding the naked legal title for them, and not being beneficially interested in the recovery. They are certainly proper parties, in a case like this one, notwithstanding Revisal, sec. 404, and it is best that they should be brought in by amendment, and joined as parties with the trustee.

It is contended by the defendants that the sureties satisfied the judgment by the payment, but this is not so, as it appears that it was assigned to a trustee for their benefit, if that was necessary, and the fact that he may be one of the sureties, which does not clearly appear, can make no difference, as he holds, at least, for the other sureties under the assignment, if, as to himself, the judgment is canceled by the payment of his share. Besides, the sureties can maintain the action upon the implied promise of their principal, H. C. Lentz, to reimburse them for the money paid on the judgment to his use, and a fresh judgment against him is not necessary for the purpose, as we have recently held in *Silk Co. v. Spinning Co.*, 154 N. C., 421. See, also, *Bank v. Harris*, 84 N. C., 206; *Mebane v. Layton*, 86 N. C., 574; *McLendon v. Commissioners*, 71 N. C., 38.

(71) As to the rights and remedies of sureties, under such circumstances, the following authorities may further be consulted: 27 A. & E. Enc. (2 Ed.), 213; Stearns on Suretyship, 470, 474, 478; Brandt on Suretyship and Guaranty (3 Ed.), secs. 342, 343, and 346; *Leightbown v. McMyn*, L. R., 33 Ch. Div., 575; *Gerber v. Shrak*, 72 Ind., 553; *Neal v. Nash*, 23 Ohio St., 483; *Benne v. Schnecke*, 100 Mo., 250; *Bragg v. Patterson*, 85 Ala., 233; *Harris v. Frank*, 29 Kansas, 200. We do not see how the defendants are now interested in the question as to the sureties' rights under the judgment. The proceeds of the property fraudulently conveyed must be applied to the payment of H. C.

Lentz's creditors, and the right of the sureties to the lien of the judgment is not, at present, involved.

Having disposed of these preliminary matters, we will now proceed to consider the remaining question, as to the fraud. It seems to us, after carefully reading the evidence, that there is plenary proof of the intent in the mind of H. C. Lentz to defeat his creditors, when he made the conveyances to his wife and Fesperman. He was utterly and hopelessly insolvent at the time. The circumstances, not disputed, tend to show his unlawful purpose to divest himself of his property and put it away so that it could not be reached by his creditors, who were justly entitled to have it applied to the payment of their debts. Not only this, but he declared his dishonest purpose to the witness J. L. Holshouser on the very eve of his impending financial disaster, telling him that he intended to save himself, and advising Holshouser to do the same. The *feme* defendant objected to this testimony, but it was competent, as to his intent, but not binding upon her or affecting her interest in the property, unless she participated in the fraud or accepted the deed with knowledge of it. As to H. C. Lentz, the proof discloses a bald and transparent fraud. Did she avail herself of it with such notice? This is really the only practical question in the case. It would seem that the fraud was so palpable—so visible to the naked eye—if she had notice of the circumstances, which appears more than probable, that she could not have overlooked it, or misunderstood the true nature of the transaction. She knew that he was insolvent, or should have known it, which is the same in law; that her husband was heavily involved and was transferring all he had to her without any adequate con- (72) sideration, and upon the sole pretense of benefiting her, without any regard for the just rights of his creditors. She had paid nothing for the property, real or personal, that he had given her, but was really, and to all intents and purposes, a mere volunteer. Such a transaction should not be allowed to stand in the way of creditors so as to defeat their rights.

The presiding judge stated the case with unusual clearness and with impartiality, and most favorably for the defendant, in his charge to the jury, following closely the decisions of this Court upon the subject, as we understand and interpret them. He instructed them substantially that, notwithstanding all the suspicious circumstances relied on to condemn the transfer of the property, if they found that the *feme* defendant paid value for the property, it would shift the burden to the plaintiffs, and require of them to prove that there was an actual intent on the part of H. C. Lentz to defraud, and, moreover, that the *feme* defendant either participated in the fraudulent alienation of her husband's property or

took the deeds from him with actual notice of his covinous purpose. He even told the jury that if, before her husband became insolvent, he had transferred to her the stock in the Rouse Company, it was a valid gift, and should be treated by them as her property, in passing upon the question as to the consideration for the conveyances, she having testified that her husband had transferred the stock to her as a gift, and afterwards had bought it back, giving her his note for $1,229 for it, and that this debt of his to her, and a previous mortgage on the land, which she assumed, constituted the consideration of the deed to her for the property. There was ample evidence that the *feme* defendant was fully cognizant of the wrongful intent of her husband in making the transfers to her. It was all done at a time when he was being hotly pursued by his creditors, and it had every appearance of an effort, on his part, to better prepare himself for the race he was running with his creditors "to save himself" and to outstrip them. No one could hardly fail to discover his motive.

In order to sustain the charge of the court, it is only necessary that we should refer to what is said by *Justice Avery* in the learned and valuable opinion he delivered for the Court in *Peeler v. Peeler,* 109
(73) N. C., 628, as follows: "Where an insolvent husband has conveyed land to his wife, and a preëxisting creditor brings an action to impeach the deed for fraud, the *onus* is upon her to show that a consideration actually passed in the shape of money paid, something of value delivered, or the discharge of a debt due from the husband to her. *Brown v. Mitchell,* 102 N. C., 373; Bump. Fraud. Con., pp. 6, 318; *Stephenson v. Felton,* 106 N. C., 120; *Osborne v. Wilkes,* 108 N. C., 669; *Woodruff v. Bowles,* 104 N. C., 213; Bigelow on Frauds, 136. To this extent she is required to assume a burden not placed upon other grantees. *Helms v. Green,* 105 N. C., 257. When she offers testimony sufficient to satisfy the jury of the existence, validity, and discharge of such previous debt by the conveyance, or shows in some other way that the deed was founded upon a valuable consideration, the burden shifts again and rests upon the plaintiff to show, to the satisfaction of the jury, the fraud which he has alleged as the ground of the relief demanded. *Brown v. Mitchell, supra; McLeod v. Bullard,* 84 N. C., 515. But if, after turning the laboring oar over to the creditor, the jury are satisfied, upon a review of the testimony, that the husband executed the deed to her to hinder, delay, or defeat a creditor in the collection of his debt, and that she participated in his purpose, or knew of his intent at the time, though the consideration may have been a valid preëxisting debt to her, it is their duty to find that the conveyance was made to defraud creditors. In the last clause of the statute (Code, sec. 1545; 13 Eliz., ch. 5, sec. 2) it is

provided that as against a person whose debt, etc., 'shall or might be in any wise disturbed, hindered, delayed, or defrauded' by the covinous and fraudulent practices previously mentioned in the same section, viz., by conveyances executed 'with the purpose and intent to delay, hinder, and defraud creditors,' such a conveyance shall be void." If there was the least departure by the learned trial judge from this statement of the law, it was decidedly in favor of the *feme* defendant, and, therefore, she cannot complain; but we think the law was given to the jury with perfect accuracy. *Redmond v. Chawdley,* 119 N. C., 575; *Graeber v. Sides,* 151 N. C., 596; *Crockett v. Bray,* 151 N. C., 615.

Speaking for himself, and not in the least committing the Court to his view, the writer of this opinion thinks that the law is not, and should not be, so favorable to the married woman as stated by (74) this Court in the cases cited. Our statute, Revisal, sec. 764, requires the purchaser of property, where the fraud of the vendor is shown, to take the burden and prove that he (or she) acquired it for value, or upon good consideration, and without notice of the fraud. *Cox v. Wall,* 132 N. C., 734; Pell's Revisal, sec. 964, and notes. But this Court seems to have made an exception to that statutory rule, in the case of the wife taking a conveyance from her husband, though there would seem to be no real and convincing reason for it. The presumption, it seems, should be stronger against her than it is when the conveyance is made to one not so closely connected with the vendor, or sustaining such an intimate and confidential relation towards him, for, in the case of husband and wife, with his strong influence over her, there is a greater temptation to commit fraud, and a better opportunity afforded for its consummation. The position of the *feme* defendant would not be improved, but made worse, should the law be thus declared. She would have to take all, instead of only a part of the burden to rebut the presumption against her. But the law, as it now stands, is more favorable to her, as we have shown, and we follow the decisions.

The jury have found that fact against the defendants, upon evidence which fully warrants the verdict, and under instructions wholly free from error.

It is competent to prove by O. D. Davis that the sureties had paid the judgment of the Davis & Wiley Bank against H. C. Lentz. He knew the facts, as its cashier and receiving teller, and why should he not be permitted to speak of it? The evidence as to the bill of sale to Fesperman was also competent, as showing a contemporary transaction, indicating the fraudulent purpose of Lentz and the preparation he was making at the time to put away his property in order to defeat his creditors. It was but forging one of the links in the chain of circum-

stances going to establish the essential fact of intent. It can make no difference that the conveyance was made to a third party, for still it bears upon the issue as to the covinous purpose. *Brink v. Black,* 77 N. C., 59. The evidence as to a fraudulent intent usually is permitted to take a wide range, as it may be inferred from many circum-
(75) stances, each one by itself being apparently of small importance, but together producing an absolute conviction.

The court might, in this case, have gone further than it did in the judgment, and ordered a sale of the land for the payment of the judgment debt evidenced by it, but there was no request for it to do so, and we merely refer to it for the purpose of calling attention to the advisability of deciding all controveries, relating to the same subject-matter, in one action, as contemplated by The Code.

No error.

Cited: *Shuford v. Cook,* 169 N. C., 54.

J. J. L. McCULLERS v. THE BOARD OF COMMISSIONERS OF WAKE COUNTY.

(Filed 21 December, 1911.)

1. Health — County Superintendent — Vacancy — Appointment — Interpretation of Statute.

It is the intent of section 9, chapter 62, Public Laws of 1911 that the office of the county superintendent of health should not remain vacant, and when the county board of health has appointed such an officer, who refuses to qualify, and the office thus remains vacant for two calendar months, the Secretary of the State Board of Health may make a valid appointment of one to fill the vacancy.

2. Same — Added Duties — Two Offices — Constitutional Law.

Section 9, chapter 62 Laws 1911, constituting the county board of health of the chairman of the board of county commissioners, the mayor of the county town, etc., the county superintendent of schools, and two physicians to be selected by these two officials, is not repugnant to Article XIV, sec. 7, of the State Constitution, which forbids the holding of two offices by one man at the same time, but simply adds further duties to the offices already created, which expires with the term of office of each.

3. Same — Officers Ex Officio — Terms of Office.

The provisions of section 9, chapter 62, Laws of 1911, that "the term of office of the members of the county board of health shall ter-

minate" at certain specified times, does not relate to the terms of the *ex officio* officers, but to the term of office of the physicians appointed by them, the terms of the *ex officio* members expiring on the dates already prescribed for their respective offices.

4. Health—County Superintendent—Vacancy—Appointment—Compensation—Interpretation of Statutes—Mandamus.

The right of one appointed by the Secretary of the State Board of Health to fill a vacancy in the office of the county superintendent of health for two months is not affected by the question of whether the compensation has been fixed by the secretary "in proportion to the salaries paid by other counties for the same service, etc.," for it is required that the board of county commissioners approve the expenditure and pass upon its reasonableness, and upon their failure to do so mandamus will lie to compel them in good faith to pass upon it and in the exercise of a sound judgment say whether or not the compensation for the services as fixed is warranted by the statute. Public Laws 1911, ch. 62, sec. 9.

5. Health—County Superintendent—Vancy—Board's Appointee—Colorable Title—Quo Warranto.

The county board of commissioners having failed for two months to fill a vacancy in the office of county superintendent of health, one was appointed by the Secretary of the State Board of Health, whom the county refused to recognize, and engaged another person to attend to his duties: *Held*, the appointee of the board of commissioners had not a colorable title to the office, and the remedy of the appointee of the secretary was not by *quo warranto*.

APPEAL from *Peebles, J.*, at October Term, 1911, of WAKE. (76)

This is a proceeding for mandamus to compel the defendant board to admit plaintiff to the office of Superintendent of Health of Wake County and to compel the said board to audit his accounts for services.

The judgment was rendered denying the relief prayed and dismissing the proceedings.

This cause coming on to be heard by me in chambers at Raleigh, Thursday and Friday, 23 and 24 November, 1911. After hearing complaint, answer, affidavits, and argument of counsel on both sides, by consent of both sides I took the papers with me in order to give the matter further consideration. Having given the matter (77) further consideration, I render the following judgment:

1. I find and hold that the pleadings raise no issue of fact requiring the intervention of a jury, and I therefore overrule the defendant's motion for a trial by jury. To this ruling defendants except.

2. I find that the facts contained in sections 1 to 8 of complaint, both included, are true.

3. It appearing from the complaint that the county board of health was organized as is required by section 9, chapter 62 of the Public Laws of 1911, and elected J. J. L. McCullers county superintendent of health, that the contingency upon which W. S. Rankin as Secretary of State Board of Health was authorized to act never happened, and the appointment of plaintiff by said Rankin was void. I also find and hold that said Rankin did not fix the fees as is directed in section 9 of said chapter 62.

4. Article XIV, sec. 7, of State Constitution, forbids the holding of two offices by one man at the same time. If the act had provided that D. T. Johnson, James I. Johnson, and Z. V. Judd should constitute the Board of Health for Wake County, their acceptance of said office would have rendered vacant the office of chairman of the board of county commissioners, office of Mayor of Raleigh, and office of Superintendent of Public Schools for Wake County. The General Assembly seems to have linked the office of Superintendent of the Board of Health for Wake County with the other three offices and made them inseparable, and for that reason I think and hold that section 9 of Public Laws of 1911, chapter 62, is unconstitutional and void.

5. I find the facts stated in section 11 of the answer to be true. I hold that Dr. R. S. Stevens is not an usurper, but is in the office of superintendent of health for Wake under color of title and is a *de facto* officer and cannot be ousted without a day in court, and hence I hold that mandamus is not the proper remedy. And I therefore dismiss these proceedings at the costs of the plaintiff, to be taxed by the clerk.

This 1 December, 1911. R. B. PEEBLES,
Judge Holding Courts of Sixth District.

From the said judgment plaintiff appealed.

(78) *Aycock & Winston and Bart M. Gatling for plaintiff.*
B. C. Beckwith and R. N. Simms for defendant.

BROWN, J. The plaintiff derives his title to the office of Superintendent of Health of Wake County by appointment of the Secretary of the State Board of Health, under chapter 62, sec. 9, Public Laws of 1911, which provides that if the county board of health of any county shall fail to elect a county superintendent of health within two calendar months of the time fixed by the statute when such election shall take place, the said secretary of the State board shall appoint.

The defendant board of commissioners passed a resolution undertaking to appoint a superintendent of health and to fix his salary. In

consequence of such conflict between the two boards and the failure to fix his compensation, the plaintiff appeared before the board of health at its next meeting and declined to qualify as Superintendent of Health for Wake County. The board of health having failed to elect a superintendent for more than two calendar months, the secretary of the State board, W. S. Rankin, on 17 July, 1911, appointed plaintiff the superintendent of health and quarantine officer for Wake County and fixed his fees and compensation, claiming to have done so in accordance with sections 9 and 16 of said act. The plaintiff qualified as such and the defendant board declined to recognize him and to pass on, audit, and approve his bill for fees, as required by section 9. His Honor found the facts as stated in sections 1 to 8, inclusive, of the complaint to be true, but it is unnecessary to state them more fully.

1. It is contended that the contingency had not arisen when the secretary could lawfully appoint. The statute requires the board of health to meet and elect on the second Monday in May, 1911, and thereafter on the second Monday of January in the odd years of the calendar. A majority of the board of health voted for plaintiff, but he refused to qualify. It was the duty of said board to at once elect another person. This it failed to do, so that the office remained vacant for more than two months up to the time the State secretary made the appointment. We think the true intent and meaning of the statute is to give such appoinment to the State secretary when the board of health for any reason permits the office to remain vacant for two calendar months from the date fixed by the statute, in this case the second (79) Monday in May.

The public interest requires that this particular office shall have an incumbent to discharge its duties, and the evident intention of the General Assembly was to prevent the office being unfilled for a longer period than the time named. We think the learned counsel for the defendants place a too restricted construction upon the meaning and purport of the words "shall fail to elect" as used in the statute. We think the General Assembly meant the choosing and induction into office of a superintendent of health within the two calendar months. *S. v. Wilroy,* 32 N. C., 329. If this were not so, then a hostile board of health could keep the office vacant by electing a person who would not qualify and the purpose of the General Assembly be entirely defeated.

2. But the real controversy in this case, which has been argued with much force by counsel on both sides, is the constitutionality of section 9 of the act.

The power of the secretary of the State board to make the appointment is conferred by said section, and if it is void *in toto,* then it is

contended that plaintiff's title to the office fails. The learned judge of the Superior Court took this view and in his judgment expressed it in these words:

"Article XIV, sec. 7, of State Constitution forbids the holding of two offices by one man at the same time. If the act had provided that D. T. Johnson, James I. Johnson, and Z. V. Judd should constitute the Board of Health for Wake, their acceptance of said office would have rendered vacant the office of chairman of the board of county commissioners, office of Mayor of Raleigh, and office of Superintendent of Public Schools for Wake. The General Assembly seems to have linked the office of Superintendent of the Board of Health for Wake with the other three offices and made them inseparable, and for that reason I think and hold that section 9 of Public Laws of 1911, chapter 62, is unconstitutional and void.

It appears that the persons named above are respectively Chairman of the Board of Commissioners of Wake County, Mayor of Raleigh, and County Superintendent of Schools for Wake County. Chapter
(80) 62, Laws 1911, appears to be a comprehensive revisal of all preceding laws. It covers the entire subject of public health, both State and county. It first provides for the establishment of a North Carolina Board of Health, which is to be made up by the election by the Medical Society of North Carolina of four members, and by the appointment of the Governor of five. Section 9 constitutes the county board of health of the chairman of the board of commissioners, the mayor of the county town, and when there is no mayor, the clerk of the Superior Court, the county superintendent of schools, together with two physicians to be elected by those three public officials.

We are unable to concur in the conclusion that the statute is violative of Article XIV, sec. 7, of our State Constitution. It is not a case where one person holds two offices at the same time, but rather the case where the duties of a member of the county board of health are to be performed *ex officio* by the chairman of the board of commissioners, the mayor, and the superintendent of schools. These duties cannot be discharged by the individuals named in his Honor's judgment any longer than during the period they hold the offices of chairman, mayor, and superintendent. The right to discharge such duties is not conferred upon them as individuals, but is a part of the duties of the one office already held by each.

Barnhill v. Thompson, 122 N. C., 493, does not sustain the contention of the defendants. The facts in that case show that the Board of Education of Bladen County was elected by the board of commissioners of said county, the clerk of the Superior Court and the register of deeds,

under the existing law, sitting with them. This body elected the defendant Thompson, who was a member of the board of county commissioners, a member of the board of education, and he undertook to exercise the duties of both offices. This Court held that he was ineligible to discharge the duties of county commissioner; that when he accepted the second office he thereby vacated the one he already held. His right to act as a member of the board of education was not questioned. In the case at bar the persons named in the judgment have not been elected or appointed to any other office, but the added duties of (81) the county board of health have been placed upon the offices they already held, and as long as they retain such offices they must discharge such duties, and when they vacate such office their successors must continue to perform them. By discharging the duties of the board of health and acting as members of the board, those gentlemen did not vacate the offices they already held, for the moment they resigned or vacated such offices they at once became ineligible to continue as members of the board of health. For this reason they could have no right to elect which office they would take, the office they held or membership on the board of health.

This legislation is not novel in North Carolina—nor, indeed, in the other States of the Union. In 1901 the Legislature passed a similar act —section 4444 of the Revisal. That act provides that two physicians shall be selected, one by the chairman of the board of county commissioners and one by the mayor of the county town, who, together with the board of commissioners, shall constitute the county sanitary committee, of which committee the chairman of the board of county commissioners shall be *ex officio* chairman.

We also have the familiar case of the Governor, who is made by law a trustee of the University of the State and chairman of the board and is required to perform these duties and also act as chairman of the executive committee of the trustees. Similar legislation is to be found in other States having a constitutional provision similar to ours. In West Virginia the law requires the Governor, Auditor, Treasurer, Superintendent of Schools, and Attorney-General to serve on the Board of Public Works, and prescribes the duties of said board. The Court of Appeals in an elaborate opinion held the act valid, saying, in substance, it simply prescribes additional powers and duties to be performed by officers already elected by the people, and that it does not amount to an appointment to an office created by law, but that it only amounts to requiring the officers of the executive department, by virtue of their respective offices to which they have been elected by the people, to act as members of the Board of Public Works; that it in substance simply

annexes additional powers and duties to their respective offices. The Court goes on to say "that it is a time-honored usage in Virginia,
(82) and continued in West Virginia, to cause certain duties which might have been assigned to officers specially appointed or elected for the purpose, to be performed by officers already appointed for general service." *Bridges v. Shallcross,* 6 W. Va., 578, citing *Wales v. Belcher,* 20 Mass., 508. The question is considered in *Sharpe v. Robertson,* 5 Gratt., 518. In that case certain duties were assigned the circuit judges to be performed in the Court of Appeals and special compensation fixed by the General Assembly. *Judge Baldwin,* speaking for the Court, says: "But the act in question creates no new judicial offices and appoints no additional judges, but merely attaches new duties for offices existing, to be performed by the incumbents, within the constitutional power of the Legislature." The subject is discussed in *Powell v. Wilson,* 16 Tex., 59, and the views we have expressed herein are fully supported. The Court says: "It cannot be doubted that it is competent for the Legislature to create an office, which shall be that of a substitute, or mere auxiliary to another, the duties of which shall commence and consist in performing the duties of the principal office." The subject is elaborately discussed in *Wilkins v. Conners,* 27 Fla., 329, and it is held that the statute making it the duty of the Sheriff of Escambia County to act as City Marshal of Pensacola is not obnoxious to the Constitution of that State, declaring that "no person shall hold or perform the functions of more than one office under the government of this State at the same time." The same view is taken in *S. v. Somnie,* 33 La. Ann., 237, where it is held that the act providing that the clerk of the district court shall be *ex officio* member of the jury commission does not confer an additional office upon the incumbent of the clerk's office in violation of the constitutional restriction.

We could multiply authorities in support of these views, but deem it unnecessary.

It is true, as contended, that section 9 uses this expression, "the term of office of members of the county board of health shall terminate on the first Monday in January in the odd years of the calendar, and
(83) while on duty they shall receive $4 per diem, to be paid by the county." The former law declared their term of office to be coterminus with that of the commissioners with whom they serve, and when on duty they shall receive the same compensation as is received by county commissioners. Evidently the language of the new act in reference to term of office applies only to the two physicians who are chosen as members of the county board of health by the chairman of the board of county commissioners, by the mayor, and by the superintendent of

schools. The change in the verbiage is due to the fact that there is a difference in the terms of the *ex officio* members of the county board of health. The county superintendent of schools goes out of office on the first Monday in July of each year; the mayor of the county town, as a rule, goes out in May or June, while the terms of the county commissioners expire in December. It evidently was not intended to either leave a vacancy in the health board or to shorten or lengthen the terms of the *ex officio* members. The person holding the office of county commissioner when his successor is elected as chairman of the board of county commissioners on the first Monday in December would go off the county board of health and the succeeding chairman of the board of county commissioners would *eo instanti* become a member of the county board of health. The same is true of the mayor and of the superintendent of public schools.

Our conclusion being that the entire section of the act is a valid exercise of legislative power, it is unnecessary to discuss the powers of the health board as a *de facto* organization with a colorable right to discharge the duties imposed upon it.

3. It is contended that the secretary of the State board did not fix the fees as required by the act. We fail to see how this affects the plaintiff's title to the office. It is plain that the secretary undertook to fix the fees to which plaintiff would be entitled, but whether he observed the standard laid down by the statute is not for us to determine in this proceeding. The statute, section 9, declares that the compensation of the superintendent of health for the county, when fixed by said secretary, shall be "in proportion to the salaries paid by other counties for the same service, having in view the amount of taxes collected by said county." (84)

And the same section declares that "all expenditures shall be approved by the board of county commissioners before being paid."

It thus becomes the duty of the board of commissioners to pass on and audit the plaintiff's accounts for services and to determine whether they are reasonable and within the bounds fixed by the statute. The approval of the defendant board is necessary to the payment of plaintiff's account, and while the courts will not undertake to compel the county commissioners to approve them, they will require them to consider the account and to pass on it in good faith in the exercise of a sound judgment as to whether or not the services as charged are warranted by the statute.

4. It is contended that mandamus is not the proper remedy, but that *quo warranto* is. This contention is based upon the theory that one Dr. Stevens is in possession of the office of "County Superintendent of Health" for Wake County and exercising its functions. We find nothing

in the record that gives Dr. Stevens even a colorable title to the office or indicates that he is in possession of it. The resolution of the county commissioners does not purport to elect him superintendent of health or even to induct him into any office established by law. If he is in the service of the county commissioners under their resolution to employ a "county physician" (the term used in the resolution), then he is merely a contract physician performing services which should be performed by the plaintiff, and is not exercising the functions of a public office. He has not even a colorable title to the office of "County Superintendent of Health." He is not a party to this proceeding and was very properly omitted.

That mandamus is a proper remedy to enforce plaintiff's demands is established by abundant authority. *Moore v. Jones,* 76 N. C., 185; *Doyle v. Raleigh,* 89 N. C., 133; *Lyon v. Commissioners,* 120 N. C., 239; *Koonce v. Commissioners,* 106 N. C., 192.

We assume that when this opinion is handed down it will be
(85) unnecessary for plaintiff to sue out the writ, but in case it is, the plaintiff may apply for a peremptory writ of mandamus to the judge of the Superior Court residing in or holding the courts of the Sixth Judicial District.

The costs of this appeal will be paid by defendant board of commissioners.

Reversed.

Cited: *S. v. Knight,* 169 N. C., 340, 357; *Halford v. Senter, ib.,* 547.

GEORGE P. REID v. R. V. KING.

(Filed 23 December, 1911.)

1. Contracts—Oral—Party Walls—Abutting Owner—Agreement to Pay—Equity—Statute of Frauds.

A parol agreement between adjoining owners of lands that one should build a division wall partly on the lands of each owner and for the use of both, for which the other was to pay one-half of the cost in the event he should thereafter use it, is enforcible in equity after the wall has been built by the one and the other has used it accordingly; and being enforced upon equitable principles, it does not fall within the meaning of the statute of frauds, which requires that a contract concerning lands or interests therein be in writing.

2. Same—Easement—Deeds and Conveyances—Subsequent Purchasers with Notice.

By parol agreement between the owners of adjoining lots, one of them built a brick building on his own land, one wall of which rested

partly on the lands of the other, and one-half the cost of its erection was to be paid by the other party when he should use it: *Held*, the effect of this agreement was to create cross-easements as to each owner, which would bind all persons succeeding to the estates to which the easements are appurtenant, and in equity a purchaser of the estate of the owner so contracting, having notice of the agreement, would take it with the liability to pay one-half the cost of the wall, whenever he availed himself of its benefits.

3. Same—Incorporeal Hereditaments.

When by parol agreement one owner of lands has built a party wall one-half upon his own land and the other half upon that of an adjoining owner, and the latter had agreed to pay for one-half of the wall when he should use it, equity, to give effect to the agreement, will regard the agreement as creating an incorporeal hereditament (in the form of an easement) out of the unconveyed estate, rendering it appurtenant to the one conveyed, and binding upon the title of subsequent assignees with notice.

4. Courts—Form of Action—Equity—Pleadings.

Actions at law and suits in equity being adjudicated and determined under our statute by the same tribunal, equities will be administered therein where they sufficiently arise upon the allegations of the pleadings, without regard to the form or manner in which they are alleged.

APPEAL from *Justice, J.*, at July Special Term, 1911, of (86) RUTHERFORD.

This action was brought by the plaintiff to recover one-half the cost of erecting a party wall on the line dividing the lots of the parties.

The following are the facts, as gathered from the pleadings and proofs: In 1904 the plaintiff and one Edward Thompson were the owners of adjoining lots in the town of Forest City, N. C. The plaintiff, in 1905, erected a two-story brick building on his lot in such manner that the eastern wall thereof rested one-half on his lot and the other half on the lot of Thompson; at the time plaintiff erected his building he entered into a verbal agreement with Thompson, providing that he might construct the east wall of the building on the dividing line of the two lots, so that one-half thereof would rest on each lot, and that the said Thompson, should he ever build on his lot, might join his building to the east wall of plaintiff's building upon his paying plaintiff one-half the value of the wall at the time he should make use of the same, and if Thompson should decide not to build on his lot, but should sell the same, then and in that case he should give plaintiff the first offer to purchase his lot, and if he sold to another he would make known to him the terms of the contract between him and the plaintiff in reference to the use of the wall. After plaintiff had erected his building, Thompson sold his lot to defendant, but before selling it to him he informed him

of the terms of his agreement with the plaintiff. Thereafter the defendant erected a two-story brick building on his lot, and in doing so used the east wall of plaintiff's building as the west wall of his (de-
(87) fendant's building); the defendant, at the time he purchased the lot from Thompson and at and prior to the time he used plaintiff's wall, had actual notice and full knowledge of the agreement between plaintiff and Thompson.

Defendant testified, in part, as follows: "After Dr. Reid had built, I went to Mr. Thompson and told him I wanted to buy the lot, and he said he was thinking of building himself; he further told me that when Dr. Reid built the wall he came to him and said his lot was narrow and he wanted to build the wall half on his (Thompson's) lot; he said he told Reid to go ahead and if he (Thompson) built, he would pay for one-half the wall, and if he did not build, he would give Reid the refusal of the lot so he could get the advantage of the wall. That was all he ever said to me about the wall until after he made me a deed."

The jury returned the following verdict:

1. Is defendant indebted to plaintiff? Answer: Yes.

2. What was the actual cost of erecting the wall as of the date that defendant joined to the wall? Answer: $625.

The court instructed the jury that, upon the admissions in the pleadings and evidence, they should answer the first issue "Yes," and that they would find, upon the testimony the actual cost of erecting the wall as of the date the defendant joined his building to it, and answer the issue accordingly.

Judgment was entered upon the verdict, and defendant appealed.

McBrayer, McBrayer & McRorie for plaintiff.
Ryburn & Hoey and M. L. Edwards for defendant.

WALKER, J., after stating the facts: It has generally been held in cases of this kind that there can be no recovery *at law* for the use of a party wall, built by one of the adjoining proprietors, against the other, but the remedy must be sought in a court of equity. The governing principle is nowhere better expressed than by *Chancellor Kent* in the leading case of *Campbell v. Messier,* 4 Johns. Ch. (N. Y.), 334. It will be well to state the facts before referring directly to the opinion of the Court: "Two parties living in the city of New York, on
(88) adjacent lots and having on the common line of their buildings a ruinous party wall unfit to stand, and one of the persons thus situated being desirous of rebuilding, proposed to the other coterminous proprietor to unite with him in rebuilding the party wall, but this re-

quest was refused. Whereupon Campbell, the proposer, proceeded to tear down his own house, as well as the party wall, and rebuilt both. Thereafter Messier, who had refused to assist in rebuilding the party wall, devised his property to his son, who thereafter sold the lot to Dunstan, and in the deed expressly conveyed to the latter the use of the party wall for building, and covenanted to indemnify him for so using it. Dunstan then pulled his house down and erected a new one, and in so doing made use of the party wall, but refused to pay his proportionate share of that wall. Campbell then sued him in an ordinary action, but was nonsuited on the ground that he had no remedy at law. On this Campbell filed his bill against both Messier and Dustan, praying that the defendants be decreed to come to a settlement with him touching the building of the party wall, and to contribute and pay one-half of the value thereof, etc. Upon this state of facts the prayer of the bill was granted, and a decree entered accordingly, *Chancellor Kent* remarking: 'I have not found any adjudged case in point, but it appears to me that this case falls within the reason and equity of the doctrine of contribution which exists in the common law, and is bottomed and fixed on the general principles of justice.' In *Sir William Harbert's case,* 3 Co., 11, and in Bro. Abr., tit. Suite and Contribution, many cases of contribution are put, and the doctrine rests on the principle that where the parties stand *in equali jure,* the law requires equality, which is equity, and one of them shall not be obliged to bear the burden in ease of the rest. It is stated in F. N. B., 162b, that the writ of contribution lies where there are tenants in common, or who jointly hold a mill, *pro indivisa,* and take the profits equally, and the mill falls into decay, and one of them will not repair the mill. The form of a writ is given to compel the other to be contributory to the reparations. In *Sir William Harbert's case* it was resolved that 'when land was charged by any tie, the charge ought to be equal, and one should not bear all the burden; and the law on this point was grounded in great equity.' (89) . . . The doctrine of contribution is founded, not on contract, but on the principle that that equality of burden as to a common right is equity, and the solidity and necessity of this doctrine were forcibly and learnedly illustrated by *Lord Ch. Baron Eyre* in *Dering v. Earl of Winchelsea,* 1 Cox's Cases, 318. . . . The obligation arises not from agreement, but from the nature of the relation, or *quasi ex contractu,* and as far as courts of law have in modern times assumed jurisdiction upon this subject, it is, as *Lord Eldon* said (14 Ves., 164), upon the ground of an implied assumpsit. The decision at law, stated in the pleadings, may therefore have arisen from the difficulty of deducing a valid contract from the case; that difficulty does not exist in this Court, be-

cause we do not look to a contract, but to the equity of the case, as felt and recognized according to *Lord Coke* in every age by the judges and sages of the law." And the cause was referred to a master to ascertain the cost of the wall. Afterward, the cause coming on again before the chancellor, he ruled that the expense of rebuilding the wall was an equitable charge on the wall, and the owner for the time being, exercising his right in the new wall, was equitably bound to contribute ratably to the expense of the necessary reparation. And Dunstan, having purchased with actual notice of the charge or claim, was ordered to pay the moiety of the expense of rebuilding the wall. That decision, which has been approved and followed in many jurisdictions, would seem to be sufficient authority against the contention of the defendant in this case, and we deem it to be the only just and reasonable view to take of the question.

It is not important for us to inquire or to decide whether an action at law will lie for one-half the cost of erecting the wall, as we have abolished all forms of actions and the distinction between legal and equitable remedies, and a party now recovers according to the allegations of his pleadings. *Voorhees v. Porter,* 134 N. C., 591; *Cheese Co. v. Pipkin,* 155 N. C., 394; so that if the plaintiff has made a sufficient allegation of facts in his complaint to entitle him to equitable relief, the Court will award it, without regard to the form or manner in which they are alleged. We think he has done so, and there was proof
(90) to establish them, as will appear from the foregoing statement of the facts.

It has been said, though, that *indebitatus assumpsit,* being of an equitable nature, will lie for an adjoining owner's share of the cost of building a party wall, and a recovery has been allowed in that form of action. *Huck v. Flentye,* 80 Ill., 258. A case much like ours in its facts is *Rindge v. Baker,* 57 N. Y., 209, in which it appeared that two adjoining proprietors entered into a parol agreement to jointly build a party wall, one-half on the premises of each, and accordingly built a portion of the wall, but one of them refused to proceed with its construction; the other having planned his building in reliance on the contract being performed, was held not confined to his remedy for specific performance, but was permitted to complete the wall and to recover of the other proprietor, in an equitable action, one-half of the expense. To the same effect is *Sanders v. Martin,* 2 Lea, 213. Numerous authorities sustain the proposition that such a recovery may be had under the equitable principle of contribution, against the defaulting proprietor, or his assignee with notice of the contract, one of the strongest of them being *Sharp v. Cheatham,* 88 Mo., 498, where the subject is treated ex-

haustively and with great learning and a copious citation of cases by *Justice Sherwood.* The effect of such an agreement is to create cross-easements as to each owner, which binds all persons succeeding to the estates to which the easements are appurtenant, and a purchaser of the estate of the owner so contracting would take it burdened with the liability to pay one-half the cost of the wall, whenever he availed himself of its benefits. 88 Mo., *supra.* The language of courts and of judges has been very uniform and very decided upon this subject, and all agree that whoever purchases lands upon which the owner has imposed an easement of any kind, or created a charge which could be enforced in equity against him, takes the title subject to all easements, equities, and charges, however created, of which he has notice. 88 Mo., *supra. Lord Cottenham* said, in *Tulk v. Moxhay,* 2 Phil. (Eng. Ch.), 774: "If an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." But although the covenant, (91) when regarded as a contract, is binding only between the original parties, yet in order to give effect to their intention it may be construed by equity as creating an incorporeal hereditament (in the form of an easement) out of the unconveyed estate, and rendering it appurtenant to the estate conveyed; and when this is the case subsequent assignees will have the rights and be subject to the obligations which the title or liability to such easement creates. A purchaser of land, with notice of a right or interest in it existing only by agreement with his vendor, is bound to do that which his grantor had agreed to perform, because it would be unconscientious and inequitable for him to violate or disregard the valid agreements of the vendor in regard to the estate of which he had notice when he became the purchaser. 88 Mo., *supra; Spencer's case,* 1 Smith L. C. (6 Ed.), 167. See also *Spaulding v. Grundy,* 126 Ky., 510, and cases cited; *Richardson v. Tobey,* 121 Mass., 457; 30 Cyc., 788 and 795. It would be useless to multiply authorities, as the most of them will be found in the cases already cited.

There can be no question but that the defendant had full notice of the transaction when he bought from Thompson, and is as much affected by the equity as Thompson would have been, if he had not sold the lot.

The statute of frauds does not apply. The equity arises regardless of any promise except, perhaps, that which is fairly implied by law. 20 Cyc., 282; *Pitt v. Moore,* 99 N. C., 85; *Ray v. Honeycutt,* 119 N. C., 510; *Tucker v. Markland,* 101 N. C., 422. No point was made as to the amount of the liability, and it seems that the plaintiff recovers less than one-half of the amount it cost him to build the wall.

No error.

(92)

JOHN PATILLO ET AL. v. JAMES LYTLE ET AL.

(Filed 23 December, 1911.)

1. Tenants in Common—Partition—Parties—Decree—Waiver.

Those who have an interest as tenants in common in lands to be divided in proceedings for partition, and whose names appear as parties in the proceedings without service of process and without their authority, are not in law parties to the proceedings, and the mere expression of their willingness or consent at the time will not bind them by an adjudication therein, when it does not appear that, by their acts, they have prejudiced the other parties or the purchaser of the lands at a sale for division, or that they have done something which creates an estoppel upon them.

2. Tenants in Common—Partition—Decree—Partial Division—Interpretation of Statutes.

Upon motion made by tenants in common to set aside the judgment rendered in proceedings in partition wherein a sale had been made of the property, it is reversible error for the trial court, upon finding that the sale was necessary to the interest of the tenants, to adjudge that the purchaser at the sale, which had not been confirmed, was a tenant in common with one who had not been bound by the former judgment the formed having bid for the interests of all except those of the latter; for the statute authorizes only a partition of the whole, and the provisions of Revisal, sec. 2506, have no application.

3. Tenants in Common—Partition—Sale—"Preferred Proposer"—Confirmation.

The highest bidder at a sale of lands in proceedings for partition by tenants in common cannot be an innocent purchaser until the sale is confirmed by the court, and until it is, the bidder is only regarded as a "preferred proposer," and is presumed to know that his bid is subject to the condition of its acceptance or rejection by the court.

4. Tenants in Common—Partition—Void Conveyance—Confirmation.

A deed made by a commissioner to sell the lands in proceedings for partition among tenants in common is invalid unless the sale has been confirmed by the court, or the parties have otherwise become bound by it.

5. Tenants in Common—Partition—Decree—Parties.

A deed by a commissioner to sell lands for partition among tenants in common, though the sale had been confirmed by the court, will not bind one of the tenants who had not been made a party to the proceedings or waived his rights; for in the absence of a necessary party the lands cannot be thus partitioned under the statute as to him.

6. Tenants in Common—Partition—Decree—Parties—Motion in the Cause—Procedure.

A nominal party in a proceeding for partition, though not so in fact, should proceed by motion in the cause to set aside the decree therein.

7. Same—Consent.

A consent decree in partition proceedings for the division of lands among tenants in common, which purports to operate upon the whole land and every interest in it, does not affect the rights of a tenant who has not been made a party, and who has not waived his rights.

8. Same—Appeal and Error—Procedure.

A sale of lands in partition proceedings among tenants in common being invalid because of the absence of necessary parties who have moved in the cause to set aside the decree, it is held in this case on appeal that the judgment be set aside, together with the order of sale and the commissioner's deed and that necessary parties be made, and the cause further proceed as the parties may be advised and in accordance with law.

APPEAL from *Webb, J.*, at May Term, 1911, of BUNCOMBE. (93)

This is a proceeding for the partition of the land described in the pleadings among the heirs of Thomas Patillo. At June Term, 1911, an order was made for the sale of the land, which was made by the commissioner on 7 August, 1911, and D. W. Harrison became the highest bidder and the land was knocked down to him at the price of $1,205, which he paid to the commissioner. No report of sale was made by the commissioner, and the sale was, of course, never confirmed by the court. The commissioner, without any order authorizing him to do so, executed a deed for the land to the bidder, D. W. Harrison.

At October Term, 1911, Carrie Burgin, Hattie Moore, Rose Bradley, Delia Davidson, and Ida Mims made a motion before the court to set aside the sale because, while their names appeared in the list of plaintiffs, they had not authorized counsel for the other plaintiffs, or any one else, to make them parties, and that they were thus made parties without their knowledge or consent, and further, that they are opposed to a sale of the land and desire an actual partition thereof.

Judge Lane found as facts at the hearing of the motion, that (94) the land brought its full value at the sale; that three of the movers had notice of the suit after it was commenced and made no objection thereto; that one of them at the sale expressed her willingness to have the land sold, but that Carrie Burgin did not know of the proceeding and, therefore, had given no authority to any one to make her a party; nor had she been notified what had been done. He further found that a sale of the land was necessary for a fair division of the same. He thereupon denied the motion of all the parties, confirmed the sale, and adjudged D. W. Harrison to be the owner of all the undivided interests in said land except that owned by Carrie Burgin, and, further, that they were tenants in common, Harrison owning all the undivided interests

except the one belonging to Carrie Burgin. The motioners excepted and appealed.

Mark W. Brown for petitioners, appellants.
Craig, Martin & Thomason for defendant.

WALKER, J. This case proceeded very irregularly in the court below from the beginning to the end of it. The court evidently found as a fact that the motioners had not authorized the proceeding to be brought, and that all except Carrie Burgin were bound by the orders and degrees therein, because they happened to know of it, one of them having shown a willingness at the sale that the land should be sold. It would have been better if his Honor had distinctly found whether or not they had authorized themselves to be made parties, but without any such specific finding, we think it a fair inference, from the other findings, that he concluded, as matter of fact, that no such authority had been given. We do not think, therefore, that they were, in law, parties to the proceeding. A mere knowledge of the proceedings, in the absence of authority given to make them parties, would not be sufficient to bind them, nor did a mere expression of willingness that the land might be sold have that effect as to Ida Mims. Before they could be estopped by conduct, they must have done something which caused the other parties or the purchaser to act in some way which will prejudice them if they are
(95) not held bound by what has been done in the proceedings, and no such result has followed. *Boddie v. Bond,* 154 N. C., 359; Eaton's Equity, p. 169.

But there is another more serious question in the case. The court, if it had the power to confirm the sale and further adjudge, as it did, without first bringing in all necessary parties, has in legal effect partitioned only a fractional interest in the land, instead of the whole thereof. It is true, Laws 1887, ch. 214, sec. 1 (Revisal, sec. 2506), provides that in all proceedings for partition actual division may be made of a part of the land and a sale of the remainder, or a part only of any land held by the tenants in common may be partitioned and the remainder held in common, but this provision does not sustain the judgment rendered below upon the motion to set aside the order of sale. The court's order did not provide for a sale of a part and actual division of the remainder, or that a part only be partitioned and the remainder held in common, but it simply ordered the sale to stand as to a fractional interest, an undivided interest, less than the whole, and the remainder to be held, not in common, as the statute provides, but in severalty by Carrie Burgin. But there is direct authority upon the subject. In *Brooks v. Austin,* 95

N. C., 474, the Court adverting to a similar state of facts, says, by *Chief Justice Smith:* "A three-tenths interest in the 30-acre tract is proposed to be sold for division, the tenant or tenants of the other seven-tenths not being before the court, nor could they rightfully be, since they have the property in common in the larger tract. *Simpson v. Wallace,* 83 N. C., 477. We have met with no case in which such an undivided interest has been the subject of partition and sale at the instance of those owning it, when the other tenants are not present in the action. The statute requires actual partition among tenants in common of the whole tract, though shares may be united and apportioned to several, or a single share may be allotted to one, the residue of the land being still held in common by the other tenants, but however done, the partition must be of the whole. The sale as a mode of partition can only be resorted to when otherwise it would be to 'the injury of some or all of the parties interested.' The Code, sec. 1904. The actual divisibility of the land into parts is an inquiry to be made before an order of sale can only be legally made when all the (96) tenants are before the court." See, also, *Gregory v. Gregory,* 69 N. C., 522.

There is no innocent purchaser in this case who can be affected by setting aside the decree. Harrison is no such a purchaser—he is not a purchaser at all, but a mere "preferred proposer," as he is styled. *Miller v. Feezor,* 82 N. C., 192; *Joyner v. Futrell,* 136 N. C., 301.

In the last cited case it is said: "The only other question which we need consider, that is, as to the validity of the deed of the executor and its sufficiency to pass the title, without any confirmation of the sale by the court, is equally well settled. This Court, and all courts, we believe, having jurisdiction to pass upon judicial proceedings for the sale of land, have uniformly held that it is necessary that the sale be reported to the court, and that it be confirmed before the commissioner or other person appointed by the court to make the sale can have any power to make title to the purchaser. The commissioner is invested with a naked power, which must be exercised under the supervision and control of the court, and he has no authority to act save that which he derives from the court under its order or judgment. The bidder at a judicial sale, on the other hand, acquires no right before the sale is reported by the officer and the sale is confirmed by the acceptance of his bid. Until then, the bargain with him is not complete and he acquires no title of any kind to the land. He is regarded as a mere preferred proposer until he has been accepted by the court as the purchaser, and every bidder is presumed to know, because he should know, that his bid is made subject to the condition of its acceptance or rejection by the

court. A formal direction to make title is not always necessary to confer upon the commissioner the power to convey the land to the purchaser by deed, but a confirmation of the sale cannot be dispensed with in any case, unless perhaps in some way it has been waived. It is a condition precedent to the exercise of the right to convey the title. This principle has been settled by numerous authorities. *Bost ex parte,* 56 N. C., 482; *Brown v. Coble,* 76 N. C., 391; *Mebane v. Mebane,* 80 N. C., 34; *Latta v. Vickers,* 82 N. C., 501; *Foushee v. Durham,* 84 N. C., 56; (97) *Miller v. Feezor,* 82 N. C., 192; *Attorney-General v. Navigation Co.,* 86 N. C., 408; *Dickerson ex parte,* 111 N. C., 108; *Vanderbilt v. Brown,* 128 N. C., 498; *Mason v. Osgood,* 64 N. C., 467; Rorer Jud. Sales, sec. 122."

We also held that the deed of the commissioner without confirmation, being unauthorized, was void. Revisal, secs. 2512, 2513. Harrison is to be treated, therefore, as a mere proposer, whose bid was awaiting acceptance by the court, and was subject to its rejection. But if the sale had been confirmed, it would not have bound Carrie Burgin, who was not a party to the proceeding (*Henderson v. Wallace,* 72 N. C., 451) and without whose presence, as a party, the court could not, as we have seen, proceed, under the statute, to partition the land. The judge cannot make an order of sale or any other order in the case which is contrary to the mandatory provisions of the statute. The court and the parties must proceed according to the statute, and not otherwise. It is a wise provision which requires all the land to be partitioned in some way pointed out by the statute, which we cannot repeal or modify by judicial construction, nor can we approve such a radical departure from statutory methods. What we have said in this case is supported by the decision of the Court in *Tayloe v. Carrow,* 156 N. C., 6, as will appear in the opinion, of which the following passage is a clear summary: "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 has taken possession of the premises. Knapp on Partition, 336."

The parties took the proper course to set aside the decree by a

motion in the cause, as they were parties nominally, though not (98) so in fact. *Doyle v. Brown,* 72 N. C., 393; *Sumner v. Sessoms,* 94 N. C., 377.

It is suggested that this is a consent decree. But parties to a suit cannot by consent impair the rights of those in interest, who are not made parties, and the decree directly affects their rights, though they were not heard. The whole of the land was partitioned, and the judgment, therefore, operates upon every interest in it.

The judgment will be set aside, as also the order of sale, and deed of the commissioner, the latter returning the purchase money to D. W. Harrison, and the case may then proceed by making all necessary parties, and in other respects as the parties may be advised.

Error.

(99)

E. A. SMITH v. C. H. MILLER ET AL.

(Filed 23 December, 1911.)

1. Commissioner to Sell Lands—Taxes—Liens—Order of Court—Parties in Interest.

An order of court that a commissioner, appointed to sell lands, pay taxes and assessments against the property, constituting a lien thereon, is valid and proper, being necessary for the protection of the interests of the parties.

2. Same.

Parties interested in lands which have been ordered by the court to be sold by its commissioner cannot avail themselves of the benefit of an order that the commissioner pay the taxes and assessments constituting a lien on the land, and then be heard to complain of its validity.

3. Same—Future Taxes.

An order of court that a commissioner of the court appointed to sell the lands in controversy pay "all such taxes and assessments as are and have been levied" is sufficiently comprehensive in its terms to include the past, present, and future taxes and assessments.

4. Same—Title.

An order of court that its commissioner appointed to sell the land in controversy pay off such future taxes and assessments as may constitute a lien on the lands is valid, when it is made in the interest of the parties and in protection of their title.

5. Estates—Life Tenant—Taxes—Payment by Remainderman—Interpretation of Statute.

If the life tenant should fail or refuse to pay taxes and assessments on the lands. *Semble*, the remainderman may pay them, and maintain an action for damages therein sustained by him, either at common law or under Revisal, sec. 2859.

6. Same.

When it appears that the life tenant in lands has failed or refused to pay the taxes and assessments levied upon the lands, it is not required that the remainderman wait until there is a sale and accumulation of cost and expenses before he exercises the right of paying the taxes and assessments, it being otherwise inevitable that the lands will be sold, and, under such circumstances, he may intervene and pay the taxes before the land is exposed to sale.

7. Same—Commissioner to Sell—Purchaser—Clear Title—Interpretation of Statutes.

When a commissioner is appointed by the court to sell lands, in which there is an estate in remainder after a life estate, an order directing him to pay "all such taxes and assessments as are and have been levied" thereon is valid, and will be allowed out of the proceeds of the sale of the lands, the object of the law being to pass a clear title to the purchaser. Revisal, secs. 2857, 2858.

8. Commissioner to Sell Lands—Order of Court—Commissions Allowed—Appeal and Error.

An order of court allowing a certain sum to a commissioner for the sale of lands in dispute, not excepted to, will be presumed, on appeal, to have been made by the lower court upon a full consideration of all the facts and circumstances, and will therefore be upheld. The question in this case, as to the power of another judge subsequently holding court in the county to review such an order, was stated by the court, but not determined, it not being deemed necessary to pass upon it.

9. Commission to Sell Lands—Void Sales—Personal Dealings—Judgment—Credits—Disposition of Proceeds of Sale—Appeal and Error.

A commissioner appointed by the court disbursed a large sum in the manufacture of concrete blocks for use in the construction of a building on the land. The court below found as a fact that the blocks were manufactured by the commissioner in his individual capacity, and was not the property of the estate, as he, personally, could not make a valid sale to himself as commissioner, and ordered the blocks to be sold and the proceeds applied as a credit on a judgment rendered against the commissioner: *Held*, the sale of the blocks under the order was void, and the commissioner in his individual capacity is entitled to have the value of the blocks, or at least the proceeds of the sale, paid to him.

(100) APPEAL by defendant from *Lane, J.*, at November Term, 1911, of BUNCOMBE.

George A. Shuford, Mark W. Brown, and Weaver & Stepp for plaintiff.

A. S. Barnard for defendant.

WALKER, J. This case has been before us for adjudication of one question or another several times, and is reported in 151 N. C., 620; 152 N. C., 314; 155 N. C., 242, and 155 N. C., 247. The defendant C. H. Miller, who was the commissioner appointed by the court to sell certain realty, has brought the case here by appeal from the final judgment, he having excepted to rulings of the court during the several stages of the proceedings in the court below, which was the proper method of procedure, as we held in *Smith v. Miller,* 152 N. C., 314, and 155 N. C., 242. He relies upon the following exceptions taken to the rulings of *Judge Peebles:*

1. Miller, as commissioner, was allowed certain items in his account, and to this ruling of the judge there was no exception, so that they must stand. But he was denied credit for other items, and to this ruling he has excepted. Among them is a claim he now makes for taxes and local assessments levied upon the property which he sold under orders of the court. It appears that at December Term, 1904, *Judge Shaw* made an order directing or authorizing Miller, as commissioner, "to pay all such taxes and street assessments as are and have been laid against any of the property described in the petition (for a sale of the land) (101) in this cause, same to be paid by him out of funds in his hands." No exception was taken to this order by any of the parties. The commissioner paid taxes and assessments since his qualification, to the amount of $2,018.76, some before the order was made and some afterwards, but not included in the amount presently to be mentioned. He also paid taxes and assessments then in the hands of the sheriff and city tax collector for collection, amounting to $3,131.78, the total amount of taxes and assessments thus paid being $5,735.44. The appellees contend that he is not entitled to credit for this payment of taxes and assessments: first, because, as *Judge Peebles* ruled, *Judge Shaw* had no power to make such an order; second, because the amount paid over and above the sum of $3,131.78, which was then due and collectible, was not embraced by the terms of the order; and, third, because the life tenant, Mrs. Elizabeth A. Smith, was liable for the taxes and assessments and they were not properly and legally chargeable upon the fund in the hands of Miller as commissioner.

We do not see why *Judge Shaw* could not make such an order. It was within the power and jurisdiction of the court to sell the land for partition, and in order to give a clear title it was certainly necessary

that the taxes, which constitute liens upon the land, should be paid. What would be the use of dividing the lands if they could be sold for taxes and the estate of the parties therein be forfeited or lost? This proceeding would, in such a case, be a vain and useless one. The commissioner may not have been under any obligation to pay the taxes and assessment without an order, but it seems to us, at least, that the order was not only a proper and legal one, but absolutely necessary for the protection of the interests of the parties. It was clearly to their advantage, and having profited by it, they will not now be heard to complain. He who is willing to reap the benefit should be made to take it with the burden which naturally and equitably goes with it. We think the court had the jurisdiction and the order was a just and lawful exercise of his power. Our opinion also is that the order of *Judge Shaw* embraces, and was intended to include, if we are to construe it by the words (102) employed, not only taxes and assessments then due and in the hands of the officers for collection, but all such as thereafter accrued, as well as those theretofore paid by Miller himself, while commissioner, for the estate. The language is, "all such taxes and assessments as *are and have* been levied." It would seem that these words are sufficient to take in the past, present, and future taxes and assessments. This meaning is not only apparent on the face of the order, but it would be hard to conclude that the court intended that only a part should be paid. If any of the taxes or assessments had been left unpaid, the property could just as well have been sold for that part as for the whole thereof. It is true, the statute provides for the payment of the taxes by the life tenant. But suppose she failed to pay them, either purposely or because she had no funds with which to pay them, must the property be sacrificed for this reason, and should we heed such an argument from the remaindermen, who are now enjoying the benefit which they derived solely from the payment? If the life tenant failed to pay, they may, perhaps, have an action against her, either at common law or under the statute, Revisal, sec. 2859, which reads as follows: "Every person shall be liable for the taxes assessed or charged upon the property or estate, real or personal, of which he is tenant for life. If any tenant for life of real estate shall suffer the same to be sold for taxes by reason of his neglect or refusal to pay the taxes thereon, and shall fail to redeem the same within one year after such sale, he shall thereby forfeit his life estate to the remainderman or reversioner. The remainderman or reversioner may redeem such lands, in the same manner that is provided for the redemption of other lands. Moreover, such remainderman or reversioner shall have the right to recover of such tenant for life all damages sustained by reason of such neglect or refusal on the part of

such tenant for life. If any tenant for life of personal property suffer the same to be sold for taxes by reason of any default of his, he shall be liable in damages to the remainderman or reversioner." By this provision of the law the remainderman or reversioner may redeem from a tax sale; but must he wait until there is a sale and the accumulation of costs and expenses, before he exercises the right? If it is inevitable that the land will be sold for the tax, why should he (103) wait? The law evidently means, that if the life tenant does not pay, and thereby exposes the land to sale, he may intervene and prevent a sale by paying the tax, and for the same reason that he can redeem from a tax sale already made. It may be that he could do so without the aid of the statute. Revisal, sec. 2857, provides for the payment of all taxes assessed upon real property ordered to be sold in judicial proceedings and remaining unpaid, and also for the payment of such as may be required to redeem the same, if it has been sold for taxes, and it then provides that payment of the taxes shall be made out of the proceeds of sale. Sections 2857 and 2858 provide also for the payment of taxes assessed upon real estate by trustees, mortgagees, and lienors. The object of the law seems to be, not only to preserve the property for the benefit of all interested parties, but to pass a clear title to the purchaser when it is sold. This exception is sustained, and Miller will be allowed the full amount of taxes and assessments paid by him.

2. We also think that Miller, as commissioner, should be allowed commissions at least to the amount that they were ordered to be retained by him, which appears to be $1,400. There was no exception to this order at the time, and *Judge Shaw* is presumed to have made it upon full consideration of all the facts and circumstances, and while we do not decide that the order was not reviewable by *Judge Peebles,* as it is not necessary to do so, we do not see why it should not stand as it was made. The learned judge, in overruling it, may have been influenced, at least to some extent, by the erroneous view taken of some of the questions we are now considering. This exception to the ruling disallowing commissions of $1,400 is sustained.

3. Miller, commissioner, disbursed a large sum in the manufacture of concrete blocks for use in the construction of the new hotel building in Asheville. *Judge Peebles* refused to allow him any credit for this expenditure, and ordered his successor, Mr. Whitson, to sell the blocks and apply the net proceeds as a credit on the judgment against Miller in this case, after finding as a fact that the blocks were manufactured by Miller "in his business and are not the property of the Smith estate, but the property of Miller, as he could not sell them to himself as commissioner. He is not credited with them, but they (104)

are ordered to be sold." If they did not belong to the "Smith estate," but to Miller, it follows that the court had no right to order a sale of them. They had not been levied upon or seized in execution for any debt due by Miller to the "Smith estate." It is clear to us that the sale of them was not only irregular, but void, and Miller is entitled to have, at least, the proceeds or the amount thereof paid to him. This was said in the argument to be $60. He is also entitled, at least, to the proceeds of any other property of his which has been sold in like manner.

None of the exceptions we have considered are covered by our first ruling in the case, that the court did not have jurisdiction to authorize the building of the hotel. They relate entirely to other matters clearly within the cognizance of the court. The other exceptions of defendant are overruled.

It may be that some of the amounts are not correctly stated, and if they are not, the court below may refer the matter for a finding as to the true amounts, unless the parties can agree as to them.

The judgment of the Superior Court will be modified in accordance with this opinion.

Error.

(104)

O. J. LUDWICK AND J. R. EAME v. GEORGE T. PENNY AND C. C. BENNETT.

(Filed 23 December, 1911.)

1. Claim and Delivery—Defendant's Measure of Damages—Pleadings—Interpretation of Statutes.

Where, under claim and delivery proceedings, the plaintiff comes into the possession of the property, the subject of the proceedings, and the judgment is given for the defendant, Revisal, sec. 570, limits the defendant's recovery to the return of the property, or the value thereof, in case a return cannot be had, and damages for the same; and defendant's counterclaim asking for no more is superfluous pleading.

2. Same—Malicious Prosecution—Judgment—Res Judicata.

When a recovery is had only for the damages allowed to the defendant in claim and delivery proceedings for the wrongful seizure of his property used in his business, as allowed by Revisal sec. 570, and in that action on further damage has been set up by way of counterclaim than those given by the statute the doctrine of *res judicata* does not apply in an independent action brought by the defendant in the former action to recover of the plaintiff therein damages for breaking up and destroying his business by unlawfully and maliciously prosecuting the action of claim and delivery.

3. Same—Counterclaim.

When the defendant in claim and delivery proceedings has recovered judgment against the plaintiff for the damages allowed for the wrongful seizure allowed by Revisal, sec. 570, and has set up therein a counterclaim for only the damages allowed by the statute, the damages for "unlawfully, willfully, wrongfully, wantonly, recklessly, and maliciously" suing out the process are not included in the determination of the action, and *res judicata* cannot be pleaded in an independent action subsequently brought by the defendant for their recovery.

4. Same.

The fundamental reasons for the application of the doctrine of *res judicata* are that there should be an end of litigation and that no one should be vexed twice for the same cause; therefore, when the defendant in claim and delivery proceedings has recoverd of the plaintiff therein such damages for his wrongful seizure of defendant's property as allowed by Revisal, sec. 570, and he has claimed no more, he may, by an independent action, sue for such damages to his business as may have been caused by the malicious prosecution of the plaintiff's action; for such was not the subject of recovery in the claim and delivery proceedings, and the doctrine of *res judicata* has no application.

5. Same—Practice.

A suit for maliciously prosecuting a proceeding in claim and delivery for the purpose of breaking up the business of another will not lie before the termination of the claim and delivery proceedings, and the defendant, in such proceedings cannot therefore set up a counterclaim in that action for the damages he may have sustained in his business.

6. Claim and Delivery—Malicious Prosecution—Pleading—"Probable Cause."

An allegation in a complaint that the defendant maliciously, recklessly, and wantonly destroyed the plaintiff's business by seizing his property in a claim and delivery proceeding, is a sufficient allegation of a want of probable cause.

7. Same—Interpretation of Pleadings.

Pleadings will be liberally construed, and when there is an allegation in a complaint for damages for a malicious abuse of process, and it appears that it was based solely upon the facts that the plaintiff was unable to replevy the property seized under claim and delivery proceedings by the defendant, and that in consequence his business was destroyed, the allegations show that the action is really one to recover for the malicious prosecution of a civil action and an interference with the plaintiff's propert by claim and delivery proceedings.

8. Same.

When in an action for damages to plaintiff's business by reason of the defendant's seizing his property in claim and delivery proceedings, it is alleged that the plaintiff was not indebted at all to the defendant, and that defendant seized the property which plaintiff was unable

to replevy, and that the defendant "unlawfully, wrongfully, wantonly, and recklessly commenced said action and prosecuted the same to his damage," the words employed are stronger than if a distinct allegation had been made that the claim and delivery were taken out "without probable cause," and, there being no set form for allegations of this character, the use of this expression is not required. Distinction between malicious prosecution and malicious abuse of process stated by WALKER, J.

9. Appeal and Error—Objections and Exceptions—Assignments of Error.

When a party states his ground of objection to the admissibility of evidence upon the trial, his exception on appeal to the Supreme Court will be confined to the ground upon which he has based it.

BROWN, J., dissenting.

(106) APPEAL by defendants from *Daniels, J.*, at June Term, 1911, of GUILFORD.

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

Justice & Broadhurst for plaintiff.
J. T. Gold and King & Kimball for defendant.

WALKER, J. Plaintiffs brought this action to recover damages for unlawfully and maliciously suing out process and levying upon plaintiffs' property, thereby breaking up and destroying their busi-
(107) ness. Defendant had previously sued the plaintiffs for the recovery of the property, and under claim and delivery proceedings had seized the same. That suit was decided in favor of the defendants, for the reason hereinafter stated. The defendant held a note, and a mortgage on the property to secure the same, which was executed by one Thomas to Penny. The property was afterwards sold by Thomas to the plaintiffs, Ludwick and Bame, who undertook to pay the note secured by the mortgage. They alleged that, by an agreement between all interested parties and the payment of $1,500, the debt and mortgage had been satisfied when Penny brought his suit against them. The jury so found in that action, and further found, in answer to issues submitted to them, that the value of the property, sold and unsold by Penny, was $2,500. The court thereupon adjudged that the defendants in that suit, Ludwick and Bame, recover of the plaintiff, George T. Penny, the sum of $750, the value of the property which had been sold, and the costs of the action, and also the sum of $1,800, the value of the unsold property, as found by the jury; but as to the latter sum ($1,800) a stay bond of execution was ordered, so that the plaintiff, Penny, might

have the opportunity to redeliver the unsold property. The defendants in that action, Ludwick and Bame, set up a counterclaim for the unlawful and wrongful conversion of their property by Penny, and for nothing more.

The defendant in this action, George T. Penny, pleads that the plaintiffs are estopped by the judgment in the action of Penny v. Ludwick and Bame to claim any damages for "breaking up and destroying their business by unlawfully and maliciously suing out process of claim and delivery and seizing their property, as that question was directly involved in the former suit." We do not adopt this view of the matter. The jury found, in this case, that "the defendant, George T. Penny, had unlawfully, willfully, wrongfully, wantonly, recklessly, and maliciously sued out the process of the court in the case of Penny v. Ludwick and Bame, as alleged in the complaint," which was equivalent to saying that Penny, knowing that he had no cause of action against the defendants in that suit, Ludwick and Bame, had wrongfully, maliciously, and wantonly brought the suit and levied upon their property which was used in their business, which, it is alleged, subsequently (108) detroyed it. This matter was not involved in the former suit.

The Revisal, sec. 570, provides that in an action to recover the possession of personal property, if the property has been delivered to the plaintiff, and the defendant claims a return thereof, and becomes entitled to it by succeeding in the action, judgment for him shall be for a return of the property, or for the value thereof, in case a return cannot be had, and damages for taking and withholding the same. It is true, the defendants in that case set up a counterclaim, but they did not allege any facts which would entitle them to any greater relief than is given to them by Revisal, sec. 570, and the counterclaim was superfluous pleading.

The cause of action alleged in this case was not, therefore, involved in that suit, nor was it at all considered, nor did the defendants therein recover any damages on that account. One valid reason for not estopping the plaintiffs in this action by the judgment in the former suit is that the statute we have cited limits the recovery in the latter to the property or the value thereof, unless, perhaps, the defendants in that suit had set up a counterclaim for more, that is not only for such damages, but for maliciously breaking up and destroying their business.

The defendant Penny relies upon the following principles, which he says are established by *Porter v. Mack,* 50 Wa. Va., 581, 592, and numerous other authorities cited in the brief of his counsel: "When a person has a cause of action which he may assert by an action *ex contractu* for the direct damages, or *ex delicto* for both the direct and indirect dam-

ages, if he selects the former he waives the latter, including all claim for indirect damages. Both actions are regarded as for the same wrong, of which he can have but a single satisfaction, though it in no wise compensates him for the damages sustained." 21 A. & E. Enc., 237, note 1, Webb's Pollock on Torts, 658; *Kendall v. Stokes,* 3 How., 87; *Norton v. Dougherty,* 3 Gray, 372; *Ware v. Percival,* 61 Me., 391; *Newby v. Caldwell,* 54 Iowa, 102; *Wagner v. Wagner,* 36 Minn., 239; *Thompson v. Myrick,* 24 Minn., 12; *Whitney v. Clarendon,* 18 Vt., 258;
(109) *Smith v. Way,* 9 Allen, 473. And again: "In all cases where the plaintiff has his option in the outset to bring tort or contract to recover damages for one and the same injury upon a state of facts which will support either, an adjudication in one, whichever he may elect, is, upon principle, a bar to the other." And further it is urged by him that "a cause of action and the damages recoverable therefor are an entirety. The party injured must be plaintiff, and must demand all the damages he has suffered or which he will suffer from the injury, grievance, or cause of action of which he complains. He cannot split a cause of action and bring successive suits for parts, because he may not at first be able to prove all the items of the demand, or because all the damages have not been suffered. If he attempts to do so, a recovery in the first suit, though for less than his whole demand, will be a bar to a second action."

The principle here asserted in defendant's behalf, as defeating the plaintiffs' right of recovery in this action, finds support in the decisions of this Court. *Eller v. R. R.,* 140 N. C., 140; *Mast v. Sapp,* 140 N. C., 538.

The defendant also contends that the Court has adopted in such cases as this the following rule: "Where two or more successive actions are identical as to the parties, the alleged cause of action, the defenses relied upon, and the relief demanded, a judgment upon the merits in the first action will estop any and all parties from maintaining the subsequent ones. Except in special cases, the plea of *res judicata* applies not only to points upon which the court was actually required to pronounce judgment, but to every point which properly belonged to the subject of the issue, and which the parties, exercising reasonable diligence, might have brought forward. Under our present system of pleading and practice a party is conclusively presumed, when sued in a second action on matters before litigated, to have set up in the former action all the equitable defenses of which he might have availed himself to defeat the legal title." *Tuttle v. Harrill,* 85 N. C., 456; *Anderson v. Rainey,* 100 N. C., 321; *Buchanan v. Harrington,* 152 N. C., 335; *Harper v. Lenoir,* 152 N. C., 723; *Wagon Co. v. Byrd,* 119 N. C., 460.

We have no desire to contravene what is thus stated by the authorities, for we believe that when they are properly considered and understood, it will be found that the principle is correctly formulated (110) by them and is in itself just and right. There should be an end of litigation, and this is the fundamental idea upon which the rule of *res judicata* is founded, and to this may be added, as another reason for the rule, the maxim of the law that no one should be twice vexed for the same cause. But does this well-settled rule apply to this case? We think not, and the case of *Tyler v. Capehart,* 125 N. C., 64, which explains and defines the doctrine on this question, is decisively against the defendant's contention. It is said in that case that "A judgment is decisive of the points raised by the pleadings, or which might be properly predicated upon them, but does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings. Although the present cause of action might have been set up as a second cause of action in the former suit, as it was not, and was not actually litigated, and was not 'such matter as was necessarily involved therein,' the plea of *res judicata* will not avail."

We have seen that our statute confines the recovery in an action for personal property with the ancillary remedy of claim and delivery to the property itself or the value thereof, which, of course, excludes the recovery of any damages for maliciously suing out process and destroying the plaintiff's business, which is a distinct cause of action with a different rule as to the measure of damages. Cooley on Torts (3 Ed.), 348, Judge Cooley tells us when an action will lie for the malicious prosecution of a civil suit, and in that connection he says: "So a suit for malicious prosecution will lie where the plaintiff's property or business has been interfered with by the appointment of a receiver, the granting of an injunction, or by writ of replevin." *Brownstein v. Sahlein,* 65 Hun., 365; *McPherson v. Runyon,* 41 Minn., 524. He also says that the same rules apply to actions for malicious civil suits as for criminal prosecutions, and thus states this branch of the rule: "It is laid down or assumed in all the cases that an action for the malicious prosecution of a civil suit is governed by the same (111) principles as one for the malicious prosecution of a criminal action. There must be malice and the want of probable cause, and the same rules apply in the proof or disproof of these elements. So the advice of counsel will have the same effect as in case of criminal prosecution, under the same conditions. And the malicious suit must be terminated in favor of the plaintiff in that action." *Ibid.,* 352.

Speaking of the malicious abuse of process, he distinguishes it from a

malicious civil suit, where there is an interference with property or business, as follows: "If process, either civil or criminal, is willfully made use of for a purpose not justified by the law, this is abuse for which an action will lie. The following are illustrations: Entering a judgment and suing out an attachment for an amount greatly in excess of the debt; causing an arrest for more than is due; levying an execution for an excessive amount; causing an arrest when the party cannot procure bail and keeping him imprisoned until, by stress thereof, he is compelled to surrender property to which the other is not entitled. In these cases, proof of actual malice is not important, except as it may tend to aggravate damages; it is enough that the process was willfully abused to accomplish some unlawful purpose. 'Two elements are necessary to an action for the malicious abuse of legal process: First, the existence of an ulterior purpose; and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process.' In a suit for malicious abuse of process it is not necessary that there should have been a termination of the suit in which the process was issued, nor a want of probable cause for the suit." *Ibid.*, 354 *et seq.* The distinction is clear: one consists in commencing and prosecuting a suit maliciously and interfering with property or business, and the other consists in the willful, unlawful, and wrongful use of the process itself. As the suit must have been terminated before an action will lie for prosecuting it maliciously, this cause could not be set up in the action itself as a counterclaim or otherwise. *Fulton Grocery Co. v. Maddox,* 111 Ga., 260; *Bonney v. King,* 103 Ill. (112) App., 601; *Luby v. Bennett,* 111 Wis., 613.

But the conclusive answer to the contention that the former judgment is *res judicata* is that the defendant asked for no more than the statute allowed him to recover in that action, that is, the damages for the conversion only, and nothing more. This being the measure of his recovery, as fixed by the statute, he was not at liberty to ask for more damages than those authorized by the positive law in such cases, and therefore, having no opportunity to recover them in that action, he is not estopped to ask for them in this one.

The very question involved in this case is decided against the defendant's contention in *McPherson v. Runyon,* 41 Minn., 524; 16 Am. St., 727. It is suggested that the complaint shows that the plaintiffs are suing for a malicious abuse of process only, but a cursory reading of the complaint will make it appear, we think, that the action is really one for the malicious prosecution of a civil action and an interference with their property by claim and delivery proceedings. It is true, plaintiffs

allege that there was a malicious abuse of the process issued by the court, but they base this allegation solely upon the fact that they were unable to replevy the property by giving bond, which is manifestly insufficient to sustain such an action. They do allege, though, in substance, facts which are sufficient to constitute a good cause for malicious prosecution, for they say that defendant, knowing the plaintiffs were not indebted to him, *at all,* upon the debt and mortgage, unlawfully, wrongfully, willfully, wantonly, and recklessly commenced said action and prosecuted the same to their damage. They do not use the words "without probable cause," but no set form of words is required, if those of equivalent import are used, and the language of this complaint, in that respect, is much stronger than if the plaintiffs had employed the words "and without probable cause." If what the plaintiff alleges is true, there was no probable cause, but the action was wantonly instituted, and with reckless indifference to plaintiffs' rights of property. Pleadings are now construed liberally, and plaintiff recovers according to his allegations. *Cheese Co. v. Pipkin,* 155 N. C., 394; *Vorhees v. Porter,* 134 N. C., 591; *Blackmore v. Winders,* 144 N. C., 212. But after (113) all is said, the fact remains that the defendant in the former action alleged no more than would enable him to recover what the statute allowed him to recover as damages, and that corresponded exactly with the allegation. The case is governed by *Bowen v. King,* 146 N. C., 385, where it is said: "While the allegation of the complaint may be broad enough to constitute a demand for the possession, it is evident, from a perusal of the entire pleadings, that the demand was not intended to be for the possession, which the plaintiff undoubtedly had when the action was commenced, but was to recover damages caused by reason of the wrongful seizure and detention of the property. As heretofore stated, it does not definitely appear how plaintiff reacquired possession of the property, but assuming—and there are statements from some of the witnesses tending to show this—that the possession was restored by means of a former action of claim and delivery, while plaintiff could have had his damages assessed in the former action (Revisal, sec. 570), the authorities seem to be to the effect that he was not required to take this course, but, after obtaining possession, could, in another action, recover damages for the injury done by the wrongful seizure and detention of his property. *Woody v. Jordan,* 69 N. C., 189; *Asher v. Reizenstein,* 105 N. C., 213."

Our conclusion is that the plaintiffs are not estopped by the former judgment.

The testimony of the plaintiff, O. J. Ludwick, was objected to upon the ground that the former judgment was *res judicata,* and the assign-

ment of error based upon this exception cannot be broader than the exception itself. Where a party states the ground of his objection to evidence below, he cannot rely upon a different ground in this Court. This is well settled. *Kidder v. McIlhenny,* 81 N. C., 123; *Jones v. Call,* 93 N. C., 179.

We do not mean to imply that there was any error in the court's ruling upon the evidence, or in its charge to the jury upon the damages. Those questions are not presented to us by the exceptions and assignments of error.

The court properly refused to sign the judgment tendered by (114) the defendant, upon a verdict in favor of the plaintiff.

No error.

BROWN, J., dissenting: The facts, as I understand them, are that Penny brought an action against Ludwick to recover possession of certain personal property, consisting of a soda fountain, cash register, cigar case, stove, electric meter, refrigerator, electric fan and a motor fan, used in a restaurant in High Point, and took out the ancillary remedy of claim and delivery. Ludwick failed to replevy and the property was delivered to Penny.

At the trial Penny failed to establish his right to recover the property, and judgment was given for Ludwick. The case is reported 152 N. C., 376. In that action, as appears in this record, Ludwick not only denied Penny's title to the property and right to recover, but set up (something he was not compelled to do) a counterclaim, in which he averred that Penny had unlawfully and wrongfully seized the property and converted it to his own use, to his great damage. Ludwick asked as relief that the property be restored and that he recover as damages $4,000. Ludwick recovered judgment for $700 on third issue and $1,800 on fourth issue. 152 N. C., 377.

Ludwick now brings this suit, alleging that Penny had maliciously sued out the claim and delivery and had destroyed his business by the wrongful seizure of his property. I am of opinion that the plaintiff Ludwick, having seen fit to plead a counterclaim in the other action and to claim damages for the wrong done him, should have set up all his items and claims for damage in that counterclaim and have them all determined on one trial. He should not be permitted to divide up his damages, as they all grew out of one and the same transaction and one and the same tort.

For a long time I thought such a counterclaim could not be pleaded in an action in nature of claim and delivery, and that the defendant must wait until that action was ended in his favor and then sue for

damages. But that question was settled by this Court in *Smith v. French,* 141 N. C., 1, wherein it is held that the defendant may plead his counterclaim for damages for the tort in the claim and delivery action. In that case *Mr. Justice Hoke* says: "Even if the (115) present opinion should be found to conflict with some former decision, it is only a question of procedure, not involving a rule of property, and we think it better that our present construction of the statute should now be declared the true one as more in accord with the spirit and letter of our Code, which, as heretofore stated, designs and contemplates that all matters growing out of or connected with the same controversy should be adjusted in one and the same action.

"A counterclaim connected with plaintiff's cause of action or with the subject of the same will nearly always take its rise before action brought, but we hold that neither the statute nor the reason of the thing require that such counterclaim should necessarily or entirely mature before action commenced nor even before answer filed, if the provisions of The Code permit, and right and justice require that an amendment be allowed which will enable parties to end the same controversy in one and the same litigation."

Thus we see that this plaintiff had the right to plead a counterclaim for damages for the wrongful seizure of his property in the other action, and also that he did plead it. Having chosen to plead it, he should have set up all his items of damage in that counterclaim and should not be heard again concerning the same transaction.

It is immaterial that plaintiff now avers that the taking of his property by legal process was maliciously done. It was all connected with and grew out of the one act, and could and should have been embraced in his counterclaim in the former suit. It is a well-settled principle that the commission of a single tortious act creates a single cause of action only, and all damages resulting therefrom must be recovered in one suit. 24 Am. & Eng. Ency., 788.

The counterclaim set up by plaintiff in the former action is to be treated as if he had chosen to commence an independent action for damages. He should have set up all his damages in the one action and have them determined on the one trial. This is the true spirit and value of Code pleading.

In the case of *Porter v. Mack,* 50 W. Va., 581, 592, it is (116) said: "The law seems to be well settled that when a person has a cause of action which he may assert by an action *ex contractu* for the direct damages, or *ex delicto* for both the direct and indirect damages, if he selects the former he waives the latter, including all claim for indirect damages. Both actions are regarded as for the same wrong, of

which he can have but a single satisfaction, though it in no wise compensates him for the damages sustained."

In that case a recovery was sought to be had for an alleged conspiracy to break up the business of the plaintiff, and this was a second action and the plaintiff was held bound by the adjudication of the previous action. In his counterclaim this plaintiff averred that the taking of the property was wrongful. He could just as easily have averred that it was malicious. He could have claimed damages to his business as the result of the taking as well as the injury and sacrifice of his property.

In 21 Am. 8 Eng. Ency. (1 Ed.), 237, it is said: "In all cases where the plaintiff has his option in the outset to bring tort or contract to recover damages for one and the same injury upon a state of facts which will support either, an adjudication in one, whichever he may elect, is, upon principle, a bar to the other." See also, *Norton v. Dougherty,* 63 Am. Dec., 758 (Mass.); *Ware v. Percival,* 61 Me., 391; *Newby v. Caldwell,* 54 Ia. 102; *Wagner v. Wagner,* 36 Minn., 239.

In *Norton v. Dougherty, supra, Chief Justice Shaw* says: "On consideration, the Court are of the opinion that the former judgment was a good bar, because the first action was brought to recover damages for the same wrong or injury and because it could be supported by the same evidence."

Mr. Sutherland says: *"Causes of Action Not Divisible.*—A cause of action and the damages recoverable therefor are an entirety. The party injured must be plaintiff, and must demand all the damages he has suffered or which he will suffer from the injury, grievance, or cause of action of which he complains. He cannot split a cause of action and bring successive suits for parts; he may not be able at first to prove all the items of the demand, or because all the demands have not (117) been suffered. If he attempt to do so, a recovery in the first suit, though for less than his whole demand, will be a bar to a second action." In support of this statement the author cites a large number of cases, amongst others, *Porter v. Mack, supra.*

These well-settled principles are clearly stated in the well-considered opinion of *Mr. Justice Clark* in *Wagon Co. v. Byrd,* 119 N. C., 460, in which it is held that, "The judgment or decree of a court of competent jurisdiction is conclusive not only as to the subject-matter actually determined thereby, but also as to every other matter which properly belonged to the subject in litigation, and which the parties by the exercise of reasonable diligence might have brought forward at the time and had determined respecting it."

The only evidence of damage which plaintiff offers on this trial is injury to his business by reason of the wrongful taking of his restaurant

fixtures. He could and should have alleged and proven the same item of damage on the trial of his counterclaim. This is not an action for malicious prosecution, which could not be commenced until after the termination of the former action. The complaint does not allege a want of probable cause, or any other of the usual and necessary allegations in a suit for malicious prosecution. On the contrary, in section 4 of the complaint this action is characterized as one for "abuse of process." Such an action need not await the termination of the former proceeding. "An action for damages for the abuse of legal process may be maintained before the action in which such process was issued is terminated." 19 Cyc., 632.

It seems to me plain that every element of damage set up in this action could and should have been set up in the counterclaim in the former under the principles laid down in *Smith v. French, supra.*

I am of opinion that the former judgment for damages rendered in plaintiff's favor on his counterclaim is a bar to the recovery of further damages for the same wrong.

Cited: Wright v. Harris, 160 N. C., 546, 548; *Carpenter v. Hanes,* 167 N. C., 554; *Renn v. R. R.,* 170 N. C., 141.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1912

SPRING GREEN CHURCH v. MANSFIELD THORNTON ET ALS., TRUSTEES.

(Filed 21 February, 1912.)

1. Trusts and Trustees—Religious Societies—Partition.

Lands held by trustees under a deed from the Shiloh Association of churches for certain declared school purposes, which association has subsequently increased in the number of churches, and the school has been incorporated by the Legislature in an act recognizing the trusts set out in the deed, cannot be divided by the churches in proceedings for partition, for such would be subversive and destructive of the trusts declared.

2. Trusts and Trustees — Religious Societies — Appointment of Trustees — Control.

The only manner in which the Shiloh Association of churches may exercise any control of the property held by the trustees under its deed declaring certain trusts, is by the election of trustees at the meeting for that purpose regularly held under the legislative act of its incorporation. *Kerr v. Hicks*, 154 N. C., 265, cited and applied.

3. Trusts and Trustees—Religious Societies—Trusts Declared—Powers of Sale—Purposes.

The provisions in the deed in trust to the trustees of the "Shiloh Association" of churches, that the trustees have "the rights and privileges of selling and mortgaging the property herein conveyed whenever they are required and requested to do so by the association," is construed to apply only to selling and mortgaging the trust estate in pursuance and furtherance of the trusts declared, and not for the purpose of partition.

4. Trusts and Trustees—Religious Societies—Trust Estates—Cotenants—Possession—Partition.

The individual churches of the Shiloh Association hold no such interest in the trust estate declared by their deed in trust as to make them

contenants therein and permit a division of it in proceedings for partition thereof; nor have they the possession, a necessary element in maintaining such proceedings.

5. Trusts and Trustees—Religious Societies—Failure of Trustee—Equity.

The courts, in their equitable jurisdiction, would not permit the trusts declared in the deed of the Shiloh Association of churches to fail for the want of a trustee; and if these trusts are considered for charitable purposes, the courts, under proper conditions would appoint trustees from time to time, under Revisal, sec. 3923.

(120) APPEAL by defendants from *Cline, J.*, at January Term, 1912, of WARREN.

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

T. T. Hicks for plaintiff.

Tasker Polk, Andrew J. Harris, and Thomas M. Pittman for defendants.

CLARK, C. J. In 1871, a voluntary association known as "Shiloh Association" was formed by several Missionary Baptist churches for colored people. In 1883 the association purchased land for $2,500 and established a school called "Shiloh Institute." Considerable additional money from individuals, and from the churches composing the association, has since been raised by donations from time to time and put in improvements and repairs upon said property. The deed for the property when purchased was executed to certain trustees appointed by said association, and recited, "upon the trust that they, the said parties of the second part, and their successors in the said office of trustee aforesaid, duly qualified and appointed by the said association, shall hold the said property herein conveyed for said association, to be used under the direction and management of the said parties of the second part
(121) as trustees aforesaid and their successors, for the purpose of establishing and maintaining a school of general learning, and for any other proper and legal purpose which the association may deem best; and the said parties of the second part and their successors to have the right and privilege of selling and mortgaging the property herein conveyed, whenever they are required and requested to do so by the association."

Said "Shiloh Institute" was incorporated, Private Laws 1891, ch. 321, which created said trustees a body politic and corporate and specified that they are to "have and to hold the buildings, grounds, and all appurtenances embraced in the deed." This act was amended, Private Laws

1903, ch. 49, by increasing the number of trustees to nine and by providing that three of these were to be elected by the "Shiloh Association" every year; and they have been so elected ever since. The number of churches belonging to the association has increased to fifty-eight, several of which were not members of the association in 1883.

In *Kerr v. Hicks,* 154 N. C., 265, the Court held that such trustees elected by the churches present at a meeting held at the regular time and place duly designated by the last regular meeting were the duly elected trustees under the terms of the constitution of this association, and not those elected at a meeting held at a time and place not so authorized, though in the latter meeting a majority of the churches were represented while at the regular meeting there was a minority of the whole number represented.

This is a proceeding by three of the churches in said association, asking for a sale of the property for partition. The other alleged cotenants are not made parties. This misconceives the nature of the tenure of the property, which, as specifically recited in the terms of the deed above set out, is that the property is to be held by said trustees and their successors "for the purpose of establishing and maintaining a school of general learning and for any other proper and legal purpose which the association may deem best." The "other proper and legal purpose," it would seem, should be construed as "of the same general nature and kind" as the main trust recited. It is true that the trustees have the *"right and privilege* of selling and mortgaging the property (122) herein conveyed whenever they are required and requested to do so by the association." This also means in pursuance and futherance of the trust to maintain a school of general learning. If, however, the associtation can change the general nature of the trust, this could be done only by a majority vote at a regular meeting, and the complaint does not aver this. *Kerr v. Hicks, supra.* It could not abolish the trust, to which others have contributed funds.

Under the acts of incorporation of the institute procured by the association, the powers of the latter are limited to the election of the trustees from time to time as therein specified. In effect, the association raised a fund with which it purchased property and appropriated it to be held by trustees to maintain and establish a school of general learning. The unincorporated association held no actual property interest therein and can exercise no other control over it than through the medium of the election of the trustees who are to manage said trust. If through such trustees the association should procure the sale of the property, whether it could divide the proceeds might then come up for adjudication. But no individual church can ask the courts to order a sale for partition.

The individual churches are not incorporated and have no rights in the property which are the subject of partition among them. It does not appear what sum was raised by each of the respective churches and there is no basis for the allegation of a cotenancy by the several churches in the property. Certainly one or more of the churches cannot at will defeat the action of the association by calling for a sale and division of the property. That would destroy the trust.

If the individual churches were tenants in common they could not procure an order for partition, for they are not in possession. *Clemmons v. Drew,* 55 N. C., 314; *Wood v. Sugg,* 91 N. C., 93; *Osborne v. Mull, ib.,* 207.

Even if the individual churches should be held the *cestuis que trustent,* that would not entitle them to compel partition. *Nichols v. Nichols,* 67 Am. Dec., 712; 30 Cyc., 190, sec. 3, and notes.

There is no analogy to the sale of a mill for partition, because (123) of the inherent difficulties of the cotenants operating it "turn about." *Holmes v. Holmes,* 55 N. C., 336. In that case there was no trust and the property was run for the division of the profits among the cotenants. Nor is the case analogous to the division of church property upon a division of the church. *Smith v. Swormstedt,* 57 U. S., 388; *Diocese v. Diocese,* 102 N. C., 447. Here the property is held by incorporated trustees and the association is not the beneficiary of the trust, which is for the benefit of the colored youth, but occupies the position of supervising the trust through its power to elect the trustees, and there has been no division of the association calling for a division of the trustees to the respective fragments of a former association.

If the association itself should disband the duty would devolve upon the courts, under Revisal, 3923, to provide, if this is a charity (and if not, then under the general equity jurisdiction of the courts), for filling vacancies among the trustees as they shall occur from time to time, so that the trust may not fail. Or the General Assembly might, in such case, amend the act of 1903 which provides for the method of electing trustees.

The demurrer that the complaint does not state a cause of action should have been sustained.

Action dismissed.

R. J. SHIELDS ET AL V. LEON H. FREEMAN.

(Filed 21 February, 1912.)

1. Wills—Devisees—Pleadings—Evidence—Issues.

An issue as to whether a devisee "failed or refused to support the widow and unmarried daughters" of J., being a condition annexed to the devise, when not alleged or supported by evidence, should not be submitted to the jury.

2. Wills—Intent—Interpretation—"Desires"—Fee Simple.

The testator put his son in charge of his lands during his life and gave him a one-horse crop for his services. At this time the testator did not own a part of his father's old homestead, but urged his son, in a will he had made, to acquire as much of it as possible. Later the testator acquired that land, and by codicil added it to the devise to his son "in fee simple, to descend to his heirs," and expressed the purpose that his son should own this homestead. In his will the testator "desired" that his unmarried sisters should have a home with their mother and brother on the land: *Held*, (1) a devise to the son in fee simple; (2) a desire that the son keep the land in the male line of inheritance was without legal effect.

3. Wills—Prefixes—Uncertainty of Identification—Interpretation.

An undated prefix to a will, "This is written for L. and J. F. and is an addendum to the agreement" of a specified date, is of no effect, the agreement referred to not being "described and identified with such particularity as to designate and clearly show, and so that the court may clearly see, what paper was meant to be a part of the will." *Siler v. Dorsett*, 108 N. C., 300, cited and approved.

4. Appeal and Error—Nonsuit in Part—Fragmentary Appeal.

When the trial court dismisses an action as to a part of the lands involved in the controversy and retains it as to the other, the plaintiff should note an exception as to the part nonsuited and bring the whole matter up from final judgment, for otherwise the appeal is fragmentary, and will be dismissed.

5. Same—Discretion of Supreme Court.

While this appeal is held to be fragmentary and is dismissed, as it is from a nonsuit respecting only a part of the land in controversy, the court notwithstanding in its discretion passed upon and approved the ruling below as to the nonsuit.

APPEAL by plaintiffs from *Justice, J.*, at November Term, (124) 1911, of BERTIE.

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

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

Winston & Matthews for defendant.

CLARK, C. J. J. C. Freeman died leaving a will, of which the following is the only part material to this controversy:

"It is my full purpose that Leon Freeman, my son, shall own the old (my father's) homestead, or in case he refuses to respond, then my son Joseph W. Freeman may accept or refuse the same offer, with the positive injunction that it may and shall remain and belong in (125) the family as long as any direct male descendant shall issue from our direct bowels for a claimant. I also have in view to purchase other pieces or parts of said homestead which are to be added thereto, and in cases of failure to do so, I would have my boy, whichever may be the owner, use lawful endeavor to unite in as large a tract as circumstances will allow. I ask this as a part of the sale to this land, on account of the many old associations, recollections, and tender recollections and bygone friends, relatives, and friends.

"Now, I invest either Lee or otherwise Joe with a full possession of the farm of a one-horse crop, to be selected by himself, as an inducement to accept as superintendent the supervision of the farm and family from 1 January, 1901, till further separation of the family or until my death, after which I leave them to his best care, and the farm is his in fee simple, to descend to his heirs. The family to remain together, unless torn asunder by natural circumstances. I want everything kept together, and I would have all work together for good, provided it can be so managed. The law is less partial than I can be, and I leave all except this old homestead, which is hereby sold and conveyed, to legal methods; and my prayer shall ever ascend for whole family, the good of my friends, and the well-being of all mankind. This 15 July, 1900." To which he added this codicil: "Since writing the above, I have bought the lands herein intimated, containing 206 acres, to be paid for January, 1901, 1902, 1903—one-third amount each year; and if neither L. H. nor J. W. Freeman choose to accept the terms set forth, my wife and girls shall or may fill the wish, and after the death of my wife everything is to be equitably and legally divided. 5 October, 1901."

Upon a *caveat* entered by these plaintiffs, this paper-writing was established as the last will and testament of James C. Freeman. This action is brought by the daughters of James C. Freeman, alleging:

1. That they are tenants in common with Leon H. Freeman and entitled to be let into possession with him and to immediate partition of the land.

2. That the said will confers no title to the premises upon (126) Leon H. Freeman, and his claim is a cloud upon the title which plaintiffs ask to have removed.

3. That under the will Leon H. Freeman was to hold said premises in trust for the use and benefit of the other children of said J. C. Freeman, and not for his sole use and benefit.

4. That that part of the home place known as "Lot No. 3 in the partition of the land of Sallie M. Freeman" the said J. C. Freeman had bought at a partition sale, but had not paid therefor and no title had been made to him, and the plaintiffs contend that this part of the land did not pass under said will, but descended upon all the children as tenants in common.

Joseph W. Freeman and W. J. Freeman make no claim to the land, and did not unite with their sisters in this action, and are made parties defendant.

The first exception is that the court refused to submit an issue, "Did Leon H. Freeman fail and refuse to take care of and support the widow and unmarried daughters of James C. Freeman after his death?" There was no allegation and no evidence that he had refused and failed, and the issue was properly refused. *Sprinkle v. Insurance Co.*, 126 N. C., 678.

The second exception is that the court refused to instruct the jury that Leon H. Freeman took no interest in the land described in the said will, but that James C. Freeman died intestate in regard thereto, upon the ground that the will is too indefinite, is vague and uncertain. But we think that the will, though inartificially drawn, clearly shows that while the testator desired that his unmarried daughters should have a home with their mother and brother and that the family should remain a unit, he devised the homestead to Leon H. Freeman. He put him in charge of the farm before his death, giving him a one-horse crop for his services each year, beginning 1 January, 1901, and this was to continue until "my death; after which, I leave them to his best care, and the farm is his in fee simple, to descend to his heirs." At this time the testator did not own a part of his father's old homestead, and he urges his son to acquire as much of that as possible. Later the testator acquired that land and by codicil added it to the devise.

He further says: "It is my full purpose that Leon H. Free- (127) man, my son, shall own my old father's old homestead." He enjoins him against selling it, and hopes that it will be kept in the male line of inheritance. This last was a mere request, without legal effect.

The language is not very formal or accurate, but it is sufficient to show a devise of the property in fee to Leon H. Freeman, who accepted it. Joseph W. Freeman is a party to the action, but sets up no claim to the land.

Prefixed to the will is written these words, "This is written for Lee or Joe Freeman, and is an addendum to the agreement made 15 February, 1901." This must evidently have been added after the main body of the will set out, which was dated 15 July, 1900. The date of such prefix does not appear, and the agreement referred to can have no effect unless it was in writing and was "described and identified with such particularity as to designate and clearly show, and so that the court can certainly see, what paper was meant to be part of the will." *Siler v. Dorsett,* 108 N. C., 300.

The court dismissed the action, except as to "the lands described in the complaint as Lot No. 3, and continued the cause for trial upon the issues raised in the pleadings as to that tract of land." The plaintiffs should have noted an exception as to the nonsuit to the other part of the action and have brought the whole case up on appeal from the final judgment after the determination of the issue reserved. The appeal at this statge must be dismissed as fragmentary. *Rodman v. Callaway,* 117 N. C., 13; *Rogerson v. Lumber Co.,* 136 N. C., 266; *Billings v. Observer,* 150 N. C., 542.

We have, notwithstanding, passed upon and approved the ruling as to the nonsuit, which we have sometimes done in such cases. *S. v. Wylde,* 110 N. C., 503; *Milling Co. v. Finlay,* 110 N. C., 412, and cases there cited; *Dowdy v. Dowdy,* 154 N. C., 558.

Appeal dismissed.

Cited: *Watson v. Hinson,* 162 N. C., 82.

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(128)

S. E. MIDGETT v. C. S. VANN, FISH COMMISSIONER.

(Filed 21 February, 1912.)

1. Appeal and Error—Decisions—Taxing Costs—Trial Court—Powers.

A judgment in the Supreme Court dismissing an appeal for the failure of appellant to print the record and taxing him with cost, is final, without authority in the lower court to permit him to recover them.

2. Injunction—Damages—Attending Hearings—Personal Expenses.

Damages recoverable against the sureties on an injunction bond are such only as may be sustained by the party enjoined by reason of the injunction (Revisal, sec. 817), which does not include the personal expenses in attending the hearing; and this applies to the fish commissioner's attendance at the hearing of an injunction aginst his removing private nets from certain waters, in which action a judgment of nonsuit was finally taken.

3. Injunction—Damages—Evidence—Recovery.

When there is no evidence of any damages sustained by reason of an injunction, none are recoverable; and in this action there are no damages shown by reason of an injunction against the fish commissioner removing private nets from certain waters.

4. Costs—Attorneys' Fees.

Attorneys' fees are not recoverable by successful litigants in this State, as such are not regarded as a part of the court costs.

APPEAL from *Cline, J.*, at Fall Term, 1911, of DARE.

Motion for judgment for damages against sureties on injunction bond, heard upon exception to report of referee. His Honor overruled all the exceptions and confirmed the report. Both parties appealed.

PLAINTIFF'S APPEAL.

B. G. Crisp and E. F. Aydlett for plaintiff.

J. C. B. Ehringhaus for defendant.

BROWN, J. There were seven actions brought in the Superior Court of Dare against Thomas S. Meekins, former fish commissioner, to enjoin him from removing certain fish nets from the waters in which they were set, upon the ground that they were not set within prohibited territory. The present defendant, C. S. Vann, succeeded Meekins as fish commissioner and took his place as defendant in said actions. (129) The cases were considered together and heard by *Justice, J.*, who continued the restraining order to the hearing. Defendant Vann appealed. This appeal was dismissed at August Term, 1911, for failure upon part of defendant, appellant, to have the record printed, as required by the rule of this Court, and the judgment of the Supreme Court required defendant to pay costs of appeal.

At May Term, 1911, the plaintiffs submitted to a judgment of nonsuit.

There was a motion for judgment for damages, which was heard by a referee, whose judgment was affirmed by the Superior Court. The defendant claims damages as shown by the report:

1. For $6.35, cost in the Supreme Court, and which was adjudged against the defendant by this Court at August Term, 1911..

2. For $12.50, expenses of the fish commissioner in attending the hearing of the cases.

3. Two hundred dollars attorney fees in the cases.

There were seven of these actions brought, but it was agreed that all should abide the decision of one case.

The referee held:

1. That the defendant was entitled to recover back the $6.35 cost.

2. That the defendant is entitled to recover the $12.50 personal expenses of the defendant in attending the hearings.

The court overruled both exceptions and gave judgment against plaintiffs. Plaintiff excepted.

The referee refused to allow defendant attorney fees. Defendant excepted. Court overruled defendant's exceptions.

1. The ruling of the court that the defendant is entitled to recover back the costs taxed against the defendant by the judgment of the Supreme Court is erroneous. That judgment was final, and could only be corrected or reversed by this Court. To permit defendant to recover back costs of his dismissed appeal would in effect nullify the judgment of this Court.

2. The defendant is not entitled to recover the sum paid as personal expenses in attending the hearing upon the injunction before
(130) *Justice, J.* A party to an action is not entitled to recover his personal expenses in attending court. *Hyman v. Devereux,* 65 N. C., 589. The only damages recoverable upon an injunction bond given in pursuance of our statute, Revisal, 817, are such damages as may be sustained by the party enjoined by reason of the injunction. *Hyman v. Devereux, supra.*

There is no evidence that defendant Vann has sustained any damages because he was not allowed to remove plaintiff's nets from the disputed waters, and, therefore, he can recover nothing upon the injunction bond.

Upon plaintiff's appeal his Honor's rulings confirming report of referee are

Reversed.

DEFENDANT'S APPEAL.

The defendant assigns error because the court below sustained the ruling of the referee refusing to allow counsel fees to defendant.

Attorneys' fees are not recoverable as costs or damages in cases like this in our State. Formerly a tax fee of $5 and in some cases $10 in the Superior Court, and $15 in this Court, were taxable as costs in favor of the successful party. But they were abolished by statute in 1871. In many States attorneys' fees are allowed to the successful litigant, but it is not so in this State and some others, nor in the Federal courts.

Ry. Co. v. Elliott, 184 U. S., 530; *Hyman v. Devereux, supra; Stringfield v. Hirsh,* 94 Tenn., 425. The opinion in this latter case is an elaborate discussion of the subject and gives the States where attorney's fees are recoverable and those where they are not, placing North Carolina in the last-named class. See, also, *Donlan v. Trust Co.,* 139 N. C., 212.

The judgment on defendant's appeal is
Affirmed.

Cited: Smith v. Bonding Co., 160 N. C., 576.

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(131)

EMMIE FORBES ET AL. v. J. M. BURGESS.

(Filed 21 February, 1912.)

1. Estates of Inheritance—Legitimacy—Evidence of Marriage—Reputation.

In an action brought by the children of the deceased against those in possession of lands by conveyances from his brothers and sisters alleged to be his heirs at law, involving title to the *locus in quo* by descent, it was contended that plaintiffs were illegitimate and not entitled to the inheritance: *Held,* evidence of the general reputation of the marriage of the ancestor, that he and the mother of the plaintiffs recognized each other as man and wife and so lived together, was competent.

2. Estates of Inheritance—Legitimacy—Evidence of Marriage—Indictment.

A bill of indictment against the ancestor and the mother of the plaintiffs for illegal cohabitation is not admissible as evdience for defendant upon the question of the legitimacy of the children in their action as heirs at law, to recover lands descended, unless the whole record is introduced, so as to show the final disposition of the case; but, if error, it was harmless, as it was shown in this case that the indictment had been dismissed.

3. Estates of Inheritance—Legitimacy—Second Marriage—Living Husband—Presumptions—Burden of Proof—Instructions.

In an action involving the title to lands descended, the rights of the plaintiffs were made to depend upon their legitimacy, upon the question as to whether there had been a lawful ceremony of marriage between the ancestor and their mother, upon which the evidence was conflicting; the judge charged, in substance, that if the jury found as a fact from the evidence that the marriage was lawful, the burden shifted to the defendants to prove by the preponderance of the evidence that the first husband was living at the time of her second marriage, and that she had not been divorced; and, further, that if the second marriage had been established by competent proof, it raised the

presumption that the prior marriage had been dissolved by death or divorce, but this presumption would not apply in favor of a second marriage where the evidence thereof was only as to cohabitation and reputation: *Held*, these two phases of the charge were not in conflict with each other, and that the second one was explanatory of the first; and if there were error in the first, it was cured by the second one.

(132) APPEAL by defendant from *Cline, J.*, at September Term, 1911, of CAMDEN.

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

E. F. Aydlett and J. C. B. Ehringhaus for plaintiffs.
W. A. Worth, H. S. Ward, and W. G. Ward for defendant.

CLARK, C J. This is an action by the children of Nancy and Dempsy Wilson to recover the land described in the complaint. The defendants deny that Dempsy and Nancy were ever married to each other, and claim that they themselves have title to the land by virtue of conveyances to them from the brothers and sisters of Dempsy, who were his heirs at law.

It was in evidence that Nancy was married in 1856 to Jarvis Wilson. There was no direct evidence of a divorce between Jarvis Wilson and Nancy nor any direct evidence of the marriage ceremony having been performed between Nancy and Dempsy.

Several neighbors testified to the general reputation that Dempsy and Nancy were married; that Dempsy called her his wife and treated her as such. One witness testified that Dempsy told him that he was going down to Elizabeth City that day to be married, and upon his return stated that he had been married. Evidence of the general reputation in the community that Dempsy and Nancy were married and the above statement made by Dempsy, and that they recognized each other as man and wife, were competent. *Long v. Barnes,* 87 N. C., 329; *S. v. Whitford,* 86 N. C., 636; *Jones v. Reddick,* 79 N. C., 291; *Archer v. Haithcock,* 51 N. C., 421; 26 Cyc., 872. Proof of such reputation may be made by any party having knowledge thereof. 26 Cyc., 877.

The Court properly declined to admit the bill of indictment against Dempsy and Nancy for illegal cohabitation unless the whole record was admitted to show the disposition of the case. The clerk of the court testified that the entry on the docket showed that the case was dismissed; so if there had been error, it was harmless.

The court charged the jury "that if they found from the evidence from its greater weight that there was a lawful ceremony of mar-

riage entered into between Dempsy and Nancy, then the burden (133) shifted to the defendants to prove the illegality thereof by showing by a preponderance of the evidence that her first husband was still living at the time the plaintiffs contend that she was married to Dempsy, and that she had not been divorced from her first husband."

The court further charged, as prayed by the defendants, "Although where a marriage is established by a proof of the fact in any competent way, it raises a presumption that any prior marriage which is relied on to invalidate the second marriage has been dissolved by death or divorce, the presumption of death or divorce will not be indulged in favor of an alleged second marriage, the proof of which rests only on cohabitation and reputation." If there was any error in the paragraph of the charge above given and excepted to, it was cured by this instruction.

There was evidence which tended to show that Jarvis Wilson was dead at the time of the alleged second marriage. There was one witness who testified that Jarvis was living at the time of Nancy's death. The prayer and the charge cannot be said to be conflicting, but the charge given in the prayer is explanatory of the previous instruction. The jury found that the plaintiffs were entitled to the land as the legitimate children of Dempsy Wilson.

No error.

S. E. MIDGETT v. W. R. GRAY.

(Filed 21 February, 1912.)

1. Quo Warranto—Officers—Two Offices—Qualified in Second Office—Effect—Constitutional Law.

When a person holding an office or place of trust accepts and qualifies for a second office, within the meaning of our Constitution, Art. XIV, sec. 7, the first office *ipso facto* becomes vacated.

2. Quo Warranto—Parties—Two Offices—Leave of Attorney-General.

Where one holding an office accepts another, within the inhibition of our Constitution, Art. XIV, sec. 7, an action to declare the first office vacant may be instituted in the name of the State on the relation of the Attorney-General, by any individual who is a citizen and taxpayer of the jurisdiction where the officer is to exercise the powers of his office. Revisal, sec. 826 *et seq.*

3. Quo Warranto—Leave of Attorney-General—Practice.

An action cannot be maintained to declare an office vacant because the incumbent has accepted a second office, within the meaning of our

Constitution, Art. XIV, sec. 7, unless it appears that the leave of the Attorney-General has been obtained either before the commencement of the action or afterwards supplied pending the proceedings. Revisal, secs. 826, 827, 828, 829, and 830.

(134) APPEAL from *Cline, J.*, at Fall Term, 1911, of DARE.

Quo warranto, instituted in the name of the State on relation of S. E. Midgett, a citizen and taxpayer of DARE.

There was evidence on the part of plaintiff tending to show that defendant duly qualified and is holding the office of Clerk of the Superior Court of Dare County, and during his term of said office was appointed to the office of school committeeman for Public School District, No. 15, for said county, and was qualified and entered upon the discharge of the duties of the last-mentioned office. There was allegation, with evidence, on part of defendant, to the effect that said defendant had not duly qualified as school committeeman, nor had he acted as such officer. On the issue joined there was verdict for defendant, and plaintiff excepted and appealed, assigning errors.

B. G. Crisp, E. F. Aydlett, and J. C. B. Ehringhaus for plaintiff.
Ward & Grimes and D. M. Stringfield for defendant.

HOKE, J., after stating the case: Our Constitution, Art. XIV, sec. 7, provides that with certain stated exceptions not applicable to present case, "No person who shall hold any office or place of trust or profit under the United States or any department thereof, or under this State or under any other State or Government, shall hold or exercise any other office or place of trust or profit under the authority of this
(135) State or be eligible to a seat in either house of the General Assembly," etc., and interpreting the provision, we have held, in reference to officers of this State, that the acceptance and qualification for a second office *ipso facto* vacates the first. Connor & Cheshire on the Constitution, p. 445; *Barnhill v. Thompson,* 122 N. C., 493. Authority, with us, is also to the effect that actions of this character may be instituted in the name of the State on the relation of the Attorney-General or of any individual who is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers. Revisal, sec. 826 *et seq.; Barnhill v. Thompson, supra; Houghtalling v. Taylor,* 122 N. C., 141; *Hines v. Vann,* 118 N. C., 3; *Foard v. Hall,* 111 N. C., 369; *Saunders v. Gatling,* 81 N. C., 298. We are not at liberty, however, to consider and determine the questions principally involved in the present appeal, for the reason that it nowhere appears that the relator has ever obtained the leave of the Attorney-General either to institute

or maintain the present suit. The statute applicable, Revisal 1905, ch. 12, secs. 826, 827, 828, 829, clearly provides that before an action may be instituted or maintained on the relation of a private citizen such leave shall be obtained and that satisfactory security must be furnished, indemnifying the State against all costs and expenses which may accrue in consequence of bringing the action. True, the Court has held in *Shannonhouse v. Withers,* 121 N. C., 376, that it is not absolutely essential that the leave should be had before suit commenced, provided it is obtained afterwards and supplied, but it must always be made to appear, pending the proceedings, that the leave of the Attorney-General has been given to prosecute the action. An inquiry of this nature, primarily, concerns the public interests, and we may not overlook an omission in plain disregard of the statutory requirement. This view is strengthened by the subsequent section, 830, which provides that even after leave given and action commenced, the same may, under certain conditions, be withdrawn and, on certificate to that effect being properly filed, the judge shall, on motion, dismiss the action. For the reasons given, we are of opinion that the present action should be dismissed.

Action dismissed.

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(136)

T. M. LAMB v. THOMAS COPELAND ET AL.

(Filed 21 February, 1912.)

1. Deeds and Conveyances—Corners—Common Reputation—Parol Evidence.

Parol evidence of declarations as to the placing of the corner of private lands of which the title is in dispute is allowed when made *ante litem motam* by a declarant who was disinterested at the time and dead at the time of the trial; and in such case the lapse of time is not always controlling.

2. Same.

Parol evidence of common reputation as to the placing of a corner on the question of private boundary is also admissible in this State when the same is shown to have existed from a remote period, and direct evidence of its origin is not likely to be procurable. Such reputation must always be shown to have existed *ante litem motam,* and should attach itself to some monument of boundary, or natural object, or be fortified by testimony of occupation and acquiescence tending to give the land some definite and fixed location.

3. Same.

Testimony of a witness that he had made a survey of the lands, the subject of the action, in 1897, and began at a pine stump which by com-

mon reputation was a corner of the lands claimed by one of the parties as embraced in his deed: *Held*, incompetent, as there was nothing to show that the common reputation offered had its origin at any former time or at a period so remote that direct evidence as to the placing of this corner in question could not have been procured.

4. Same—Mutual Recognition—Harmless Error.

When in an action of trespass involving a disputed title to lands both parties have recognized a certain corner as being correct, error in permitting parol evidence of common reputation as to its location is harmless.

5. Deeds and Conveyances—Trespass—Evidence—Chain of Title—Same Description—Instructions—Harmless Error.

When the plaintiff in an action of tresspass has shown no actual occupation of the lands by himself or those under whom he claims, it is immaterial and harmless for the court to confine him to lands contained in the description of his original deed in his chain of title, where the description in all of the mesne conveyances is the same.

(137) APPEAL from *Cline, J.*, at Fall Term, 1911, of CHOWAN.

Trespass *quare clausum*, etc. Plaintiff alleged ownership of the Caleb Winslow farm, and as a part of his proof offered in evidence a deed from Miles Perry to Caleb Winslow bearing date in 1798, a line of mesne conveyances of said farm to plaintiff. Plaintiff offered evidence further tending to show that the deed of Miles Perry covered the land in controversy, and that defendants through their agents had wrongfully cut some juniper timber on said land. Defendant, admitting ownership of the Winslow farm by plaintiff and the cutting of the timber, alleged and offered evidence tending to show that the Caleb Winslow farm and the deeds under which plaintiff claimed the same by correct location did not cover the land in controversy. On issues submitted there was verdict for defendant; judgment, and plaintiff excepted and appealed.

Aycock & Winston and W. M. Bond for plaintiff.
Ward & Grimes for defendant.

HOKE, J. In presenting his evidence, a witness testifying for plaintiff said that in 1897 he made a survey of the Winslow farm and began at a pine stump which by common reputation was a corner of the Caleb Winslow land. On objection, the court excluded this testimony as to common reputation on the ground that the "same was not ancient," and plaintiff excepted. We are of opinion that his Honor made the correct ruling.

It is well established with us that under certain restrictions evidence of this character will be received on questions of private boundary. Its admission is based on the principle of necessity and is to a large extent subject to what is sometimes termed the best evidence rule. That is, it is competent when from lapse of time or unusual conditions better evidence of a relevant kind is not likely to be attainable. The case of declarations of deceased individuals as to particular corners, etc., is in illustration of the same principle—that is, they are admissible when made *ante litem motam* by a declarant who was disinterested when they were made and is dead at the time of trial. Here the lapse of time is not always controlling, but the evidence is held competent by reason of the death of the declarant and when more direct evidence is not likely to be procurable. *Lumber Co. v. Triplett,* 151 N. C., (138) 409; *Bullard v. Hollingsworth,* 140 N. C., 634; *Bland v. Beasley,* 140 N. C., 631; *Yow v. Hamilton,* 136 N. C., 357; *Suttle v. Thompson,* 82 U. S., 151-163; *Stroud v. Stringfield,* 38 Texas, 649; 2 Wigmore, secs. 1852-1853. In *Bland v. Beasley, supra,* the Court said: "In *Hemphill v. Hemphill,* 138 N. C., 504, the Court, in speaking of this character of evidence, said: 'It is the law of this State that, under certain restrictions, both hearsay evidence and common reputation are admissible on questions of private boundary,' citing *Sasser v. Herring,* 14 N. C., 340; *Shaffer v. Gaynor,* 117 N. C., 15, and *Yow v. Hamilton,* 136 N. C., 357. And in the same opinion, speaking of the restrictions placed upon evidence of common reputation, the Court said: 'This reputation, whether by parol or otherwise, should have its origin at a time comparatively remote and always *ante litem motam.* Second, it should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location,' citing *Tate v. Southard,* 8 N. C., 45; *Dobson v. Finley,* 53 N. C., 496; *Mendenhall v. Cassells,* 20 N. C., 43; *Westfelt v. Adams,* 131 N. C., 379; and *Shaffer v. Gaynor,* 117 N. C., 15."

And in more especial reference to reputation evidence the Court further said: "But the decisions are also to the effect that to justify the reception of such evidence, the time at which the common reputation had its origin should be at a remote period. 'Comparatively remote' is the term used in *Hemphill v. Hemphill, supra.* It was so used for the reason that as the principle was established of necessity, when from changing conditions and the absence of permanent monuments, better evidence of boundary could not be procured, so the time may vary to some extent, and the facts and circumstances may show that the necessity does or does not exist. On the admission of such testimony as to

the time required, and the test to be applied, it is held in *Neiman v. Ward,* 57 Pa., 67, that 'Reputation and hearsay is such evidence as is entitled to respect when the lapse of time is so great as to render it difficult to prove the existence of original landmarks.'"

This being the correct principle, there was nothing to show that the common reputation offered in this instance had its origin at any (139) former time or at a period so remote that direct evidence as to the correct placing of this corner in question could not have been procured, and the court, as we have stated, made correct decision in excluding the evidence.

A perusal of the record will disclose, however, that in the development of the case both sides recognized and treated the corner in question as one of the corners of the Caleb Winslow farm, so that in any event no harm came to plaintiff by this ruling of the court.

It was objected further that the charge of the court confined plaintiff to the correct placing of the deed from Miles Perry to Caleb Winslow, whereas the plaintiff might have recovered by showing that one of his mesne conveyances covered the land, to wit, that from Caleb Winslow to C. H. Hostetter bearing date 14 January, 1890; but we do not see that the objection is open to plaintiff on the evidence. There was no actual occupation of the *locus in quo* shown by plaintiff or those under whom he claimed. The issue was made to depend on the correct placing of his boundaries, and there is nothing in the record to show that this deed to Hostetter in any way differed from that of Miles Perry or that the one covered more land than the other.

No error.

Cited: Ricks v. Woodard, 159 N. C., 649; *Sullivan v. Blount,* 165 N. C., 11; *Byrd v. Spruce Co.,* 170 N. C., 434; *Lumber Co. v. Hinton,* 171 N. C., 30.

O. H. CLARK AND F. A. SILVER v. EAST LAKE LUMBER COMPANY.

(Filed 21 February, 1912.)

1. Pleadings—Defenses, Inconsistent.

An action brought by an agent to sell lands to recover his commissions of sale, alleging the wrongful refusal of the owner to convey them to a purchaser he had found who was ready and able to pay the purchase price; and also alleging damages upon the ground that the owner had represented his title to be good, when it was afterwards ascertained to have been defective, which prevented the sale sets forth inconsistent causes of action.

2. Principal and Agent—Vendor and Vendee—Commissions on Sales—Lands—Purchaser, "Ready, Able, and Willing."

For an agent to recover commissions for the sale of lands, he must show that he found a purchaser who was ready, able, and willing to buy upon the terms prescribed by the owner.

3. Contracts—Option—Definition—Propositions—Acceptance.

An option is a right acquired by contract to accept or reject a present offer to sell. It remains only a proposition until its acceptance identical with the offer.

4. Same—Principal and Agent—Vendor and Vendee—Terms.

An agent to sell lands upon commission procured an option to be given by the owner to the proposed purchaser to buy a certain number of acres of land more or less, for which the owner would execute a deed with general warranty, provided that the purchase, if consummated, would be at a designated place after at least five days prior notice given the owner: *Held*, the agent was not entitled to his commissions when the acceptance was for the specified number of acres, was for a clear and undisputed title for the whole tract, and the notice of acceptance was not given to the owner as provided for in the option.

5. Contracts—Vendor and Vendee—Option—Title.

The vendee under an option of purchase of lands is not required to take a disputed title, when he has agreed to accept only a good title to the lands, though he was advised by his attorney that the litigated title, could, in his opinion, be cleared up.

6. Contracts—Options—Vendor and Vendee—Principal and Agent—Misrepresentations—Damages—Evidence.

An agent for the sale of lands brought his action against the owner for damages alleged to have been sustained by him from the owner's misrepresentation of title, and the consequent loss of the sale to a purchaser whom he had procured under an option: *Held*, (1) he could not recover the expenses he had incurred prior to the date of the option he relied on; (2) it was necessary for the agent to show he relied on the alleged misrepresentations of title by the owner; (3) that under an agreement that the acceptance was subject to an investigation of title, it is necessary that the title be found acceptable and clear by the attorney selected; (4) there must be evidence of the value or amount of the work claimed by the agent as damages; (5) there must be evidence to show the connection between the representations alleged to have been made by the owner and the damages claimed on that account.

APPEAL from *Cline, J.*, at Fall Term, 1911, of DARE. (141)

The plaintiffs allege two causes of action. The first is that on or about 24 May, 1905, the defendant employed the plaintiffs to sell for it a certain tract of land, particularly described, and agreed to pay them 5 per cent commission on the purchase price, which should not be

less than $220,000; that they procured a purchaser at said price, who was ready, able, and willing to buy; that the defendant was duly notified thereof, and it refused to make title to said purchaser, and refused to pay the plaintiffs their commissions.

The second alleges the contract of 24 May, 1905; that the defendant represented that they had a perfect title to said lands; that relying on this representation, the plaintiffs represented to the prospective purchasers that the title was good; that it became necessary for said purchasers to expend $9,752 in the examination of said lands, which they did; that after this expense was incurred it was found that the title was not good, and said purchasers would not accept it; and that the plaintiffs had paid to said purchasers the amount expended.

On 23 January, 1905, the defendant agreed to pay the plaintiff Silver commissions to negotiate a sale of its Dare County lands, containing 167,555 acres, more or less, and on the same day executed its option to William O'Brien, a prospective buyer, procured by said Silver, which option, unless accepted, expired on 28 February, 1905.

The plaintiffs offered evidence tending to prove that the plaintiff Clark was equally interested with the said Silver in said commissions, and that F. W. Heimick and M. H. Alworth were equally interested with O'Brien in said option. Also that said option was extended by mutual consent and was used as a basis for an option given in May, 1905.

On 24 May, 1905, the defendant gave an option to buy said lands to said Alworth and Heimick, the material parts of which are as follows:

"That for and in consideration of the sum of $1 to the party of the first part in hand paid by the parties of the second part, and for other good and valuable considerations, the receipt whereof is hereby acknowledged, the party of the first part has granted unto the parties of the second part the exclusive option or right to purchase from the
(142) party of the first part all of the land owned by the party of the first part in Dare County in the State of North Carolina, said lands consisting of 167,555 acres, more or less, being the same premises particularly described in a deed given to the said party of the first part by the Peoples Bank of Buffalo *et al.*, and recorded in the office of the Register of Deeds in Dare County, 6 December, 1904; said purchase to be for the sum of $220,000, payable in manner as follows, to wit: $40,000 cash at the date of the deed under this option, the balance of the purchase price to be paid as follows:

(Terms omitted.)

"This agreement or exclusive option is also given to the parties of the second part upon the express condition that the parties of the second part shall at once employ a competent attorney and commence an exam-

ination of the title of all of said property without delay. One of the attorneys to be employed by the said parties of the second part shall be W. D. Pruden of Edenton, North Carolina, if possible; and it is expressly agreed by the parties of the second part that if they shall not have notified the said Pruden by telegram or otherwise within three days from the date hereof of their employment of him, the said Pruden, for such purpose, then this option shall be and become null and void.

"The purchase when consummated shall be closed at Manteo, North Carolina. It is agreed that the parties of the second part shall give notice by telegram to R. E. Johnston of Greenville, South Carolina, and to G. S. VanGorder of Buffalo, New York, at least five days prior to the date when they will be ready to close the said purchase, of their election to close the said purchase at that time.

"It is understood and agreed that the said conveyance to the parties of the second part shall be by general warranty deed, subject only to the said mortgage of $120,000 above described."

Mr. Pruden was employed to examine the title, and on 15 June, 1905, the said Heimick and Alworth sent to R. E. Johnston, at Greenville, S. C., and to G. S. VanGorder, at Buffalo, N. Y., the following telegram:

"We elect to exercise the option heretofore granted by the East Lake Lumber Company to M. H. Alworth and F. M. Heimick, dated 20 May, 1905, and purchase the property described in said option (143) for the sum of $220,000, under the terms of payment stated therein, provided you can give us a clear and undisputed title to the whole of the 167,550 acres of land and timber in Dare County, heretofore represented by you to us to be owned by the East Lake Lumber Company."

F. W. Heimick was examined as a witness, and among other things testified as follows: That when he sent the telegram to VanGorder he was staying at the Atlantic Hotel in Norfolk. That he did not stay more than about a day after sending the telegram before he left for home. That the only notice he gave of acceptance was by this telegram. That he never furnished any copy of the estimate made by the timber estimators. That he expected a reply by wire or letter. That he received no reply to his telegram. That he went back to his home in Duluth. That ended the matter until the plaintiffs started this suit. That he did not receive any letter from Johnston or VanGorder replying to the telegram sent. Had no conversation with them afterwards. That he got from Mr. Pruden an unsatisfactory report of the title. That Mr. Pruden said there was a great deal of litigation over it, but he thought it could be ultimately cleared up; and witness told him he was not buying a lawsuit.

This is the only reference in the evidence to the result of the investigation of the title.

The plaintiffs also offered evidence that Heimick was worth $250,000, O'Brien $6,000,000, and Alworth $20,000,000.

The plaintiffs also offered evidence that the defendant verbally represented the title to said land to be good, and that in consequence thereof they made the same representation to O'Brien, Alworth, and Heimick, who, after the execution of said option of 23 January, 1905, went on said lands with a large number of employees, spent several weeks examining said land and the timber thereon, and incurred much expenses therefor, which the plaintiffs claimed amounted to $9,752, and which they offered to prove they had paid.

The examination of the property was completed between 15 April, 1905, and 1 May, 1905.

No evidence was offered as to the number employed to examine the lands or as to the value of the services.

Nothing was done between the parties after the telegram of 15
(144) June, and there was evidence that the title to large parts of the land was defective.

At the conclusion of the evidence there was judgment of nonsuit, and the plaintiffs excepted and appealed.

E. F. Aydlett and J. C. B. Ehringhaus for plaintiffs.
Pruden & Pruden, Ward & Grimes, and W. M. Bond for defendant.

ALLEN, J. The two causes of action set out in the complaint are inconsistent, and both cannot be true.

In the first, the plaintiffs seek to recover commissions because they contend they found a purchaser for the land of the defendant, who was ready and able to pay the purchase price, and so notified the defendant, who refused to convey; and in the second, to recover damages because the defendant represented the title to the land to be good; that they relied on these representations and found a purchaser for the land, who, after examination, refused to buy because the title was defective.

We will, however, consider the causes of action separately.

The right of the plaintiffs to recover commissions is dependent upon proof that they had found a purchaser for the land, ready, able, and willing to buy, upon the terms contained in the paper of 24 May, 1905, and that notice of this fact was given to the defendant.

The defendant had the right to prescribe the terms of sale, and is not liable for commissions unless those imposed were complied with; and, on the other hand, the plaintiffs cannot be deprived of compensation be-

cause of failure by the defendant to convey, if they found a purchaser who notified the defendant of his readiness and ability to comply with the option. *Martin v. Holly,* 104 N. C., 38; *Mallonee v. Young,* 119 N. C., 552; *Trust Co. v. Adams,* 145 N. C., 166.

In the last cited case *Justice Walker,* speaking for the Court, says: "It is now the established doctrine of the courts that, in the absence of any usage or contract, express or implied, to the contrary, or conduct of the seller preventing a completion of the bargain by the broker, an action by the latter for his commissions will not lie until it is shown that he has procured and effected a sale of the property (145) upon the terms fixed by the vendor. It is not enough that the broker has devoted his time, labor, or money to advance the interests of his employer. Unsuccessful efforts, however meritorious, afford no ground of action. Where his acts bring about no agreement or contract between his employer and the purchaser, by reason of his failure in the premises, the loss of expended and unremunerated effort must be all his own. He loses the labor and skill used by him which he staked upon success. If there has been no contract, and the seller is not in default, then there can be no reward. His commissions are based upon the contract of sale."

We must then inquire into the terms of the contract of 24 May, 1905, and see what was required of the purchaser before the defendant was under any legal obligation to convey.

The contract of 24 May is an option, which is a right acquired by contract to accept or reject a present offer to sell (*Trogden v. Williams,* 144 N. C., 199), and is no more than a proposition to sell until accepted (*Hardy v. Ward,* 150 N. C., 391), and the acceptance must be identical with the offer to be effective (*Gregory v. Bullock,* 120 N. C., 262; *Tanning Co. v. Telegraph Co.,* 143 N. C., 378; *Green v. Grocery Co.,* 153 N. C., 412).

In *Tanning Co. v. Telegraph Co., supra,* it was held that an acceptance for 1,500 barrels of oil was not good when the offer was to sell *about* 1,500 barrels, and in *Green v. Grocery Co., supra,* it is said, quoting from the Supreme Court of the United States: "It is an undeniable principle of the law of contracts that an offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of or departure from those terms invalidates the offer, unless the same be agreed to by the person who made it."

Applying these principles to the evidence, we are of opinion that there has been no acceptance of the offer to sell on the terms contained in the option, and that the plaintiffs are not entitled to recover commissions.

(1) The offer is to sell 167,555 acres, more or less; the acceptance is to buy the whole of 167,555 acres.

(2) The offer is to sell and to execute a deed with general warranty; the acceptance is to buy, provided a clear and *undisputed* title (146) can be made for the whole.

(3) The offer provides that the purchase, when consummated, shall be closed at Manteo, and the purchasers shall give notice to the defendant at least five days prior to the date, when they will be ready to close said purchase, of their election to do so at that time; and such notice was not given.

We do not hold that there must be an acceptance in the exact language of the offer, but must recognize the right of parties to impose the terms upon which they will enter into a contract of sale, and in our opinion the acceptance of 15 June differed materially from the offer of 24 May.

If the defendant had acted upon the acceptance, and had tendered a deed to the purchaser, he might refuse to pay the purchase money, because of a discrepancy in the acreage, as his acceptance was for the whole, or if the title to the whole was good, he could still decline to pay because of a dispute.

There is a vast difference between a good title and one that is undisputed, and the purchaser had a clear conception of this, as shown by his statement to his attorney that he was not buying a lawsuit, when told by him that the title was in litigation, but he thought it could be cleared up.

The notice was also material, and contemplated that the purchaser should fix a date at Manteo, not less than five days from the time of the notice, when the parties could meet and consummate the sale, which was not done.

There is no evidence that the purchasers went to Manteo after 15 June, and one of them testified that he remained in Norfolk one day after sending the telegram, and then went to his home in Minnesota and heard no more of the matter until this action was instituted.

The objections to the maintenance of the second cause of action are equally fatal:

(1) The complaint alleges the execution of the contract of 24 May, 1905, and that the damages sought to be recovered were on account of expenses incurred pursuant thereto, while the evidence of the plaintiff is that they finished the work causing the expense by 1 May, before the contract was made.

(2) The cause of action is based upon a false representation as to title, and in any event it was necessary to prove that the repre-

sentation was relied on. The contract and the evidence offered (147) by the plaintiffs show conclusively that this could not be so.

The contract gives time to the prospective purchasers for an examination of the titles, and requires them to employ a competent attorney and commence an examination of the title of all of said property without delay, and one of the purchasers testified that the report of the attorney was unsatisfactory, and that he told him he was not buying a lawsuit.

(3) No evidence was offered to show the amount of work done or the value thereof.

(4) No connection is shown between the representation alleged to have been made by the defendant and the damages claimed.

Affirmed.

Cited: Winders v. Kenan, 161 N. C., 634; *Trust v. Goode,* 164 N. C., 23.

J. W. GREGORY v. HANNAH C. PINNIX ET AL.

(Filed 21 February, 1912.)

1. Pleadings—Allegations—Interpretation.

The allegations of a pleading are liberally construed with a view to substantial justice between the parties under our Code system.

2. Pleadings—Issues Raised.

An issue arises upon the pleadings when a material fact is alleged by one party and controverted by the other (Revisal, sec. 544) in special proceedings for partition of lands. Revisal, sec. 710.

3. Pleadings—Tenants in Common—Material Allegations.

In special proceedings to partition lands the allegation that the parties are tenants in common is a material one, as the right of the parties to the partition is only conferred on tenants in common. Revisal, sec. 2487.

4. Same—Issues—Questions for Jury.

When in proceedings for partition of lands, the allegation that the parties are tenants in common is denied, an issue of fact is raised which must be submitted to the determination of the jury.

5. Tenants in Common—Partition—Pleadings—Amendments — Discretion—Appeal and Error.

It is within the discretion of the trial judge to permit answers to be filed in proceedings for partitioning lands which had been stricken out by the clerk, and his action therein is not reviewable on appeal.

(148) APPEAL from CAMDEN from order of *Cline, J.*, rendered 21 December, 1911.

This is a proceeding to sell lands for partition, heard in the Superior Court, on appeal from the Clerk of Camden County.

The petitioner alleges, among other things:

"1. That he is a tenant in common, is seized in fee, and is the owner of the following described lands lying and being in the county and State aforesaid, situated in the jurisdiction of this court and bounded as follows:

"17. That the interest of your petitioner in said land is as follows: 291-1296.

"18. That the interests of the defendants are as follows: Mrs. Hannah C. Pinnix, 194-1296 undivided interest; N. M. Ferebee, 388-1296 undivided interest.

"That plaintiff is advised, believes, and alleges that John J. Old, John Hinton, Elizabeth Old, Lovey Grisham, Louisa Old, Hollowell Old, Jr., James Old, the persons named in count 2, as heirs at law of Hollowell Old, are dead, and that their heirs at law jointly own 423-1296 of said property, viz.:

"That the heirs at law of John J. Old, who are unknown to your petitioner, jointly own 9-1296.

"That the heirs at law or devisees of John Hinton, who are, as your petitioner is informed and believes, Mary F. Hinton, Sophia L. Sawyer (whose husband is Lee Sawyer), Charles L. Hinton, E. V. Hinton, W. E. Hinton, and R. L. Hinton, jointly own 81-1296.

"That the heirs at law of Lovey Grisham, who are unknown to your petitioner, jointly own 9-1296.

(149) "That the heirs at law of Hollowell Old, who are unknown to your petitioner, jointly own 81-1296.

"That the heirs at law of James Old, who, as your petitioner is informed and believes, are Livius L. Old, Lula J. Walker (whose husband is L. B. Walker), James H. Old, Eva L. Ferebee (whose husband is E. D. Ferebee), Daisy E. Brooke (whose husband is T. L. Brooke), James E. Smith, James E. Old, Edward J. Smith, Mary M. Smith, Augustus C. Smith, Earl Smith, Roy Smith, Hulda F. Smith (whose husband is ..... Smith), and Samuel F. Old, jointly own 81-1296 thereof."

These allegations are denied in the answers; and in addition to a denial, the defendants allege that if the petitioner had a deed for any part of the land described in the petition he owned no beneficial interest therein, but held the title, if any he had, for the Richmond Cedar Works.

In this condition of the pleadings, his Honor held that issues of fact

were raised, and directed that the same be tried before a jury, to which the petitioner excepted.

His Honor also permitted certain answers to be filed, which had been stricken out by the clerk, because not filed within the time prescribed by law, and the petitioner excepted.

The appeal is by the petitioner from the order setting aside the order of sale made by the clerk, and directing that the issues of fact be passed on.

J. C. B. Ehringhaus and G. W. Ward for plaintiff.

J. K. Wilson, W. A. Worth, E. F. Aydlett, and J. C. Biggs for defendant.

ALLEN, J. The ruling of his Honor, that the denial in the answer of the allegation in the petition, that the petitioner is a tenant in common with the defendants, and is seized in fee, raises an issue of fact, would not be questioned but for certain expressions in several of our decisions which, considered without reference to the facts in the cases and the history of proceedings in partition, would render it doubtful.

The first of these cases is *Purvis v. Wilson,* 50 N. C., 23, in which *Pearson, C. J.,* says that the plea by the defendant in partition of *non tenent insimul* is the plea of sole seizin, and that this raises the general issue; and this is followed by *Wright v. McCormick,* 69 N. C., 15, in which the same judge says: "The plea of 'sole seizin' must (150) be put in before the order for partition is made, otherwise it is waived, and the parties are, for the purposes of the proceeding, taken to be seized as tenants in common."

In another case, *Honeycutt v. Brooks,* 116 N. C., 792, *Furches, J.,* says: "Plaintiffs allege that they are tenants in common with defendants in said lands. The said defendants answer and deny that plaintiffs are the owners of the lands mentioned in their complaint, and plead *'non tenent insimul'* (sole seizin in themselves), which is the 'general issue' in a proceeding for partition"; and in *Graves v. Barrett,* 126 N. C., 269, the present *Chief Justice* makes substantially the same statement: "But in a petition, title is not in issue, unless the defendants put it in issue by pleading 'sole seizin.'"

In *Purvis v. Wilson* and in *Honeycutt v. Brooks* sole seizin was pleaded, and the question of the effect of the denial of the allegation that the petitioner and the defendant were tenants in common was not raised.

In *Wright v. McCormick* it does not appear that the defendant denied

the tenancy in common, and in *Graves v. Barrett* there was no plea of sole seizin, and the Court approved the proceeding in which issues were submitted to the jury upon a denial of the cotenancy.

It appears, therefore, that the ruling of his Honor is not in conflict with the decisions relied on by the petitioner, and the appearance of conflict doubtless arose by treating the plea of *non tenent insimul* as synonymous with the plea of sole seizin, because it is more comprehensive and includes it.

In 2 Sellon's Practice, 314, the author says, speaking of pleadings in partition: "To the declaration there can be no plea in abatement, since the statute 8 & 9 W. 3 c. 31 f. 3. Nor shall the writ abate by the death of the defendant. And if he pleads in bar, he can plead no other plea than *non tenent insimul,* for every other plea in bar is tantamount to *non tenent insimul.* Upon which plea issue may be taken, and the parties proceed to trial as in other cases."

The definition of the plea *non tenent insimul,* as given by
(151) Bouvier, is, "A plea to an action in partition, by which the defendant denies that he holds the property which is the subject of the suit, together with the complainant or plaintiff," and by Black: "A plea to an action in partition, by which the defendant denies that he and the plaintiff are joint tenants of the estate in question."

The plea is in substance a denial of the tenancy in common, as appears from the following form: "And the said C. D., by G. H., his attorney, comes and says that he did not hold the premises in said petition of the said A. B. set forth, together with the said A. B. at the time of the commencement of the proceedings in this cause, as alleged in said petition of the said A. B.; and of this he, the said C. D., puts himself upon the country." Tillinghast Forms, 625.

It would seem, therefore, that the denial of the cotenancy, while not technically the plea of *non tenent insimul,* is substantially the same, and at this day, when substance is not sacrificed to form, would be held to permit the same defenses under it if the question was to be determined at common law.

The construction of the pleadings is not, however, controlled by the rules of the common law, but by the Code system, and as was said in *Stokes v. Taylor,* 104 N. C., 395, and approved in *Brewer v. Wynne,* 154 N. C., 471: "The rule of the common law was that every pleading should be construed strongly against the pleader. The Code system is just the reverse. 'In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties.'"

The difference between the two is well stated, with reference to the plea under consideration, in 30 Cyc., 225, in an article by Mr. Freeman, the editor of the American Decisions and the American State Reports and the author of a treatise on Cotenancy and Partition: "The plea of *non tenent insimul* constituted the general issue in actions of partition at common law. Every allowable plea which could be interposed amounted to *non tenent insimul.* This plea put in issue all the material allegations of the complaint, and seems to have been so adequate as to authorize defendant to place in evidence every conceivable fact which, if proved, would prevent plaintiff's recovery. Under the (152) Code rule of pleading the general issue is made by a general denial. Therefore such a denial or any form, either of allegation or denial, which necessarily negatives the idea that plaintiff and defendant were cotenants at the commencement of the action must be sufficient where the only object of the pleader is to defeat plaintiff's claim to partition, and anything less than this must be insufficient."

The rules of civil procedure are applicable to special proceedings (Revisal, sec. 710), and one of these rules is that an issue arises on the pleadings when a material fact is maintained by one party and controverted by the other. Revisal, sec. 544.

The materiality of the allegation that the petitioner is a tenant in common with the defendant is apparent, as the right to institute the proceeding for partition is conferred only on tenants in common (Revisal, sec. 2487), and it is upon this ground that judgments in partition are held to estop as to the title. *Armfield v. Moore,* 44 N. C., 164; *Carter v. White,* 134 N. C., 474; *Buchanan v. Harrington,* 152 N. C., 334.

In the last case, *Justice Manning* says: "We apprehend, however, that whenever plaintiff alleges himself to be the owner in fee, or of any specified estate, or avers any other ultimate fact under which he is entitled to relief, it becomes the duty of the defendant either to concede or take issue with the allegation or averment, and that the judgment in the action will be as conclusive as it would upon a like issue in any other action."

We therefore conclude that his Honor held correctly that the denial of the cotenancy raised an issue of fact for the determination of the jury.

We are also of opinion that his Honor had the power to permit the answer to be filed, and that the exercise of his discretion is not reviewable. *Faison v. Williams,* 121 N. C., 152.

In this case the Court says: "It is unnecessary to consider whether the judge could reverse the action of the clerk in refusing leave to amend, for the act of 1887, ch. 276 (amending section 255 of The Code),

provides that whenever a cause is sent up to the judge *for any ground whatever,* the 'judge shall have jurisdiction,' and may either fully determine the cause himself or make orders therein and send it
(153) back to be proceeded in by the clerk."

Affirmed.

Cited: *Pinnell v. Burroughs,* 168 N. C., 318.

J. N. GREGORY v. HANNAH C. PINNIX ET AL.

Ward & Thompson for plaintiff.

J. K. Wilson, W. A. Worth, E. F. Aydlett, and J. C. Biggs for defendant.

ALLEN, J. The decision between the same parties in another case at this term is controlling in this.

Affirmed.

L. A. ROUNTREE AND RUFUS EASON v. THE COHN-BOCK COMPANY.

(Filed 21 February, 1912.)

1. Deeds and Conveyances—Timber—Period to Cut—Interpretation.

A deed conveying standing timber on the lands described within a time specified conveys only the timber removed by the vendee within that period, and the timber then remaining belongs to the grantor or his assigns.

2. Same—Extension—Notification—Conditions Precedent.

When, in a deed conveying standing timber upon lands to be cut and moved in a certain period of time, there is a clause extending, upon the payment of a stipulated price, the time for a certain other period, the grantee, claiming the privilege, must notify the grantor of his intention to exercise it before or at the expiration of the time allowed within which the timber should have been removed, and pay or tender the amount named for the right of this extension.

3. Same—Additional Provisions.

The grantee of standing timber failed or omitted to notify the grantor of his intention to take advantage of the extension of time beyond the first period named, and to pay or tender the amount specified for the ex-

ercise of this privilege and relied upon a clause in his deed reading that "the said parties of the second part, their heirs and assigns, shall have power and are hereby authorized at any period last aforesaid to enter upon the lands," etc.: *Held*, this clause does not have the effect of waiving any of the conditions necessary to make the extension clause effective, but defines what may be done under it after the conditions are performed.

APPEAL from *Cline, J.*, at Fall Term, 1911, of CHOWAN. (154)

This is an action to restrain the defendant from entering upon certain land, and cutting timber thereon.

The defendant claims under a certain timber deed, executed by the plaintiffs on 9 September, 1904, to the Gay Lumber Company, which conveyed certain timber on said land, and contained the following provisions:

"The said parties of the second part shall cut and remove the timber hereby bargained and sold and conveyed within five years from date of contract. And should said second parties be unable to remove said timber within the time above specified, they shall have further time to remove said timber as they may require, not exceeding three years, upon payment to said parties of the first part of a sum equal to 6 per cent per annum for the additional three years of time required on the purchase price as above stated.

"The said parties of the second part, their heirs or assigns, shall have power, and are hereby authorized, at any time during period last aforesaid, to enter upon the lands above described for the purpose of cutting, removing, or doing whatsoever they may elect with the timber hereby conveyed, and are hereby authorized and empowered to build and construct such roads, tramroads, or railroads over and across the above described lands or any other lands owned by them, and may use such brush, trees, and undergrowth upon said lands as they may need in the construction of said road, tramroads, and railroads, and are hereby empowered to exercise full, perfect, and absolute ownership and control of the same, to prosecute each and every person cutting or removing said timber, or in any manner interfering with it, whereby its growth will be affected, or its value depreciated."

There was no tender of any amount to the plaintiffs under (155) the extension clause in the deed, until more than five years after the execution thereof.

There was a judgment for the plaintiffs, and the defendant excepted and appealed.

Ward & Grimes for plaintiff.

L. L. Smith for defendant.

ALLEN, J. It is well settled that the legal effect of the first clause in the deed to the Gay Lumber Company, conveying the timber with the right to remove the same in five years, is to convey all the timber which the vendee should remove within the prescribed time, and that such as remained thereon after that time would belong to the vendor, or to his grantee of the premises. *Hornthal v. Howcott,* 154 N. C., 228; *Powers v. Lumber Co.,* 154 N. C., 407.

It was also decided in *Bateman v. Lumber Co.,* 154 N. C., 248, that the correct interpretation of a clause extending the time within which the timber may be removed requires of the grantee, claiming the privilege, that he notify the owner of the property of his intention to exercise it, and that he pay or tender the stipulated amount on or before the expiration of the first period granted for the purpose of removal of the timber.

It follows, therefore, from these authorities and upon the admissions, that no notice was given to the grantors in the deed to the Gay Lumber Company of an intention to exercise the privilege of extending the time for the removal of the timber, and that no money was paid or tendered on or before the expiration of the first period; that the defendant has no title to nor interest in the timber unless there is something in the deed which requires the application of a different doctrine.

The defendant contends there is a clause in the deed, not to be found in any of the timber deeds considered by this Court, which distinguishes it from the cases cited, and relies upon that part providing that "The said parties of the second part, their heirs and assigns, shall have power, and are hereby authorized, at any time during period last aforesaid, to enter upon the land," etc.

In our opinion, that clause does not have the effect of waiving
(156) any of the conditions necessary to make the extension clause effective, but does define what may be done under it after the conditions have been performed.

The "period last aforesaid" has never had any existence, because of failure to give notice, and to pay or tender the stipulated amount, and the defendant cannot justify an entry on the lands thereunder.

We therefore conclude that there is no error in the judgment restraining the defendant from entering on said lands and cutting the timber therefrom.

Affirmed.

Cited: Lumber Co. v. Whitley, 163 N. C., 49; *Lumber Co. v. Riley, ib.,* 255.

E. T. JENNETTE & CO. v. CITY HAY AND GRAIN COMPANY.

(Filed 28 February, 1912.)

1. Contracts, Written—Telegrams—Questions of Law.

A telegram and its reply expressing the agreement of the parties is a contract in writing the meaning of which is for the court to determine.

2. Same—Vendor and Vendee—Terms of Sale—Interpretation.

In reply to defendant's letter offering corn at a certain price, without stipulation as to time of delivery, plaintiff telegraphed: "Letter 23. Book 400 cracked corn. Shipment thirty days, if possible. Answer immediately by wire"; to which defendant replied: "Booked cracked corn": *Held*, under the contract, the defendant was obliged to sell to plaintiff cracked corn in the quantity and at the price named if ordered within thirty days, and not thereafter.

3. Contracts—Vendor and Vendee—Measure of Damages—Vendee's Duty.

The plaintiff having purchased a number of sacks of cracked corn of the defendant, received shipments with knowledge that the sacks were not tagged as required by the Department of Agriculture and that it did not come up to the grade purchased, and sold a number of the sacks to a purchaser who kept them two weeks, when they were seized by the said department. The defendant theretofore sent the necessary tags for the sacks to the plaintiff, who refused to have anything further to do with the shipment, and the corn became worthless in the hands of the department: *Held*, it was the duty of the plaintiff to do what he reasonably could to lessen his loss, and the measure of his damages was the difference in value of the corn as it actually was and which it should have been under his contract, and such other expenses as were actually incurred by him in handling it.

APPEAL from *Joseph S. Adams, J.*, at December, Term 1910, (157) of BEAUFORT.

The plaintiffs, F. T. Woolard and E. J. Jennette, trading as E. T. Jennette & Co., bring this action to recover $150, alleged to be due as damages on a contract for the purchase of 400 sacks of cracked corn.

The plaintiffs contend that the contract between them and the defendant required the defendant to ship 400 sacks of corn, at a stipulated price, within thirty days from 26 March, 1909, as ordered out by them, and to ship on orders after the thirty days upon adding 2 cents per sack, which addition was called "carrying charges," and the defendant contends that the contract was to ship 400 sacks if ordered out within thirty days.

It is admitted that 150 sacks were shipped under said contract within thirty days from its date, and that the plaintiffs ordered out the remaining 250 sacks on 29 April, 1909, after the expiration of the thirty days, which the defendant refused to deliver, and the plaintiffs offered evidence of their damages sustained by reason of such refusal.

The 150 sacks shipped by the defendant were in three shipments of 50 sacks each, the last shipment being about 7 April, 1909. All of these shipments were made upon drafts with bills of lading attached, and the plaintiffs were compelled to pay the drafts before they could receive the corn; and tags, containing an analysis as required by chapter 149, Laws 1909, were not attached to the sacks; and the plaintiffs offered evidence that the sacks were less in weight than was required by said statute.

One of the plaintiffs testified that the first and second shipments were defective in quality and short in weight; that when the third shipment was received they sold 45 sacks of it to Smith Paul, who carried it to his place of business from the depot, and after it had been in his possession about two weeks it was seized and condemned by the
(158) Department of Agriculture, on account of the shortage in weight and the defective grade; that after the seizure the plaintiffs never offered to sell it, and had nothing more to do with it; that they replaced the corn taken from Paul, and the last time they saw the corn seized it was rotten and worthless.

The said plaintiff also testified that the order for the 400 sacks of corn was a telegram, of date 26 March, 1909, at 9:28 p. m., which was as follows: "Letter 23. Book 400 cracked corn. Shipment thirty days, if possible. Answer immediately by wire"; to which the defendant replied, at 10:10 A. M. of 27 March, 1909: "Booked cracked corn."

The letter of 23 March, referred to in the first telegram, is one from the defendant to the plaintiffs, offering corn and naming the price, but making no statement as to time of shipment.

On 8 April the plaintiffs wrote the defendant, complaining of the quality of the corn and the deficiency in weight, and on 9 April the defendant replied, saying, among other things: "We request that you dispose of these goods to the best advantage, sell it in bulk, or in any other way that you think best, and send us account of sales; and if you so desire, we will cancel the contract with you for the balance, as the margins we are able to get on your contract are not adequate to all of the trouble we are having."

The defendant sent to the plaintiff the analysis tags required by the statute, soon after the shipments began, and such tags were on the 45 sacks at the time of seizure.

On 24 April, 1909, the day of the said seizure, the plaintiffs notified the defendant thereof, and soon thereafter (the exact time not stated) the defendant paid the Department of Agriculture the charges assessed by it.

His Honor charged the jury that the plaintiffs were not entitled to recover anything on account of the refusal to ship the last 250 sacks, because ordered after the expiration of the contract, and the plaintiffs excepted.

The plaintiffs requested his Honor to charge the jury as fol- (159) lows: "It is contended by plaintiffs that of one shipment of 50 sacks, 45 sacks were seized and condemned by the Department of Agriculture and became a total loss to the plaintiffs, and that they replaced the same with other corn which they purchased at a higher price, or $1.65 per sack; that this shipment so seized was made by defendant, bill of lading attached, and was paid for by plaintiffs before the bill of lading was obtained and before the corn had or could have been examined in the usual course of business of this kind; that the same was taken direct from the depot to customer's place of business and was thereafter found in defective condition and condemned; that said shipment was defective in quality and short in weight and so much below the corn contracted for in grade as to be practically valueless on this market; that defendant was notified of this condition and thereafter undertook to settle the matter with the department itself. If you find these contentions to be true from the evidence, the court charges you that the plaintiff would be entitled to recover $1.50 per sack for the corn condemned, or so much thereof as was shipped by defendant, and in addition thereto would be entitled to recover the difference between $1.50 per sack on said shipment of 50 sacks and the market price of No. 2 cracked corn at the time and place of delivery, if you find from the evidence that such price had advanced."

This was refused, and plaintiffs excepted. There are other exceptions in the record, but they embrace the same questions covered by the two exceptions stated. There was a verdict in favor of the plaintiffs for $38.25, and from a judgment rendered thereon they appeal.

Small, McLean & McMullan for plaintiffs.
Rodman & Rodman for defendant.

ALLEN, J. The contract between the plaintiffs and the defendant is in writing, and consists of the telegram of 26 March, 1909, sent by the plaintiffs, and the reply of the defendant of 27 March, 1909, and being in writing, it was for the court to determine its meaning. We think his Honor held correctly, as he charged the jury that "The contract between the parties was that the defendant would sell to the plaintiff 400 sacks of No. 2 cracked corn, delivered in Washington, at $1.50 per sack, provided that the same was ordered out by the plaintiffs (160)

within thirty days, and plaintiff was not entitled to call for shipment of any part of the 400 sacks after the thirty days had expired."

This seems also to have been the understanding of the plaintiffs at the time this action was commenced, as they wrote the defendant on 3 May, 1909: "We are reasonable, and do not expect anything unreasonable. Now, if you will refer to the purchase of this goods, you will find that we ordered some of this shipment out at once; we could have put the entire shipment off until thirty days. It looks as this should give us consideration."

They made no claim then that they had the right under the contract to order out any of the corn after thirty days.

This being the correct construction of the contract, there can be no recovery for refusal to ship the 250 sacks ordered by the plaintiffs after the expiration of thirty days.

Instead of the prayer requested by the plaintiffs, in reference to the 45 sacks, his Honor charged the jury: "As to the 45 sacks seized and condemned, the court charges you that after this corn was shipped it became the property of the plaintiffs, and when it was seized and condemned in the hands of one of their customers, it was their duty to release the same, and the measure of damages in such case was the difference in value between No. 2 cracked corn, weighing 100 pounds per sack, at the time and place of delivery, and the corn which was actually delivered, together with such reasonable costs and charges as plaintiffs incurred on account of the seizure and rehandling of the corn in question. After this corn was delivered to the plaintiffs and seized by the State, it was the duty of the plaintiffs to do the best they could with it and to pay the cost of forfeiture and other necessary expenses incurred; but it is admitted in this case that defendant paid the costs of the forfeiture, and the plaintiffs are therefore not entitled to recover anything on that account, but only the difference in the value between this corn and No. 2 cracked corn, as above stated, together with any other expenses actually incurred by them in its handling."

(161) In view of the evidence of the plaintiffs and the admitted facts, this instruction was as favorable to the plaintiffs as they were entitled to. They say they discovered that the corn being shipped by the defendant had no tags on it, and was short in weight and defective in quality, before the shipment containing the 45 sacks was made, and that they continued to receive and sell it. The defendant sent the analysis tags to the plaintiffs as soon as notified of the necessity for them, and wrote them on 9 April to dispose of the corn in any way they thought best. The corn seized by the Department of Agriculture was in the possession of Smith Paul two weeks before the seizure, and

he says he made no complaint about the corn, and the defendant paid the charges to the department. During this time the plaintiffs made no effort to release the corn from seizure, and, as they say, they had nothing more to do with it and permitted it to remain in the warehouse until it became worthless.

We find

No error.

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(162)

ROPER LUMBER COMPANY v. RICHMOND CEDAR WORKS ET AL.

(Filed 28 February, 1912.)

1. Injunctions—Insolvency—Pleadings.

An allegation of insolvency is not necessary for an injunction to restrain a continuous trespass over the lands of another in the operation of a tramroad for hauling timber, and the cutting or destruction of timber thereon.

2. Injunction—Damages—Equity.

Because a private corporation can respond in damages for its trespass in operating a tramroad over the lands of another and cutting or injuring timber thereon, it will not prevent the equitable relief of injunction against the continuance of the trespass.

3. Same—Trespass—Cutting Timber.

The right to enjoin the continuance of a trespass upon the lands of another in operating a tramroad and cutting and injuring timber thereon is given because of the extraordinary character of the act sought to be enjoined, and does not depend upon the solvency of the trespasser.

4. Railroads—Tramways—Rights of Way—Written Authority—Indfiniteness—Waiver.

A defendant, sought to be enjoined from a continuous trespass on plaintiff's lands, in operating a tramroad through them for the purpose of hauling lumber which had been cut on other lands in litigation between the parties, relied on a permission alleged to have been given by the plaintiff, contained in a letter, as follows: "Should there be any desire on your part to remove the timber which you have cut, you will find us not unwilling to give our permission." The right claimed was over a different tract of land than that referred to in the letter: *Held*, the language relied on by defendant was too indefinite to authorize the right of way for the tramroad or to be effective as an estoppel.

5. Railroads—Tramways—Rights of Way—Former Adjudications—Locus in Quo—Insufficiency.

In an action to enjoin the continued operation of a tramroad across plaintiff's land, the defendant relied on an order entered in an action concerning other and separate lands in litigation between the same parties, and not included in the present proceedings, as follows: "It is further

ordered and adjudged that each party shall have the right to remove such timber as it has already cut on said lands": *Held*, the order relied on cannot be so construed as to include a grant of right of way across lands not contemplated by or in any way subject to that litigation.

6. Railroads—Tramways—Rights of Way—Partition—Grants—Interpretation.

In 1817 a certain large tract of land was partitioned among several tenants in common, through which a cross canal runs eastwardly as tributary to Dismal Swamp Canal, used for floating logs to the latter canal, a navigable waterway. For the preservation of the cross canal, it was provided in the division: "It will be convenient in carting to the cross canal, for one proprietor to have the free privilege of carting across another proprietor's share," etc. This provision or privilege was not incorporated in subsequent conveyances: *Held*, it could not have been contemplated at the time that instrumentalities such as tramroads for hauling timber would be employed, but that each proprietor should only have the privilege theretofore enjoyed, as appurtenant to each tract, instead of in gross.

7. Railroads—Tramways—"Way by Necessity"—Pleadings.

For the plea of "a way by necessity" to lands to be available, it must be pleaded with particularity, setting out the facts from which it may be seen by the courts that the necessity for the way exists, and a general plea is not sufficient.

8. Railroads—Tramways—"Way by Necessity"—Presumption from Grants—Privity—Unity of Possession.

A way of necessity known to the common law arises only by implication in favor of a grantee, and being founded on a grant, it can only arise between grantor and grantee, and may not be presumed or acquired over the land of a stranger, or where there is no privity of title and unity of ownership.

9. Same—Inconvenience.

When there is a grant from which the law may imply "a way by necessity," mere inconvenience will not suffice to justify it.

10. Railroads—Tramway—"Way by Necessity"—Interpretation of Statutes.

The right to establish cartways, tramways, etc., over the lands of another, when no such right arises by implication of law, is regulated in this State by statute, and one who desires to cross the lands of another for the purpose of removing timber, or for other purposes, must follow the statute or purchase the right. Revisal, sec. 2686.

11. Railroads—Tramways—Rights of Way—Private Use—Constitutional Law.

Upon the principle that private property can only be taken for a public use, an act of the Legislature is unconstitutional which attempts to give the power of eminent domain, and the right to condemn property, to private lumber railroads.

(163) APPEAL from order of *Allen, J.*, rendered at chambers, 19 May, 1911; from CAMDEN.

Two actions between same parties pending in the Superior Court of Camden County were consolidated and heard upon motion for an injunction to the hearing by *Allen, J.*, who dissolved the restraining order theretofore granted, and refused to continue the same to final hearing. The plaintiff appealed.

Angus D. MacLean, W. M. Bond for plaintiff.
Aycock & Winston, Starke, Venable & Starke for defendants.

BROWN, J. It is admitted for the purposes of this appeal that the plaintiff is the owner of Lots 2, 3, and 12, and the defendant of Nos. 7 and 8 in the division of the lands known as the New Lebanon estate; and it also appears that defendant has purchased an interest in Lots 1 and 4 of said division. It also appears that the defendant claimed the Allen Swamp, lying south of the New Lebanon lands, in which defendant had cut certain timber before the beginning of this (164) suit.

Neither the Cedar Works Corporation nor its codefendant and subsidary, the Dismal Swamp Railroad Company, are common carriers, and they do not assert any right of eminent domain.

All of the evidence shows, plaintiff's affidavits being uncontradicted in this respect, that defendants were constructing and operating railroads and carrying away timber over plaintiff's land, occupying the camps thereon and cutting out trees and undergrowth along the roadways.

The defendant contends that the injunction was properly dissolved, for five reasons:

1. Because the complaint fails to allege the insolvency of the defendant.

We disagree with counsel that plaintiff's allegations do not bring its case within the spirit of section 807 of the Revisal. That act distinctly relieves the plaintiff in an action to enjoin a trespass upon land from alleging insolvency "when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees." *Lumber Co. v. Cedar Co.*, 142 N. C., 417.

The complaint in this case alleges both species of trespass, and an appropriation of a part of plaintiff's property, without authority, for the purpose of operating a steam railroad over it. Such trespasses as those alleged would have been enjoined at common law without the aid of the statute. *Gause v. Perkins*, 47 N. C., 221; *Tise v. Whitaker*, 144 N. C., 511.

Even a railway corporation, a common carrier possessing the power of eminent domain, may be enjoined from an extension of its track un-

authorized by its charter. The right to enjoin in such cases does not depend upon the insolvency of the corporation, but the remedy is given because of the extraordinary character of the act sought to be enjoined. 1 High on Injunctions, sec. 599; *People v. R. R.*, 45 Barb., 63.

It would be a most extraordinary destruction of the rights of property if a private corporation, possessing no power of eminent domain, could seize the lands of another, to which it had no semblance of title,
(165) and appropriate them to its own use, simply because it was able to respond in damages. This contention of the defendants is, in our opinion, without support in reason or authority.

2. Because the defendant had the permission of the plaintiff to remove its timber from the Allen Swamp, and this permission carries with it the power to remove it by the usual and ordinary methods.

The only foundation for this claim is a letter from C. I. Millard, written to W. J. Parrish, general manager of defendant, in reference to the litigation concerning Allen Swamp (no part of the New Lebanon lands), in which this expression is used: "Should there be any desire on your part to remove the timber which you have cut, you will not find us unwilling to give our permission."

We are cited to no authority by defendant tending to support this contention. Assuming that the letter was authorized by plaintiff, its language is too indefinite to convey any right or estate in lands, much less a right of way for a railroad across plaintiff's New Lebanon lands, or even to be effective by way of an estoppel.

3. The defendant rests its third claim upon an order at Spring Term, 1911, made by *Ward, J.*, in a suit in the Superior Court of Gates County, wherein this defendant was plaintiff, and this plaintiff was defendant, in which is this paragraph: "It is further ordered and adjudged that each party shall have the right to remove such timber as it has already cut on said land."

It is admitted that the suit in which this order was made concerned the Allen Swamp only, and had no connection with the New Lebanon lands. The record in that case shows that both parties claimed title to the Allen Swamp and had cut timber in it at the time the order was made. While the learned counsel for defendant in their brief profess to rely on this order "above and beyond all other contentions," they cite no authority and give no substantial reason why such order can reasonably be construed to include the grant of a right of way across lands not connected in any way with the subject of litigation.

Both parties had cut timber in the Allen Swamp, the title to
(166) which was in litigation, and the order was intended to give to each party the right to remove such timber as it had already

cut from the swamp, and does not purport to go beyond that. The order does not undertake to provide any means of transportation for the timber after it is removed from the confines of the swamp.

4. It is again contended that the partition proceedings of the New Lebanon estates gives defendant authority by virtue of its ownership of Lots 7 and 8 to construct and operate its railroad across plaintiff's Lots 2, 3, and 12.

The facts are that in the year 1817 the New Lebanon estate, a large tract of land in Camden County, was partitioned among the several tenants in common. The Cross Canal runs through this land eastwardly and is tributary to the Dismal Swamp Canal. It was used to float juniper logs down to the Dismal Swamp Canal, a navigable waterway, and in order that this use of the Cross Canal might be preserved, it was provided in the division that "It will be a conveniency in carting to the Cross Canal, or Crooked Ditch, for one proprietor to cross the land of another; therefore every proprietor is to have the free privilege of carting across another proprietor's share, but not to have any privilege to cut any timber except for the making or repair of the road." This provision was not incorporated nor the privilege specially reserved or granted in any of the subsequent conveyances under which either party derives its title in severalty to parts or shares of said land.

It is contended by defendant that the word "carting" was used by the commissioners who made partition of the New Lebanon estate in a broad or generic sense, and comprehended any method of carrying off timber which might thereafter be generally adopted.

In 1817 steam railroads were unknown, and we cannot suppose that transporting timber by such instrumentality could have been in contemplation of the commissioners who divided the lands. Even in this day and generation a grant of a cartway would hardly be construed to include a right of way for a railroad.

The use of a cartway may be general and enjoyed by a neighborhood, while that of a railroad is of necessity exclusive and (167) confined to the proprietor operating it.

We think that an examination of the map and of the division itself clears up any doubt as to the meaning and purpose of the commissioners. They evidently intended that the proprietors, who theretofore owned the land in common, should thereafter have the same access to the Cross Canal or Crooked Ditch as they before enjoyed, and the right to use it was thereby made appurtenant to each tract instead of in gross.

As is well said in the plaintiff's brief: "If in place of the Cross Canal there had been a public road running through the land, with the right reserved to each proprietor, in severalty, to cross the land of another,

'as a conveniency in carting' to the public road, no different principle would be invoked; and yet it is difficult to imagine that this would confer the right of building a private railroad and operating log trains thereon in order to cart timber from Gates County to Virginia, in a direction and manner opposed to use of the public road altogether."

5. The last reliance of the defendant is upon a "way of necessity."

We think the defendant could not avail itself of any such plea without setting it up in an answer and setting out the necessary facts.

To plead a way by necessity in general terms will not suffice. *Bullard v. Harrison,* 4 M. & Sel., 387.

But we will consider it as fully and sufficiently pleaded and undertake to show that the defendant cannot justify under it.

What constitutes a way by necessity is not very clearly defined or agreed upon by the early sages of the law. Sergeant Williams was of opinion that there is no such thing as a right of way by necessity except when it is pleaded by way of prescription or grant. *Pomfret v. Ricroft,* Saund, 323, note 6.

Chancellor Kent agrees with Sergeant Williams, and says "that it places the doctrine upon a reasonable foundation, and one consistent with the general principles of the law." 3 Kent Com., 341.

This learned judge and commentator says: "A right of way (168) may arise from necessity in several respects. Thus, if a man sells land to another which is wholly surrounded by his own land, in this case the purchaser is entitled to a right of way over the other's ground, to arrive at his own land. The way is a necessary incident to the grant, and without which the grant would be useless." 3 Kent Com. (13 Ed.), p. 421.

What is meant by the term "way by necessity" is laid down by Woolrych as follows: "All the authorities support the doctrine that in the case of a grant of land without a reservation of any way, a way by necessity will pass as incident to the grant." Treatise on Ways, p. 21.

This way of necessity as known to the common law arises only by implication in favor of grantees.

Since the way is founded on a grant, it can arise only between grantor and grantee. No way of necessity can be presumed or acquired over the land of a stranger. It does not arise where there is no privity of title. *Thrump v. McDonnell,* 120 Ala., 200.

Without privity of estate and unity of ownership there will be no way of necessity. *Ellis v. Blue Mount. Assn.,* 69 N. H., 385; 42 L. R. A., 570.

Powers v. Hefferman, 122 Am. State Reports, 210, Note C, where the

authorities are collected; *Cooper v. Maupin,* 35 Am. Dec., 464, and notes; *Woolridge v. Coughlin,* 46 W. Va., 345.

There is nothing in the record to show that there is any privity of estate between the plaintiff and defendant in respect to the Allen Swamp or any other land from which defendant is removing the timber. Even if that were so, there is nothing to show that defendant has no other possible way to remove the timber.

Even where there is a grant from which the law may possibly imply a way of necessity, a mere inconvenience is not enough to justify it. It is necessity, not inconvenience, that gives the way. *Pettingill v. Porter,* 85 Am. Dec., 676; *Powers v. Hefferman,* 122 Am. State Reports, 211, Note D.

So far as we can see, the case cited by defendant in support of this contention, *Lumber Co. v. Hines Bros.,* 127 N. C., 130, has no bearing upon this question, as it was a controversy over the location of an unlocated floating right of way granted to plaintiff. The doc- (169) trine of a way by necessity does not appear to be discussed in the opinion.

The right to establish cartways, tramways, etc., over the lands of another, when no such right arises by implication of law, as herein pointed out, is in North Carolina regulated by statute, and one who desires to cross the land of another for the purpose of removing his timber, or for other purposes, must follow the statute or else purchase the right. Revisal, sec. 2686.

The General Assembly has attempted to clothe private lumber railways with the power of eminent domain and the right to condemn property for a very limited period, impelled to do so by the immense growth of the timber industry and the consequent necessity for the operation of steam railways in such enterprises.

But the Court has held such legislation beyond the power of the General Assembly, upon the principle that private property can only be taken for a public use, and not for private gain. *Cozard v. Hardwood Co.,* 139 N. C., 284.

In concluding the opinion of the Court in that case, *Mr. Justice Connor* uses the following expressive language:

"While, as found by his Honor, it is reasonable and even necessary to the successful operation of defendant's enterprise that they carry their timber over the plaintiff's land to reach the markets, and while there may be no injustice to him in permitting them to do so, and while his opposition may be either sentimental or selfish, yet the courts may not violate or weaken a fundamental principle upon the strict observance and enforcement of which the security of all private property,

so necessary to the safety of the citizen, is dependent. The guaranties upon which the security of private property is dependent are closely allied, and always associated with those securing life and liberty. Where one is invaded, the security of the other is weakened."

We are of opinion, upon a review of the record, that the defendants have shown no semblance of right to operate their railroad over plaintiff's land, or to cut and remove timber therefrom, and that plaintiff is entitled to an injunction as prayed. The cause is remanded to the Superior Court of Camden County with directions to the judge (170) resident or the judge riding the district to issue the injunction until the final hearing, as prayed, upon the plaintiff giving the undertaking required by law.

Reversed.

Cited: *Foster v. Carrier,* 161 N. C., 474; *Sutton v. Sutton, ib.,* 667; *Lumber Co. v. Cedar Works,* 165 N. C., 83; *Combs v. Comrs.,* 170 N. C., 91.

W. M. BERRY, INDIVIDUALLY AND AS TAX COLLECTOR OF ELIZABETH CITY, v. W. T. DAVIS ET AL.

(Filed 28 February, 1912.)

1. Taxation—Tax Collectors—Powers—Interpretation of Statutes.

A tax collector of a city to whom has been given all the rights and remedies for collecting taxes possessed by sheriffs under the general revenue laws of the State is confined to the methods which the statute specifies, and resort may not be had to a civil action for that purpose except where these methods are inadequate and unavailing.

2. Taxation—Methods for Collection—Interpretation of Statutes—Constitutional Law.

Our statutes provide "that no mortgage or deed of trust executed upon personal property shall have a lien thereon superior to the lien acquired by a subsequent levy upon said property" for the payment of taxes, etc., requiring certain notice to the mortgagee or trustee to afford them an opportunity for payment, with costs incident to making the levy, which shall become a part of the mortgage debt, etc. (Revisal sec. 2863); that taxes shall not be a lien on personal property, etc. (Revisal, sec. 2863); that all personal property shall be liable to be seized and sold for taxes, etc., and transfers thereof, except as to *bona fide* purchasers, etc., "shall be null and void as to said taxes," and not affect the rights, etc., of the sheriff to levy upon and sell it for taxes, if the "levy be made within sixty days after such transfer" (Revisal, sec. 2886): *Held,* these provisions are within the powers of the Legislature, and are valid.

3. Taxation—Methods of Collection—Personal Property—Tax List—Execution—Levy—Claim and Delivery—Interpretation of Statutes.

The express statutory method for collecting taxes on personal property is by seizure and sale, and in the absence of some exceptional conditions rendering such remedies inadequate and unavailing, an executive officer holding the tax list and charged with the duty of collecting is confined to them; and the tax list being in the nature of an execution, he may not under ordinary conditions resort to the process of claim and delivery in enforcement of his claim.

4. Taxation—Methods of Collection—Personal Property—Levy—Practice—Special Circumstances.

While in this action the ordinary methods of collecting taxes on personal property should have been pursued by the officer charged with collecting them, instead of resorting to claim and delivery for the purpose, the possession of the property by the principal defendant, his appearing under the facts of the case to have regarded the levy as properly made, and his agreement that the courts should determine the controversy, withholds the court from dismissing the action.

5. Taxation—Tax Collector—Settlement—Subsequent Enforcement—Interpretation of Statutes.

A tax collector does not lose his right to pursue the statutory methods provided for enforcing collection of taxes against the personal property of a delinquent taxpayer because he has accounted for those taxes to the proper authorities in a settlement with them.

6. Taxation—Liens—Lapse of Time—Mortgagor and Mortgagee—Interpretation of Statutes.

Under our general statute applicable, one charged with the collection of taxes is allowed no longer than one year from the day prescribed by statute for his settlement and payment thereof, and thereafter his lien on property of a delinquent taxpayer is not enforcible against the right acquired under a registered mortgage. Revisal, sec. 2869.

APPEAL from *Cline, J.*, at Fall Term, 1911, of PASQUOTANK. (171)

Claim and delivery, in enforcement of a lien claimed on personal property of delinquent taxpayers.

One G. H. Wood, holding a mortgage on the property seized in the cause, having intervened, it was adjudged that the plaintiff owned the property to an amount sufficient to pay the taxes due from the delinquents, to wit, $84.68—$42.74 for 1909 and $41.94 for 1910— and the question of the right to this sum as between the plaintiffs, the tax collector of Elizabeth City, and the mortgagee, being reserved, the property was turned over to the mortgagee, who sold the same as per agreement (B), made of date 17 August, 1911, paid $100 of proceeds into court, subject to the judgment. On the hearing, it appeared that the tax collector, before bringing suit, had paid over the amount of tax (172)

to the city and that the property was not sufficient to pay the debt secured by mortgage and the taxes; that action was commenced on 11 August, 1911; mortgage executed 7 June, 1911; verbal notice given of amount of taxes due, to mortgagee's attorney, when agreement (B) was made, to wit, 11 August, 1911.

On question reserved, judgment was given in favor of mortgagee, and plaintiff excepted and appealed.

J. Kenyon Wilson for plaintiff.
No counsel contra.

HOKE, J., after stating the case: Plaintiff, the tax collector of Elizabeth City, having by statute all the rights and powers conferred upon sheriffs by the general revenue laws, held a claim for unpaid taxes against W. T. and G. M. Davis to the amount of $84.68, $42.74 of which was for unpaid taxes for 1909 and $41.94 was for taxes for 1910. Having settled with the corporation of Elizabeth City, plaintiff, holding the tax lists and the claim arising thereon, on 11 August, 1911, instituted claim and delivery in enforcement of the demand, and under process seized a considerable lot of personal property, owned and in the possession of the principal defendants. Thereupon, and on the day the action was instituted, G. H. Wood, having a mortgage on the property, duly registered in said county on 7 June, 1911, on application, was allowed to intervene and claim the property under said mortgage. Plaintiff and the intervenor, with the assent of defendants, thereupon entered into an agreement in the cause, Exhibit (B), by which the property was turned over to the mortgagee for purpose of sale under the mortgage, and $100 of proceeds were paid into court "to abide the results of the cause as to the claim of said G. H. Wood." Judgment was entered that plaintiff was owner of the property seized, to the extent of the $84.68, subject to the rights of the mortgagee. On question reserved, the court, being of opinion that the mortgagee had the superior claim, entered judgment in his favor, and plaintiff excepted and appealed.

(173) As heretofore stated, the present plaintiff, the tax collector of Elizabeth City, has been given all the rights and remedies for collection of taxes possessed by the sheriffs under the general revenue laws of the State, and it may be well to note that this right of collecting taxes is a statutory right, and, as a rule, the collecting officer is confined to methods which the statute specifies. True, we have held, in this State, that where these methods are unavailing or inadequate, the authorities are allowed to resort to a civil action, a modification of the more general principle, applied and sustained in a forcible opinion

by the present *Chief Justice* in *Guilford v. Georgia,* 112 N. C., 34, though in that case decided intimation is given that as to the executive officers and under ordinary conditions, the remedies provided by the statute must be pursued. Recurring, then, to the portions of the statute more directly relevant, it is provided by section 2863 that taxes shall not be a lien on personal property except where otherwise provided by law, but from a levy thereon. By section 2886 all personal property subject to taxation shall be liable to be seized and sold for taxes, etc., and all transfers of personal property by any taxpayer, made after his taxes are due, by way of gift or mortgage, or deed of trust, or of assignment for creditors, or bequest by will, or any other way or for any other purpose than a *bona fide* sale for value in the ordinary course of dealing, shall be null and void as to said taxes and shall have no effect upon the rights, powers, and duties of the sheriff to levy upon and sell such property for such taxes, provided such levy be made within sixty days after such transfer.

By chapter 207, Private Laws 1911, section 2863 of the Revisal is amended as follows: *"Provided,* that no mortgage or deed of trust executed upon personal property shall have the effect of creating a lien thereon superior to the lien acquired by a subsequent levy upon said property for the payment of the State, county, and municipal taxes assessed against the same; but the sheriff or other tax collector levying upon such property, for the purpose of collecting the taxes due thereon, shall give due notice to the mortgagee or trustee of such property of the amount of such taxes at least ten days before the sale of the same, and such trustee or mortgageee shall have the right to pay said taxes and the costs incident to making said levy, when the sheriff or (174) tax collector shall release the same to such trustee or mortgagee, and the amount so paid by said trustee or mortgagee shall constitute a part of the debt secured in said mortgage or deed of trust."

There is no doubt as to the power of the General Assembly to enact legislation of this character, certainly as to mortgages and deeds of trust, etc., made subsequent thereto (37 Cyc., p. 714); and a proper consideration of these and other sections of the Revisal bearing on the subject leads to the conclusion that, while the Legislature intended to make the claim for taxes, in the cases and to the extent specified, a superior claim on personal property, such claim, as a rule, could only be made efficient by proper levy on same.

A different rule exists in reference to real estate. By section 2864 the tax list is made a lien on all the real estate of a taxpayer within the county from and after June 1 in every year, and, in addition to the remedies by summary process, provides in certain cases for a foreclosure

of the lien by action (Revisal, section 2866); but, as heretofore stated, there is no such provision as to personal property, and the only remedy expressly given is that by seizure and sale, and in the absence of some exceptional conditions rendering such remedies inadequate and unavailing, an executive officer, holding the tax list and charged with the duty of collection, is confined to this. A tax list here is in the nature of an execution, and, until levy made, an officer may not resort to process of claim and delivery in enforcement of his claim. 34 Cyc., 1392, citing *Muchasen v. Lane,* 82 Ill., 117.

There were no exceptional circumstances present in this case justifying a departure from the ordinary methods, the principal defendants being in full and undisputed possession of the property as owners, and we would feel constrained to dismiss the action but for the fact that judgment by default, and without exception, has been entered establishing plaintiff's ownership, and the mortgagee having intervened, the parties treating the proceedings as a proper levy, have submitted the question of the superiority of their claims on the facts heretofore stated.

(175) It was chiefly urged for the mortgagee that the plaintiff had lost his rights as collecting officer because he had accounted to the corporation for the taxes claimed, but authority with us is against defendant's position. *Jones v. Arrington,* 94 N. C., 541. In that case it was held in effect that when a sheriff or collecting officer had advanced the amount of taxes in settlement with the county, this would not constitute a payment, and that the remedies provided by the law for the enforcement of collections would still exist. To the extent, then, that the plaintiff retained the statutory powers conferred for this purpose, his claim must be upheld, as we have seen he had all the rights and powers in collecting corporation taxes conferred by the general law on sheriffs.

By chapter 72, sec. 2869, "a sheriff, and in case of his death, the sureties on his tax bond, is allowed one year and no longer from the day prescribed for his settlement and payment of taxes, within which to finish the collection of all taxes." As to the taxes for 1909, the time allowed by this section had expired, and plaintiff, having no further right to enforce collection by levy as to this, his demand must fail. As to the taxes due for 1910, to wit, the sum of $41.94, the right of collection coming within the provisions of the statute, the claim to that extent must be sustained, and judgment will be entered for that amount and costs.

Judgment modified.

Cited: *Wilmington v. Moore,* 170 N. C., 53.

GEORGE W. THOMAS, ADMINISTRATOR, v. BETTIE BUNCH ET AL.

(Filed 28 February, 1912.)

1. Deeds and Conveyances—Construed as a Whole—Formal Parts—Intent.

In construing a deed the courts attach little importance to the position of its different clauses, but look to the whole instrument, without reference to formal divisions, to ascertain and effectuate the intention of the parties as gathered from every part of the deed, if it can be done by any fair and reasonable construction.

2. Deeds and Conveyances—Reservation of Life Estate—Consideration of Support—Defeasance.

A deed to lands in consideration of support by the grantees of the grantor and his wife, with a clause of defeasance to compel performance, in which "a life estate is hereby reserved by" the grantors, conveys only a remainder to the grantees upon their performance of the consideration.

3. Estates—Remainderman—Widow—Dower—Homestead—Seizin of Husband—Constitutional Law.

When the life estate is outstanding at the time of his death, the widow of the remainderman is not entitled to dower or homestead in the lands, as he was not seized thereof; and the husband must be the owner of the homestead at the time of his death, leaving a widow but no children, for the exemption of the lands from his debts inures to her benefit. Const., Art. X, sec. 5.

APPEAL from *Justice, J.*, at November Term, 1911, of BERTIE. (176)

This is a proceeding by the administrator of Charles B. Bunch to sell land for assets, and the only question presented by the appeal is the right of the widow of the intestate to dower or to a homestead in the land described in the petition.

A jury trial was waived and the following facts agreed to:

"First. That on 9 March, 1899, Asa Cooper was the owner in fee simple and in possession of the following described tract of land in Bertie County, N. C., to wit: The Asa Cooper tract of land, which is bounded by the lands of H. W. Bazemore and Mrs. J. J. Cobb, and by the public road leading from Republican Church to Windsor, and being the tract of land Asa Cooper that day was living on, and containing 40 acres, more or less.

"Second. That on the said 9 March, 1899, Asa Cooper and wife, S. A. Cooper, conveyed said land to Charles B. Bunch by deed of record in Book 94, page 397, Bertie Register of Deeds' office, a copy of which deed is annexed as part hereof.

"Third. That immediately upon the execution of the said deed Charles B. Bunch and wife moved upon said land and took charge thereof, and

in all respects cared for and supported the said Asa Cooper and his wife, S. A. Cooper, until the death of C. B. Bunch, and then his heirs at law continued to do so.

"Fourth. That Asa Cooper died on 21 June, 1906, and his wife, S. A. Cooper, died on 2 January, 1910.

"Fifth. That Charles B. Bunch died intestate and without (177) leaving any children, on 29 December, 1909, leaving his wife, Hattie I. Bunch, him surviving.

"Sixth. That Hattie I. Bunch does not own any real estate of any kind and has no homestead of her own.

"Seventh. That George W. Thomas has been regularly appointed and is now the duly qualified administrator of all and singular the rights and credits, goods and chattels of the said Charles B. Bunch.

"Eighth. That the personal property of the said Charles B. Bunch has been exhausted in the payment of his debts, and there is indebtedness still outstanding, and for the payment of which it will be necessary to sell the land of the said Bunch.

"Ninth. That Hattie I. Bunch claims to own and demands a homestead in the said tract of land, and in the surplus arising from the sale of the same, which is under mortgage, and she consents that the administrator sell said land for assets to pay said debts, costs, and charges of administration, and asks for a homestead in the excess.

"Tenth. That if the said Hattie I. Bunch is not entitled to a homestead in said land, she demands her dower therein, and she consents to a sale and to have the value of her dower calculated and paid to her. Her age is 28 years.

"Eleventh. That James H. Bunch, William Bazemore, Mattie Bazemore, and Thomas H. Bazemore are the heirs at law of Charles B. Bunch."

The deed referred to is dated 9 March, 1899, and the grantors therein are Asa Cooper and S. A. Cooper. It conveys the land described in the petition to Charles B. Bunch and his assigns, and, after the description of the land, contains the following clause:

"The terms and conditions of this deed are as follows: That the said Charles B. Bunch obligates on receipt of this deed executed to him by said Asa Cooper and wife, S. A. Cooper, to support and care for them during their natural lifetime, and a life estate is hereby reserved by said Asa Cooper and S. A. Cooper, his wife. Should the said Charles B. Bunch, party of the second part, fail to comply with the terms of this deed, then the same shall be null and void."

The *habendum* follows, and then covenants of seizin and (178) warranty.

His Honor held that S. A. Cooper was entitled to a life estate in said land under said deed, and as she was living at the time of the death of Charles B. Bunch, he was not seized of said land, and his widow was not entitled to dower or a homestead therein, and she excepted and appealed.

Winston & Matthews for appellant.

Pruden & Pruden, S. Brown Shepherd, and Gillam & Davenport for appellee.

ALLEN, J. The right of the widow of Charles B. Bunch to dower or to a homestead depends on the estate and interest in her husband at the time of his death.

If there was an outstanding life estate, there was no seizin in him which would entitle her to dower, *Houston v. Smith,* 88 N. C., 313; *Barnes v. Raper,* 90 N. C., 190; *Redding v. Vogt,* 140 N. C., 562; nor was he entitled to a homestead in the remainder, *Murchison v. Plyler,* 87 N. C., 79; *Stern v. Lee,* 115 N. C., 427; and it is only in the contingency that the husband is the *owner* of a homestead at the time of his death, leaving a widow but no children, that the exemption from debts inures to her benefit. Const., Art. X, sec. 5.

The decision of this appeal depends, therefore, on the construction of the deed from Asa Cooper and S. A. Cooper to Charles B. Bunch, and if, by correct interpretation, a life estate is reserved therein to S. A. Cooper, the widow of Bunch would not be entitled to dower or a homestead, because S. A. Cooper was living at the time of the death of Bunch, and his estate would be in remainder.

It is true that under the modern rule of construction, little importance is attached to the position of the different clauses in a deed, and the courts look at the whole instrument, without reference to formal divisions, in order to ascertain the intention of the parties. *Gudger v. White,* 141 N. C., 512; *Featherstone v. Merrimon,* 148 N. C., 205; *Triplett v. Williams,* 149 N. C., 396; *Real Estate Co. v. Bland,* 152 N. C., 231; but rules of construction can only be resorted to when the meaning is doubtful and each and every part of the deed must be given effect, if this can be done by any fair or reasonable con- (179) struction. *Davis v. Frazier,* 150 N. C., 451.

Language of similar import and almost identical with that in the deed before us was considered in the case of *In re Dixon,* 156 N. C., 26, and it was there held that the grantee took an estate in remainder after the death of the husband and the wife. In this deed the language is, "and a life estate is hereby reserved by said Asa Cooper and S. A. Cooper, his wife," and in the deed in the *Dixon case,* "I, the said R. A. L. Carr,

reserving a life interest for myself and wife, Sarah A. L. Carr, in the above described land," and it was said in the latter case: "The reservation in the deed is valid, and said deed did not become effective till after the death of the grantor and his wife"; and again: "Construing the whole deed as written, there is here a reservation of the whole for the life of the grantor and his wife, with remainder in fee to their daughter."

If there is any difference in the meaning of the clauses in the two deeds, there is stronger reason for saying that the deed in this case conveys an estate in remainder to the grantee, because in the deed in the *Dixon case* the husband alone was the grantor, and a life *interest* was reserved, while in this the husband and wife are the grantors, with the reservation of a life *estate.*

The provision for support is in consideration of the conveyance of the remainder, and the clause of forfeiture was inserted to compel performance of the obligation.

We conclude that a life estate was reserved to Asa Cooper and S. A. Cooper, and that Charles B. Bunch was, at the time of his death, the owner of an estate in remainder, the said S. A. Cooper being then alive, and that the widow of said Bunch is not entitled to dower or a homestead therein.

Affirmed.

Cited: Baggett v. Jackson, 160 N. C., 31; *Jones v. Sandlin,* 160 N. C., 155; *Beacom v. Amos,* 161 N. C., 366; *Brown v. Brown,* 168 N. C., 14.

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(180)

H. E. TRIPP ET AL. v. THE COMMISSIONERS OF PITT COUNTY ET ALS.

(Filed 28 February, 1912.)

1. Stock Law—Added Territory—Boundaries—Interpretation of Statutes.

Chapter 702, Laws of 1911, prescribes a well-defined line, all west of which is to be added to the stock-law territory of Pitt County, which, with the lines of such territory theretofore existing by chapter 386, Laws 1901, makes complete boundary lines to the old and new territory, and includes stock-law districts of inconsiderable area already established by the Legislature: *Held,* chapter 702, Laws 1911, enlarging "the present stock-law territory of Pitt County," refers only to the territory embraced in chapter 386, Laws 1901, entitled "An act to consolidate and enlarge the stock-law territory of Pitt County."

2. Stock Laws—County Commissioners—Appointment of Fence Commissioners—Collateral Attack—Injunction—Interpretation of Statutes—Officer de Facto.

The action of the board of county commissioners in appointing certain fence commissioners at a special meeting, without giving the public notice required by Revisal, sec. 1317, cannot be collaterally attacked, or called in question in proceedings to enjoin them from acting as such; and the fence commissioners acting under the appointment are officers *de facto*.

3. Stock Law—County Commissioners—Fence Commissioners—Irregularity of Appointment—Quorum—Valid Acts.

The action of a majority of the board of fence commissioners is valid, and the validity thereof is not affected by the irregularity of the appointment of a minority number, when all concur.

4. Stock Laws—Uniformity of Penalties—Interpretation of Statutes.

The small areas of stock-law territory in Pitt County included in the territory added by chapter 702, Laws 1911, to that described in chapter 386, Laws 1901, have the same penalties imposed for the infraction of the law as those prescribed by chapter 386, Laws 1901, being "the same as those in the Revisal," and hence it is not indefinite or uncertain what penalties would apply.

5. Stock Laws—County Commissioners—Fence Commissioners—Trespass—Interpretation of Statutes.

The Fence-law Commissioners of Pitt County, proceeding under chapter 702, Laws 1911, in the added stock-law territory, to grade, build, and widen the public road along which the new boundary fence runs, in accordance with the provisions of chapter 714, Laws 1905, and chapter 386, Laws 1901, are not trespassers in so doing.

6. Stock Laws—Assessments—Vote of People—Constitutional Law.

Laying an assessment for building a stock-law fence in territory where the law is effective is not taxation requiring its submission to a vote of the people of the district, especially where the money for the purpose is in hand from other lawful sources; and, in this case, being for the future repair of the line in common with other fencing required, an assessment may be laid under chapter 386, Laws 1901.

7. Stock Laws—Building Fences—Interpretation of Statutes.

The Fence Commissioners of Pitt County are authorized by chapter 386, Laws 1901, to use convicts in building fences on the line of the territory added by chapter 702, Laws 1911.

8. Stock Laws—Building Fences—Assessments—Interpretation of Statutes—Constitutional Law—Referendum.

The courts will construe a statute to ascertain as far as possible the intention of the Legislature, and there being nothing in the Constitution, Art VII, sec. 7, which requires that an assessment in stock-law territory for the purpose of fencing be referred to a vote of the people, it is not required of chapter 386, Laws 1901, that this should have been provided for in order to sustain its validity. The Referendum discussed.

(181) APPEAL by both parties from an order of *Foushee, J.*, rendered 15 February, 1912, at chambers; from PITT.

W. T. Evans and Harry Skinner for plaintiffs.
F. G. James & Son and Albion Dunn for defendants.

CLARK, C. J. The General Assembly of 1911 enacted chapter 702, "To enlarge the present stock-law territory of Pitt County." Section 1 provides that "the following prescribed line shall constitute a part of the boundary line of the stock-law territory of Pitt County." Then follows a well-defined description of the only line (which is about 14 miles long), and it is added: "All of the territory *west* of said boundary line not included within the stock-law territory shall be established and added to and consolidated with the present stock-law territory of said county." The new territory has only this one boundary, as all the other boundaries of that territory are those which were the eastern boundary of the "stock-law territory" created by chapter 386, Laws 1901, with which it was consolidated. The old line is a crescent and the
(182) new line is like the chord of a bow, the space inclosed thereby being the added territory.

Section 2 provides that "On and after 1 January, 1912, the territory so becoming a part of the now existing stock-law territory of Pitt County shall be subject to all the provisions of the law that now applies or may hereafter apply to the stock law territory of said county."

Prior to 1901 there were several small stock-law inclosures in Pitt County. The Legislature that year passed chapter 386, entitled "To consolidate and enlarge the stock-law territory of said county." The territory so styled "The stock-law territory of Pitt County" is the only one which, in the language of chapter 702, Laws 1911, could be "enlarged" by this newly added territory, for it is the only stock-law inclosure which the newly added district would touch and of which the prescribed line could become "a part of its boundary line," and the only one to which (in the language of the act) it could be "added to and consolidated with the present stock-law territory of said county." Said "stock-law territory of Pitt County," as it is styled in said chapter, Laws 1911, is also the only stock-law territory which would come within the description of chapter 702, Laws 1911, "*west* of said boundary line."

The "stock-law territory" described by that term in Laws 1901, ch. 368, covers something over four townships and lies wholly on the south side of Tar River and is the only considerable body of stock-law territory in Pitt County. It touches and reaches halfway round the new district

added by the act of 1911, which therefore, as already said, required only one boundary, the 14-mile line above referred to. The other stock-law districts in Pitt County are inconsiderable in area and are not contiguous to the new district nor to each other. They are:

1. Part of Belvoir Township on the other or north side of Tar River, and does not lie *"west"* of the new boundary line, as required by the act of 1911.

2. A narrow strip about 2 miles wide lying on the south side of the river and running down to the Beaufort line and *east* of the new boundary.

3. A small territory around each of the towns of Ayden and Winterville, but these are within the limits of the new territory and themselves fall within the terms of section 2 of the act of 1911. (183)

It is thus plain that chapter 702, Laws 1911, "To enlarge the present stock-law territory of Pitt County," refers to, and can only refer to, "the territory" embraced in chapter 386, Laws 1901, entitled "To consolidate and enlarge the stock-law territory of Pitt County."

This action is brought by three plaintiffs who aver that they own land embraced within the district to be added to the aforesaid stock-law territory by the act of 1911. They seek to enjoin the commissioners of Pitt County and the fence commissioners from building a fence along said boundary described in the act of 1911. Owing to the great curve in the eastern boundary of the "stock-law territory" embraced in the act of 1901, ch. 386, it is averred that the fence hitherto kept up on said eastern boundary is some 80 miles long. The county commissioners in their affidavit aver that the new 14-mile fence required by the new act relieves them from at least 50 miles of fence—that is, that the old eastern boundary was at least 64 miles long. This act of 1911 was doubtless passed with some view to that economy.

The plaintiffs ask the restraining order on the following grounds:

1. That the appointment of the fence commissioners by the county commissioners was illegal.

The facts are that at the regular meeting on the first Monday in January, 1912, the county commissioners elected three new fence commissioners, two of the old commissioners holding over, and the board of county commissioners adjourned "subject to the call of the chairman." Two of the fence commissioners failing to qualify, the county commissioners were called in session in an adjourned meeting and two others were elected in their places. The plaintiffs contend that said meeting was illegal, and therefore the board of fence commissioners is an illegal body, because a special session of the county commissioners could not be

held except after public notice in the manner required by Revisal,
(184) 1317. The object of this provision is to protect the county against excessive per diem on the part of the county commissioners. These fence commissioners were *de facto* officers, recognized by the electing body as such, and their title cannot be called in question in this injunctive proceeding and in this collateral way. Besides, three of the commissioners have an unquestioned title, and their action would be valid. *Conference v. Allen,* 156 N. C., 528.

2. The plaintiffs contend that the act is invalid because it is indefinite and uncertain what penalties would apply, because there are other inclosures in Pitt County of stock-law districts.

But, as we have seen, the "stock-law territory" to which this new territory is added is that described in chapter 386, Laws 1901, and the penalties therein prescribed are "the same as those in the Revisal," as indeed are also the penalties in the stock-law district in Belvoir Township north of Tar River and nearly so those in the district east of the new boundary. The penalties in the two little inclosures around Ayden and Winterville are slightly different, but they are inside the territory newly added, and therefore would come within the terms of the act of 1911 which makes applicable the penalties in the other stock-law districts, which, as is above said, are those of the Revisal. Besides all this, the penalties to be imposed are not a matter which arises in this proceeding, which is to restrain the erection of the stock-law fence. That matter would properly come up in any proceeding to impose a penalty.

3. The plaintiffs further contend that the county commissioners have no right to trespass on private property to erect the fence.

The county commissioners are grading and building and widening the public road along which the new boundary fence runs. And they are erecting the fence on the territory of said road. The road is being graded by virtue of chapter 714, Laws 1905, which provides how the right of way shall be acquired, as also does the act of 1901, ch. 386, in regard to the fence. Even if this last did not apply, it would be the duty of the commissioners to build the fence under the provisions of the general law. *Busbee v. Commissioners,* 93 N. C., 143.

4. The plaintiffs further contend that the act is unconstitutional because the tax for building the fence is laid without being sub-
(185) mitted to a vote of the people.

It has been settled by repeated decisions of this Court (*Busbee v. Commissioners, supra,* and cases there cited), that an assessment for the building of a stock-law fence is not a tax which requires a referendum vote by the people. Besides, it is not contradicted that no assessment has been made, or is now necessary, to build this 14 miles of new

fence, because there is in hand the sum of $4,000 raised in the "stock-law territory" created by chapter 386, Laws 1901, which has been saved by it becoming unnecessary to maintain the long line of 64 miles of fence which was formerly the eastern boundary of that territory and which has now been allowed to go down. Should it become necessary in the future to lay an assessment, it would be laid under the act of 1901, ch. 386, for the repair of this 14-mile fence in common with the other fencing required for said territory, or it could be laid under the general statute. *Busbee v. Commissioners, supra.*

5. The last ground of the plaintiffs is that the county commissioners had no right to use the county convicts to build said fence.

It appears that the county convicts are grading the county road, and that county commissioners have hired them out to the fence commissioners to put up this fence alongside the road, as they are fully authorized to do so by virtue of chapter 87, Laws 1907.

This is the not unusual case where those living within territory to which the stock law is applied are more or less divided in regard to the advisability of a stock law. Very often the General Assembly in passing such acts submit, as in the general act in the Revisal, the question of the acceptance of the act by a referendum to the people. In twenty-five States there are provisions which give the people a right to call for a referendum or a popular vote to decide whether any act passed by the Legislature shall be approved or not, at the ballot box. But in this State there is as yet no such provision in the Constitution, except as to taxes in certain cases (Const., Art. VII, sec. 7), nor by statute; and whether an act of this kind shall be submitted to the people, or not, is as yet left to the discretion of the General Assembly. The (186) courts have no power to require that an act be submitted to popular approval of the people interested, by a referendum. The courts all hold that assessments for building stock-law fences, paving streets, and the like, do not come within the constitutional provision, Article VII, sec. 7, which requires a submission to a referendum. *Cain v. Commissioners,* 86 N. C., 8, and cases citing it in Anno. Ed.; *Raleigh v. Peace,* 110 N. C., 32. The courts are required to hold every act constitutional unless as the United States Supreme Court says it is unconstitutional "beyond all reasonable doubt." *Ogden v. Saunders,* 12 Wheaton, 213. It is the bounden duty of the courts, also, not only to hold an act valid, if by any reasonable construction it can be so held, but they should give to every statute a reasonable construction and effectuate as far as possible the intention of the Legislature.

However desirable it might be that there should have been a referendum vote on this measure by the people of the territory added by the

act to the "stock-law territory of Pitt County," the Legislature did not see fit to so order, and the Court has no power to change the action of the Legislature.

The injunction as to the county commissioners was properly dissolved, as should also have been done in regard to the fence commissioners.

Modified and affirmed.

Cited: Evans v. Forbes, post, 586.

J. A. NEWTON ET AL. V. SCHOOL COMMITTEE OF CITY OF CHARLOTTE ET AL.

(Filed 28 February, 1912.)

1. Cities and Towns—School Committees—Discretionary Powers—Aldermen —Supervision.

The Board of Aldermen of Charlotte have no supervisory power of the school committee of that city in selecting a site, etc., for school purposes. *School Commissioners v. Aldermen,* post, 191, cited and applied.

2. Cities and Towns—School Committees—Discretionary Powers—Power of Courts—Abuse of Discretion.

The courts may not interfere with discretionary powers conferred on school committees in their administration of school affairs, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of the discretion conferred.

3. Same—Evidence.

In this proceeding involving the right of the school committee of the city of Charlotte to select and build upon a certain site selected for public school purposes, it is held, upon the affidavits tending to show the site complained of was properly selected, that the court cannot inquire into the discretion of the committee in selecting it, there being no sufficient evidence that this discretion was unreasonably or arbitrarily exercised.

(187) APPEAL from MECKLENBURG by plaintiffs from an order by *W. J. Adams, J.,* 9 December, 1911.

Clarkson & Duls, E. R. Preston, and Maxwell & Kerans for plaintiff. Burwell & Cansler and Tillett & Guthrie for defendants.

HOKE, J. This was an action to restrain defendant, the Board of School Commissioners of the City of Charlotte, from the selection of a

certain school site for the Graded School District of North Charlotte. There was judgment dissolving restraining order, and plaintiffs, citizens and taxpayers of the district, excepted and appealed, assigning for error, first, that the power of supervising the action of defendant board and of ultimate decision in the premises was vested by law in the board of aldermen of the city; second, that if vested in defendant board, they had selected a site so unsuitable and in such flagrant disregard of the rights and interests of the patrons of the school as to render their action illegal and void.

On appeal by the Board of Aldermen of the City of Charlotte in a case just decided, and for the reasons therein stated, the first exception must be resolved against the plaintiffs, and this being true, and on the facts as they appear in the present record, we are of opinion that like decision must be made as to plaintiffs' second position.

In numerous and repeated decisions the principle has been (188) announced and sustained that courts may not interfere with discretionary powers conferred on these local administrative boards for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of dicretion. *Jeffress v. Greenville,* 154 N. C., 499; *Board of Education v. Board of Commissioners,* 150 N. C., 116; *Rosenthal v. Goldsboro,* 149 N. C., 128; *Ward v. Commissioners,* 146 N. C., 534; *Small v. Edenton,* 146 N. C., 527; *Tate v. Greensboro,* 114 N. C., 392; *Brodnax v. Groom,* 64 N. C., 244.

In some of the opinions decided intimation is given that in so far as the courts are concerned the action of these administrative boards must stand unless so arbitrary and unreasonable as to indicate malicious or wanton disregard of the rights of persons affected. It is undesirable and utterly impracticable for the courts to act on any other principle. Speaking to this question in *Ward v. Commissioners,* our present *Chief Justice* quotes with approval from the opinion in *Brodnax v. Groom, supra,* as follows:

"In *Brodnax v. Groom,* 64 N. C., 244, *Pearson, C. J.,* discussed this subject, and said: 'The case before us is within the power of the county commissioners. How can this Court undertake to control its exercise? Can we say such a bridge does not need repairs, or that in building a new bridge near the site of an old bridge it should be erected, as heretofore, upon posts, so as to be cheap, but warranted to last some years; or that it is better policy to locate it a mile or so above, where the banks are good abutments, and to have stone pillars, at a heavier outlay at the start, but such as will insure permanence and be cheaper in the long run? In short,' the Court continued, 'this Court is not capable of controlling the exercise of power on the part of the General Assembly or of the

county authorities, and it cannot assume to do so without putting itself in antagonism as well to the General Assembly as to the county authorities and erecting a despotism of five men, which is opposed to the fundamental principles of our Government and the usages of all times past. For the exercise of powers conferred by the Constitution the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several (189) counties. This Court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the Government or upon the county authorities.' "

Considering the evidence presented in the light of these authorities, the court below has clearly made correct decision on the rights of these litigants. While the plaintiffs, acting no doubt under full belief that these rights and interests have been entirely disregarded, have filed strong affidavits tending to show that another place for a school site should be selected, and in fact that in the present state and placing of the population there should be two schools maintained in the district. There is satisfactory evidence on part of the defendants tending to show that the site determined on is near the physical center of the school district; that it is a most attractive site, having desirable elevation and affording ample space for the buildings for the school and playgrounds for the children.

Among other affidavits in support of their position, defendants offer that of Alexander Graham, Esq., the superintendent of the city schools. The affiant, who has now held this position for the past twenty-three years and whose administration has been again and again approved by his associates and fellow-citizens, makes oath as follows: "That he was in attendance, in his capacity as superintendent of the schools, at the several meetings of the board of school commissioners, when the location of the school spoken of in the complaint was determined by these commissioners, and he verily believes that in the selection of this site they, and each one of them, were actuated solely by their interest in the promotion of the cause of education in the city of Charlotte, and the proper use of the fund which the people have put at the disposal of the board for the purpose of buying sites for buildings and erecting houses thereon. He further swears that he is acquainted with the other sites for buildings selected by the board, and he verily believes that each one of these sites is the proper site for school buildings, and will serve the community as proper sites for schools. He further swears that he is familiar with the other sites mentioned in the com- (190) plaint, and which the plaintiffs in this action allege should have

been selected, instead of the one offered by the Pegram-Wadsworth Land Company, and he expresses the opinion that the board, in rejecting each one of these sites, did that which was best for the interests of the public and the children of that vicinity. He further swears that he believes that the best interests of the administration of the fund of the city will be promoted by consolidating, as much as possible, those few to be well equipped, and, at the same time, to be so located as to be convenient, as far as they may be, to the children of the different portions of the city, and that these selections of sites, in his opinion, should be made and, as he believes, have been made thus far, by the board with a view to the convenience and interest not only of the present generation, but of those who are to come after, and who will hereafter attend these schools. He further swears that before the Pegram-Wadsworth Land Company had made any offer whatever in regard to the site in question, that he had looked over this school district with a view to determining, in his own mind, what would be the best location for a school building for these two wards, and that he had selected the very site that has been selected by the board, his impression being that the site must be purchased and would not be donated."

In view of this and other supporting evidence, we think his Honor might well hold, as he did in his judgment, "That the board of school commissioners has fairly and properly exercised the discretion vested in the board in respect to the selection of the site for the school building referred to in the complaint." And certainly there is nothing in the record to justify the courts in undertaking to disturb the conclusion they have reached.

Affirmed.

Cited: *R. R. v. Oates,* 164 N. C., 175; *Luther v. Comrs., ib.,* 242; *Munday v. Newton,* 167 N. C., 657; *Edwards v. Comrs.,* 170 N. C., 451.

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(191)

SCHOOL COMMISSIONERS, CITY OF CHARLOTTE, v. BOARD OF ALDERMEN AND TREASURER, CITY OF CHARLOTTE.

(Filed 28 February, 1912.)

1. Municipalities—Discretionary Powers—Mandamus—Practice.

Mandamus does not lie to enforce the exercise of a discretionary power vested in the officials of a municipal corporation by the Legislature, in any given or specified way.

2. Statutes—Interpretation—Language Employed—Plain Intent.

When the language of a statute is plain and free from ambiguity, expressing a single, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly.

3. Same—Municipalities—Aldermen—School Board—Discretion.

A charter of a city which provides for the maintenance of public schools, creating a board of commissioners with exclusive control, separate from the board of aldermen, with ample power to purchase sites and to provide necessary school buildings and facilities; to employ teachers and fix their salaries, etc.; and, in general, to do anything that may be necessary and proper to open and conduct a sufficient number of schools to meet the needs of the scholastic population of the city, etc., leaves nothing to the discretion of the board of aldermen of the city in regard to the selection of a site for school purposes by the school commissioners of the town; and the board of aldermen are without authority to withhold from the school commissioners moneys received by them from a valid bond issue they were authorized to issue for school purposes, upon their assumption that a certain site in which the money was to be invested by the school commissioners was not one suitable for the purposes intended.

4. Statutes—Interpretation—General Intent—Particular Intent.

When a general intent is expressed in a statute, and the act also expresses a particular intent incompatible with the former, the particular intent is to be considered in the nature of an exception.

5. Same—Municipalities—School Board—Board of Aldermen—Discretionary Powers.

A general legislative power of government and control over a city given to the board of aldermen will not be so construed as to defeat the clearly expressed intention of another part of the act giving to a board of school trustees the exclusive control of schools of the city, with the power to select sites for schools therein, etc., so as to permit the board of aldermen a discretionary power to withhold moneys obtained for school purposes, or to determine whether a site selected by the school trustees was a suitable one.

6. Statutes—Interpretation—Powers Conferred—Abuse of Powers.

Conditions relevant as tending to show such a manifest abuse of discretion on the part of a board of school commissioners in the exercise of a legislative power to control the schools of a city, and to select sites and build schoolhouses thereon, as would render their action illegal, would involve the abuse of admitted powers and in no way affect the existence of the powers themselves.

(192) APPEAL from *Lyon, J.*, at January Term, 1912, of MECKLENBURG.

Action, instituted by School Commissioners of the City of Charlotte to compel the board of aldermen and treasurer of said city to turn over

to treasurer of the school board the proceeds arising from the sale of certain school bonds issued by the city of Charlotte under and by virtue of chapter 317, Private Laws 1911. On the hearing, judgment was rendered in manner and form as follows:

This cause coming on to be heard pursuant to the summons issued therein, and the court having heard and considered the pleadings in the cause and arugment of counsel: Now, therefore, upon motion of Burwell & Cansler and Tillett & Guthrie, attorneys for the plaintiff, it is adjudged that the plaintiff is entitled to have the proceeds of the school bonds referred to in the pleadings paid over to its treasurer as soon as the said treasurer shall give bond in proper form and in the amount required by the statute; and the said defendants and each of them are hereby commanded to turn over and deliver to the treasurer of the plaintiff all of the proceeds of the said school bonds now under their custody and control as soon as the treasurer of the plaintiff shall give a bond approved by the plaintiff. It is further adjudged that the plaintiff recover the costs of this action, to be taxed by the clerk of this court. Heard, considered, and decided this 24 January, 1912.

C. C. LYON, *Judge Presiding.*

Defendants having duly excepted, appealed to Supreme Court.

Burwell & Cansler and Tillett & Guthrie for plaintiffs. (193)
Chase Brenizer for defendant.

HOKE, J. Chapter 317, Private Laws 1911, conferred upon the Board of Aldermen of the City of Charlotte the power, on approval of the popular vote, to issue bonds for various purposes, not to exceed, in the aggregate, the sum of $1,065,000, and specified that a portion of these bonds, not to exceed in amount the sum of $100,000, should be known as "school bonds" and to be used for the purpose of purchasing lands for schools and of building schoolhouses for the graded schools of the city. The act also provided "that moneys arising from the sale of the bonds" should be used for no other purpose than that for which they were authorized to be issued. In taking the sense of the qualified voters, the different purposes were to be submitted as separate propositions and the votes taken in five different ballot boxes; and, in reference to the effect of the election, the act in question further provides: "If a majority of such qualified voters shall vote 'Issue' on any one or more of the five propositions submitted for issuing bonds for the purposes aforesaid, then it shall be deemed and held that the proposition

receiving a majority of such votes is favored and approved by a majority of the qualified voters of the city of Charlotte, and the board of aldermen shall cause bonds to be prepared and issued for the purposes so approved of by a majority of qualified voters of the city, and levy a tax in accordance with the provisions of this act." The measure having been approved by the popular vote, the bonds in question were issued and sold and the proceeds are now held by defendants, subject to the provisions of the law and the judgment of the court on the questions presented. It further appears that the plaintiffs, the School Board of the City of Charlotte, having made selection of certain sites for school purposes, have made demand on defendants that the fund in question be turned over to their treasurer, and defendants, the board of aldermen, professing a willingness to turn over $80,000 of said fund, the amount apportioned for four of the school sites, has refused to turn over the remaining $20,000, the amount apportioned for the public
(194) schools of North Charlotte, contending that the site selected for school purposes in that section of the city is not a suitable or proper one and that, under the charter of the city of Charlotte, and other acts relevant to the inquiry, and by reason of the powers conferred in said acts on the board of aldermen of the city, that said body must of necessity have a discretionary supervision of these matters and the ultimate power of determining whether the moneys in question shall or shall not be expended in the purchase of the site selected. If defendants are correct in their position, that they are possessed of discretionary power in the premises, the present action must fail, for it is familiar doctrine that mandamus does not lie to enforce the exercise of discretionary power in any given or specified way. *Board of Education v. Commissioners,* 150 N. C., 116; *Barnes v. Commissioners,* 135 N. C., 27; *Ewbank v. Turner,* 134 N. C., 77. Coming, then, to this the principal question presented, the revised charter of the city of Charlotte, enacted by the General Assembly in 1907, in reference to the public school system of the city and on matters more directly relevant to the inquiry, makes provision as follows:

"SEC. 193. That there shall be maintained in the city of Charlotte a system of public schools to be kept open not less than nine months in each year, without charge, for the education of the children of the said city within the ages of six and twenty-one years.

"SEC. 194. That said system of public schools shall be under the control of a board of school commissioners, composed of seventeen members, who shall be elected biennially at the general election held for mayor and other city officers, and shall hold office for two years, and until their successors are duly elected and qualified, and shall serve without compen-

sation. Any vacancy in said board of school commissioners shall be filled by an election held by said board, and the person so elected shall hold office for the unexpired term.

"SEC. 195. Said board of school commissioners shall be a body corporate and politic under the name of 'The School Commissioners of the City of Charlotte,' with all rights and powers of the school committees of the respective townships, in addition to the powers in (195) this act granted.

"SEC. 196. That the Mayor of the City of Charlotte shall be *ex officio* chairman of said board of school commissioners, and shall be entitled to vote in any of the meetings of said board only in the case of a tie; and in all meetings of said board a majority of the membership thereof shall constitute a quorum for the transaction of business.

"SEC. 197. That said board of school commissioners shall have exclusive control of the public schools of the city of Charlotte, and shall have full and ample powers to purchase sites, to provide necessary school buildings and facilities, to appoint examiners, employ teachers and fix their salaries, prescribe courses of study, and in general to do everything that may be necessary and proper to open and conduct a sufficient number of schools to meet the needs of the scholastic population of the city of Charlotte. And it shall be lawful for said board of school commissioners, in their discretion, to receive into the public schools of the city of Charlotte upon such terms as they may think reasonable any children of school age residing beyond the limits of said city."

"SEC. 201. The said board of school commissioners shall appoint a treasurer, and prescribe his duties and compensation. He shall give bond for the faithful performance of his duties in such sum as the said board may prescribe, which bond shall not be less than double the amount which may reasonably come into his hands at any one time, and with sufficient security, to be approved by said board.

"SEC. 202. It shall be the duty of the Board of Aldermen of the City of Charlotte to provide for the payment to said treasurer of all moneys collected under this act; and it shall be the duty of the Treasurer of Mecklenburg County to pay to the treasurer of said board of school commissioners, to be used in carrying out the objects of this act, all school moneys in his hands from time to time, to which the city of Charlotte shall fairly be entitled."

"SEC. 204. That the board of aldermen shall provide for all expenses arising from permanent repairs and improvements made from time to time by said board of school commissioners upon any of the buildings and premises in use for school purposes within the city of Charlotte." (196)

"SEC. 206. That the Board of Aldermen of the City of Charlotte shall levy an annual tax for the support and maintenance of said system of public schools in the city of Charlotte, which annual tax shall not exceed 20 cents on the $100 valuation of property and 60 cents on the poll."

Considering these sections, it is the well-recognized principle that the object of all interpretation is to ascertain the meaning of the Legislature as contained in the statute, and to this end resort must primarily be had to the language of the act itself. Where the statute is free from ambiguity, explicit in terms and plain of meaning, it is the duty of the courts to give effect to law as it is written, and they may not resort to other means of interpretation. The position, as applied to the present case, is very well stated in Black on Interpretation of Laws, as follows: "The object of all interpretation and construction of statutes is to ascertain the meaning and intention of the Legislature, to the end that the same may be enforced." This meaning and intention must be sought first of all in the language of the statute itself. For it must be presumed that the means employed by the Legislature to express its will are adequate to the purpose and do express that will correctly. 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. Even though the Court should be convinced that some other meaning was intended by the lawmaking power, and even though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the Legislature is the law, and the courts must not depart from it; and numerous decisions, here and elsewhere, are in approval of the principle as stated. *Kearney v. Vann,* 154 N. C., 311; *In re Applicants for License,* 143 N. C., 1; *Commissioners v. Packing Co.,* 135 N. C., 70; 11 Ency., U. S. Supreme Court, 110; Sedgwick Statutory Constructions, p. 231.

In *Kearney's case, supra,* it was held: "In interpreting a (197) statute the intent is to be first sought in the meaning of the words used, and when they are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instruments, no other means of interpretation should be resorted to"; and in the citation to Sedgwick, the author quotes, with approval, from *Fisher v. Bagort,* 2 Cranch., 399, as follows: "When a law is plain and unambigious, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

This charter of the city of Charlotte, and its framers, recognizing the prime importance of affording education to its people, have provided that these schools shall be kept open nine months in each year without charge for the children of the city, etc. For the control and management of the school system, a board of commissioners is established, to be elected by the people of the city. The mayor, while chairman *ex officio,* is not allowed to vote except in case of a tie. The aldermen are required to provide by taxation for the support of the schools and for all expenses arising from permanent repairs and improvements made from time to time by said board of commissioners; and as bearing more directly on the question, section 197 of the charter enacts: "That said board of school commissioners shall have exclusive control of the public schools of the city of Charlotte, and shall have full and ample power to purchase sites, to provide necessary school buildings and facilities, to appoint examiners, employ teachers and fix their salaries, prescribe courses of study, and in general to do anything that may be necessary and proper to open and conduct a sufficient number of schools to meet the needs of the scholastic population of the city of Charlotte."

The Legislature could not have selected language more explicit. There is no ambiguity nor room for construction, and, applying the principle, we are constrained to hold that in giving the board of school commissioners "exclusive control of the public schools of the city" and conferring upon them "full and ample power" to purchase sites, etc., and "do everything that is necessary and proper to open and conduct" these schools, the Legislature intended what this language means, and that the board of aldermen are without discretion in the (198) matter. This, in our opinion, being the clear import of the words used in the statute, the position is not affected because in other portions of the charter general powers are given to the board of aldermen, looking to the control and well-ordering of the city and its government, more particularly section 48, which provides that said board shall have control of the "finances and of the property, real and personal, belonging to the city," and confers upon said board power to provide for the city's obligations for lighting streets and constructing sewers," etc. There is no necessary conflict of powers presented in the record, and, if there were, the ordinary and accepted rule of interpretation is that when a "general intent is expressed in a statute and the act also expresses a particular intent incompatible with the former, the particular intent is to be considered in the nature of an exception. 1 Lewis Sutherland on Statutory Construction (2 Ed.), sec. 268; *Rogers v. U. S.,* 185 United States, 83; *Stockett v. Bird,* 18 Md., 484; *Dahuke v. Reoper,*

168 Ill., 102. Doubtless, as suggested by defendants, if the board of school commissioners should select a site so remote or enter on schemes so extravagant that to carry them out would threaten bankruptcy or serious embarrassment to the city in its financial and business life, these conditions would be relevant as tending to show such manifest abuse of discretion on the part of the commissioners as would render their action illegal; but these considerations would involve the abuse of admitted powers and in no way affect the existence of the powers themselves, this being the question presented here.

In view of the fact admitted, that these funds have been devoted exclusively to school purposes, and of the comprehensive and definite power expressly conferred by the law upon plaintiff board, we are of opinion, as stated, that the board of aldermen are without discretion in the matter, and the judgment of the Superior Court directing payment to plaintiff should be affirmed. *Battle v. Rocky Mount,* 156 N. C., 329.

Affirmed.

Cited: Davis v. Salisbury, 161 N. C., 61; *Cecil v. High Point,* 165 N. C., 434; *Southern Assembly v. Palmer,* 166 N. C., 81; *Bramham v. Durham,* 171 N. C., 198.

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(199)

A. L. JOYNER AND HUSBAND, ANDREW JOYNER, v. S. M. CRISP.

(Filed 6 March, 1912.)

1. Equity—Contracts to Convey—Entirety—Vendor and Vendee—Part Performance—Damages.

When upon the face of a contract to convey lands it appears that it is to be performed in its entirety, it is unenforcible as to a part, and hence the rule does not apply that where a vendor has not substantially the whole interest he has contracted to sell, the purchaser can insist on having all that the vendor can convey, with compensation for the difference.

2. Same—Title—Subject to Decree—Breach—Notice of Defect—Damages.

A contract or option made by the life tenant to convey the fee in lands of which the remainder is in her children, made subject to a decree to be obtained in court confirming the fee in her and ordering the conveyance thereof to be made to the vendee, is unenforcible, and as the vendee has enterd into the contract with notice of the defect in the vendor's title, he cannot recover any damages he may have sustained by reason of the breach.

JOYNER *v.* CRISP.

APPEAL from *Whedbee, J.*, at November Term, 1911, of PITT.

The action was brought by the plaintiffs to have set aside and canceled upon the ground of fraud a certain paper-writing, or contract, in reference to the selling of land entered into on 15 September, 1910, between Alice Lee Joyner and her husband, Andrew Joyner, and S. M. Crisp.

The defendant, among other things in his answer, set up a counterclaim in the nature of a cross-action, and asked for a decree compelling the specific performance of the said contract upon the part of the plaintiffs. The following deed or paper-writing is the one referred to in the cross-action:

This indenture, made this 15 September, 1910, by and between Alice Lee Joyner and husband, Andrew Joyner, of the county of Guilford and State of North Carolina, parties of the first part, and S. M. Crisp, of the county of Pitt and State of North Carolina, party of the second part:

Witnesseth, That the said parties of the first part, for and in consideration of the sum of two hundred lollars ($200) to them paid by the party of the second part, the receipt of which is hereby acknowledged, hereby agree to sell and convey by good and sufficient deed in fee simple to the party of the second part, at his option, the follow- (200) ing described land, to wit:

Situate and being in the county of Pitt, in Falkland Township, known as the John Peebles farm, and bounded as follows: on the north by Tar River, on the east by the lands known as the Hearne lands, now owned by O. L. Joyner and Mrs. Corbett, continuing east and southeast along the line of the John Randolph lands; thence west, adjoining the lands of Walter Corbett, until the line of what is known as the old William Peebles eastern boundary is reached; thence north along this line and that part of the William Peebles' line known as the Windom land; thence along this line north to its northwestern corner; thence west along the Windom line to a small branch at the western corner of the Windom line; thence to the line of the R. R. Cotten land; from thence north along said Cotten's line, known as the Southwood farm, to the main road leading from Falkland to Greenville; thence across said road north along said Cotten's line to Tar River; containing by estimation seven hundred and twenty (720) acres.

This option is to remain in force for ninety days or until such time as the parties of the first part can obtain by special proceedings in the Superior Court of Pitt County a judicial decree confirming to the party of the second part a fee simple title. Should the said party of the second

part fail to avail himself of said option, upon the securing of this judicial decree at or near the time specified, then this agreement shall be void; but in case the said party of the second part shall tender to the parties of the first part, or to the trustee appointed by the court in the judicial decree heretofore mentioned, the sum of eight hundred dollars ($800) in cash and eight notes of two thousand dollars ($2,000) each, with interest, payable annually, on each note, at 6 per cent, the said notes, with interest each year on the unmatured notes to be due and payable as follows, respectively: January first of the years 1912, 1913, 1914, 1915, 1916, 1917, 1918, and 1919, said notes to be secured by a proper and sufficient lien upon the said land for the purchase money, as the law provides, or as may be agreed upon by the parties hereto, or provided in the judicial decree above referred to.

(201) Upon the performance of the above stipulations by the party of the second part, the parties of the first part will agree to execute in their own proper persons and by the decree of the Superior Court a deed in fee simple to the said tract of land as described above, together with all the appurtenances thereunto belonging.

The said parties of the first part covenant with the said party of the second part that the said lands are free from all encumbrances, except such as will be removed by the judicial decree above referred to, and that they, in addition to said judicial decree, will provide to warrant and defend the title to the same against the claims of all persons whatsoever.

In testimony whereof, the parties of the first part have hereunto set their hands and seals, the day and year first above written.

ALICE LEE JOYNER (SEAL).
ANDREW JOYNER (SEAL).

Filed 1 April, 1911.

A. T. MOORE, *Deputy C. S. C.*

His Honor gave judgment upon the pleadings in favor of the plaintiffs, and dismissed the cross-action. On this judgment the defendant appealed.

Jarvis & Blow, S. J. Everett, Albion Dunn for plaintiff.
Moore & Long and F. G. James & Son for defendant.

BROWN, J. In the view we take of this case, it is unnecessary to consider the first exception of the defendant, in respect to the refusal of the court to make one O. L. Joyner and others parties to the action. If the contract is one which a court of equity will not require to be specifically performed, then a defect of parties is of no material matter.

His Honor ruled that the contract is one upon its face with which the plaintiffs cannot comply, and, therefore, a court of equity will not attempt to enforce it, and consequently in respect to a decree compelling partial performance, as asked by the defendant, his Honor was of opinion that the contract was intended as an entirety, and must stand or fall as such, and that the court will not under the circumstances compel partial performance of the contract and require abatement of the price. (202)

The facts are, as appears by the pleadings, that the property in question, known as the Peebles place, belonged to the *feme* plaintiff for her life, and after her death to her children, some of whom are minors.

At the time the contract referred to was entered into between the plaintiffs and the defendant, the defendant admits he knew the status of the title, and there is nothing in the pleadings themselves which indicates, or even alleges, that any imposition was practiced upon the defendant, or that he entered into this contract except with his eyes open.

The contract upon its face indicates plainly that it does not lie within the power of the plaintiffs of their own will to comply with it. It appears upon its face that the plaintiffs own practically nothing but a life estate, and that the only method to carry out the contract was by appealing to the judicial tribunal to decree a sale of the infants' estate.

The following excerpt from the contract is plainly indicative that resort to a judicial tribunal was absolutely essential to its performance, viz.: "This option is to remain in force for ninety days, or until such time as the parties of the first part can obtain by special proceedings in the Superior Court of Pitt County a judicial decree confirming to the party of the second part a fee-simple title." Again, "Upon the performance of the above stipulations by the party of the second part, the parties of the first part will agree to execute in their own proper persons and by the decree of the Superior Court a deed in fee simple," etc.

The plaintiffs in this case had no power to enter into a contract to sell their children's land, and a mere promise to resort to a court for the purpose of decreeing a sale of it cannot possibly be enforced, for it is beyond the power of the plaintiffs to predicate what the judgment of the court may be.

Upon this principle it is held that a party cannot recover upon a contract wherein a guardian, who owned certain interest in land of which his ward was part owner, agreed to institute and to carry through court proceedings necessary to the consummation of a sale or exchange of such property. *Zander v. Feely,* 47 Ill. App., 660; *LeRoy v. Jacobosky,* 136 N. C., 444.

There have been cases where guardians have entered into such contracts, and upon failure to perform them have been held liable in damages personally. *Mason v. Waitt,* 4 Scam., 127, and *Mason v. Caldwell,* 5 Gilman, 196. But we find no instance where such contract has been specifically performed by decree of court, unless it was to the ward's interest.

In regard to the contention that the defendant is entitled to the partial performance and conveyance of the life estate, and damages in the way of abatement of the price, it may be said that we recognize the general rule that where the vendor has not substantially the whole interest he has contracted to sell, yet the purchaser can insist on having all that the vendor can convey, with compensation for the difference.

But in this case it is apparent on the face of the contract that it was to be performed as a whole—stand or fall as an entirety—and, therefore, it cannot be specifically enforced as to part.

It is admitted by the defendant in his answer that he knew that the land in fee belonged to the plaintiffs' children. It seems to be well settled that the rule that when a person makes a contract for the sale of real estate in which he has only limited interest, he may be compelled in equity to convey as much of the property as lies in his power to convey, with a deduction from the agreed price, does not apply where the purchaser at the time of the sale had notice of the defect in the vendor's title. *Knox v. Spratt,* 23 Fla., 64; 26 Am. & E. Enc., 84.

For the reasons given, we think the contract is one which cannot be specifically performed, nor can the defendant recover damages for a failure on the part of the plaintiff to perform it. The judgment of the Superior Court is

Affirmed.

Cited: *Warren v. Dail,* 170 N. C., 411.

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(204)

VIOLA BODDIE v. V. N. BOND.

(Filed 6 March, 1912.)

1. Wills—Devise—Description—Parol Evidence.

A devise to the wife of "the house where we now live, with all the outhouses, embracing the peach and apple orchard," etc., is a sufficiently definite description to pass title to the property and permit the reception of parol evidence to fit the description to the land intended by the devise.

2. Deeds and Conveyances—Boundaries, Changes—Parol Evidence.

Boundary lines of lands may not be changed by evidence of a parol agreement, except where contemporaneously with the execution of the deed the physical boundaries are actually run for the purpose of making the deed and are thereby given a different placing. *Boddie v. Bond*, 154 N. C., 359, cited and applied.

3. Same—Estoppel.

Under ordinary circumstances, parties are not estopped by their parol agreement fixing the boundaries of lands at a place different from that shown in their deeds theretofore executed. *Hanstein v. Ferrall*, 149 N. C., 240, cited and distinguished.

4. Same.

The defendant having bought lands adjoining those of the plaintiff, sought to estop the plaintiff from claiming the division line given in her deed, by her acts and conduct at a subsequent time when the defendant and his vendor sought to agree upon and straighten the line between the two properties: *Held*, as there is no evidence that the plaintiff's acts or conduct induced the defendant to purchase the lands, there can be no estoppel. *Boddie v. Bond*, 154 N. C., 359, cited and applied.

APPEAL from *Justice, J.*, at September Term, 1911, of WARREN.

Civil action to recover land. Verdict and judgment for plaintiff, and defendant excepted and appealed.

The facts are stated in the opinoin of the Court by *Mr. Justice Hoke.*

T. M. Pittman, S. G. Daniels, and J. H. Kerr for plaintiff.

T. T. Hicks and J. M. Picot for defendant.

HOKE, J. This case was before the Court on a former appeal from a ruling of the Superior Court judge that plaintiff was barred of recovery by reason of an equitable estoppel arising on the facts then presented. The Court held there was error, 154 N. C., 359, and this opinion having been certified down, there was recovery by plain- (205) tiff, and the case is now here on appeal of defendants.

On the present trial it was agreed that both parties claimed under John W. Heptinstall, deceased, and plaintiff's legal title was made to rest on a devise in his last will and testament to his wife Cornelia, and by devise of Cornelia to plaintiff. The descriptive words of the devise to Cornelia are as follows: "I give my wife, Cornelia, the house where we now live, with all the outhouses and premises, embracing the peach and apple orchard," etc. Under our authorities this description is sufficiently definite to pass title to the property and permit the reception of parol evidence to fit the description to the land intended. *Ward v. Gay*, 137 N. C., 397; *Blow v. Vaughan*, 105 N. C., 198. And the jury having found that the *locus in quo* is included within the terms

of the devise to plaintiff, the question is again presented as to the existence of an equitable estoppel. On that position we find nothing in the present record which materially differs from the case as formerly presented, and for the reasons so clearly stated in the opinion by *Associate Justice Walker,* the judgment in favor of plaintiff must be sustained.

On the present trial, as heretofore, it was made to appear that plaintiff, the devisee under the will of John W. Heptinstall and subsequently of Cornelia, his wife, on 24 March, 1911, sold and conveyed to a Mrs. Miles, wife of T. J. Miles, a portion of the land, being under the impression that it was all she owned in that locality or under the devise, and in the deed described the same on one side as bordering on the "line of V. N. Bond, defendant." The plaintiff, who resided in Greensboro, N. C., having come to Littleton on the day her deed bears date, for the purpose of attending a sale of her aunt's personal property, the witness T. J. Miles, husband of the purchaser of plaintiff's lot, determined to have the dividing line between the two lots determined upon, defendant contending that the true dividing line ran straight back from the Presbyterian Church lot, and T. J. Miles, the husband of the purchaser, contending that a slight deflection should be made, and a dividing line was agreed upon between T. J. Miles, the witness and the defendant.

(206) The only difference in the evidence as shown on the two appeals is that it did not appear in the former case that plaintiff was at any time present or knew anything whatever of the occurrence, while there is evidence now appearing that she was present at the time or cognizant of what was being done; but this fact does not at all affect the result as applied to the issue. It is well understood in this State that boundary lines as contained in written deeds, dividing or other, may not be changed by parol evidence except in the one case where contemporaneously with the execution of a deed the physical boundaries are actually run and marked for the purpose of making the deed and are thereby given a different placing. And that as to deeds already executed and under ordinary circumstances parties are not estopped by their parol agreements fixing boundaries at a place different from that shown in the deeds. *Buckner v. Anderson,* 111 N. C., 575; *Shaffer v. Hahn,* 111 N. C., 1; *Carraway v. Chancy,* 51 N. C., 361; *Davidson v. Arledge,* 88 N. C., 326.

Hanstein v. Ferrall, 149 N. C., 240, in no way conflicts with these authorities. In *Hanstein's case* long acquiescence in a certain drain as the dividing line between two lots and recognition of it as such by the adjoining proprietors was held competent and material as evidence to properly fix the correct dividing line between them, but not

to change or vary it from the boundaries as contained in their deeds; and on the title to this adjoining lot, this lot in dispute held and claimed by defendant, it appears in the record, as we understand it, that defendant had bought and paid for this lot and taken a deed from one of the other devisees or heirs at law of John Heptinstall, nearly three years before this, to wit, on 10 December, 1907. As to the title, therefore, there is no evidence which shows or tends to show that what plaintiff did or said on this or any other occasion had any effect whatever in inducing defendant to buy and pay for the lot in controversy. He simply bought the lot from some one who didn't own it, and he must surrender it to plaintiff, who has the true title. As it was well said on the former appeal: "A party claiming title to lands only by reason of an equitable estoppel of the other party to the action, arising from his alleged acts and conduct respecting a line between adjoining lands, must show that the acts and conduct relied on have misled and caused (207) him loss or damage."

There is nothing to withdraw defendant's claim from the effect and operation of the principle, and the judgment for plaintiff, therefore, must be affirmed.

No error.

Cited: Patterson v. Franklin, 168 N. C., 78.

COLUMBIAN CONSERVATORY OF MUSIC v. J. H. DICKENSON.

(Filed 6 March, 1912.)

1. Bills and Notes—Contracts—Consideration—Burden of Proof.

While a promissory note, as a simple contract, requires a consideration, it imports a consideration *prima facie*, and the burden of proof is on the maker to show its failure, in resisting payment for that reason.

2. Same—Breach—Defenses—Legal Excuse—Fraud—Evidence.

In consideration of an agreement of plaintiff to give defendant's daughter a course of musical instruction by mail, the defendant gave his note in a certain sum in part payment, and after his daughter had received the instruction for a part of the time, resisted its payment upon the ground that as to another payment he thought he was giving a note, while in point of fact it turned out to be a check: *Held*, the defense was untenable, there being no evidence of fraud in the contract, which, on its part, the plaintiff stood ready to perform.

3. Contracts—Interpretation—Consideration—Breach—Measure of Damages.

When the basis of an action is a special contract to pay a sum certain, and is founded upon a valuable consideration, the contract sued

on, in the absence of fraud, must regulate the right to recover thereon, as well as the measure of damages.

4. Same—Diminution of Damages.

When the maker of a promissory note to pay a sum certain, made in consideration of a contract to give a course of musical instruction by mail, by his own act, without legal excuse, and without plaintiff's default, renders the performance by the plaintiff impossible, the measure of damages, in an action on the note, is the face value thereof, without diminution.

HOKE, J., concurs in result.

(208) APPEAL from *Cooke, J.*, at October Term, 1911, of VANCE.

Action, commenced before a justice of the peace, and tried on appeal in the Superior Court.

The action was brought to recover on an unpaid and protested check for $12, and on a note for $33, dated 22 March, 1910, given by defendant to plaintiff, and payable 1 December, 1910, with interest after maturity.

Under the charge of the court, the plaintiff obtained verdict and judgment for the amount of the check. Plaintiff appealed.

T. T. Hicks for plaintiff.

J. C. Kittrell, Thomas M. Pitman, for defendant.

BROWN, J. The pleas of defendant in answer interposed two defenses: first, fraud in procuring the execution of the note and check; second, a failure of consideration.

His Honor instructed the jury that there was no evidence of fraud, which is patent from an examination of the evidence.

Plaintiff requested the court to instruct the jury upon all the evidence, if believed, to render a verdict for the amount of both note and check. This instruction was refused.

All the evidence shows that the note and check were given for a course of musical instruction to be given by mail by plaintiff to defendant's daughter.

She made the application in due form, and received a certificate of enrollment or scholarship, which defendant produced on the trial, on notice. Defendant testified that he thought it was a note for $12 and not a check that he had signed, payable 12 April, and that "when he found out, 18 April, that it was a check, he refused to have anything more to do with the instructions or to allow his daughter to take the course." He admitted that the plaintiff tendered the instructions called for by the contract, and that he refused to allow his daughter to receive them.

We fail to see a partial, much less a total failure of consideration. Although notes as simple contracts require a consideration to support them, it has been long settled that they import a consideration *prima facie,* so as to throw on the maker the burden to show a want of consideration. *McArthur v. McLeod,* 51 N. C., 475; *Campbell v. McCormac,* 90 N. C., 492. In the latter case *Mr. Justice Ashe,* quoting from Story and Daniel, says that "It is wholly unnecessary to establish that a promissory note was given upon a consideration; (209) and the burden of proof rests upon the other party to establish the contrary, and to rebut the presumption of validity and value which the law raises."

The note sued on was given in consideration of an agreement in writing upon the part of the plaintiff to give to defendant's daughter musical instruction by mail.

The contract was duly entered into and acted upon for three weeks, the plaintiff furnishing all the contract called for—music, instructions, lessons, grading, etc.

The feasibility of teaching music in a "Correspondence School" is beyond our ken, and it is not a question within our domain, but the evidence shows that the plaintiff entered upon the performance of the contract, and its services accepted for three weeks, and then abruptly terminated by defendant because he thought he had signed a note for $12 instead of a check.

The excuse is utterly insufficient. *Sapona Co. v. Holt,* 64 N. C., 335.

As to the amount the plaintiff is entitled to recover under the evidence in this case, that is to be measured by the face of the note, for there is no evidence whatever which warrants the Court in permitting a diminution from the face of the paper. The basis of the action is a special contract to pay so much money, founded, as we have shown, upon valuable consideration, and it must regulate the plaintiff's right to recover, as well as the amount. *Engine Co. v. Paschall,* 151 N. C., 30.

It seems to be generally held that in action on a written contract, or a stipulated amount, the contract itself furnishes the measure of damages. 8 A. & E., 636. We find nothing whatever in the case of the *Horner School v. Westcott,* 124 N. C., 518, which militates against anything which we have here said, as the facts in that case were entirely different.

The plaintiff is entitled to the prayer, as requested.

New trial.

HOKE, J., concurs in result.

Cited: *Piner v. Brittain,* 165 N. C., 402.

(210)

R. B. ROBERTS v. W. T. HUDSON.

(Filed 6 March, 1912.)

1. Claim and Delivery—Title—Interpleader—Burden of Proof.

In claim and delivery, an interpleader claiming title to the property as the vendee of defendant has the burden of proving the title in his vendor.

2. Contracts, Written—Conditional Sale—Parol Contracts—Reservation of Title—Statute of Frauds.

A parol contract of conditional sale of personal property is not valid as against an innocent purchaser for value unless reduced to writing and recorded; when the contract is executory, the title thereunder does not vest in the vendee until the purchase price has been paid.

3. Contracts, Parol—Personal Property—Reservation of Title—Vendor and Vendee—Purchaser.

The only evidence of a parol contract, sued on, being that plaintiff permitted the defendant to cut cross-ties on his land at a certain price each, and allowed the defendant to haul them for convenience of shipping to a railroad, reserving the title in himself until the ties were paid for, the title to the ties does not vest until the payment for them has been made, and a purchaser thereof from the defendant cannot acquire any title, as his vendor had no title to convey.

APPEAL by plaintiff from *Ferguson, J.*, at October Term, 1911, of FRANKLIN.

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

W. H. Yarborough, Jr., for plaintiff.
T. T. Hicks for defendant.

CLARK, C. J. The defendant W. T. Hudson, by permission of plaintiff, cut 516 cross-ties on the latter's land and hauled them to Youngsville, where he deposited them on the right of way of the defendant railroad under an agreement that they were not to be moved thence till paid for. Hudson owed to the defendant Bullock money on a mortgage, and consented to furnish ties in payment thereon. These ties were about being loaded on the cars for the Pennsylvania Railroad Company, to whom Bullock had sold them, when the plaintiff took out claim and delivery for recovery of the ties. Bullock was not served with process,

but on his own application was made a party as interpleader (211) (Revisal, 800), gave bond, and claimed the ties.

The plaintiff testified that he allowed Hudson to cut the ties and haul them to Youngsville under an agreement that the title was

to remain in himself until the ties were paid for; that Hudson afterwards told him that he expected to sell the ties to Bullock, who would send plaintiff a check direct for the money, but that in the meantime the title to the ties would remain in plaintiff till they were paid for; that he never saw Bullock and did not receive the check. Hudson agreed to pay the plaintiff 12½ cents each for the ties, without grading. Hudson was to receive from Bullock 30, 35, and 50 cents for the ties, according to grade.

There was no conflicting testimony, and the court charged the jury that if they believed the evidence of the plaintiff to return a verdict for the amount of the cross-ties at 12½ cents each, $64.50. This presents the question whether the contract between the plaintiff and Hudson was a conditional sale or an executory contract. If it was the former, the plaintiff could not recover, because the contract was not reduced to writing and recorded.

The defendant Bullock being an interpleader, the burden was upon him to show that the title of the property had passed to Hudson. *Manufacturing Co. v. Tierney,* 133 N. C., 630, and cases cited. This he did not do, because the undisputed evidence is that the contract between the plaintiff and Hudson was that the title to the ties was to remain in the plaintiff till paid for. The plaintiff did not part with the right of possession, but merely permitted the ties, as a matter of convenience, to be hauled to the station, there to remain, without being loaded on the cars, till the sale should be consummated by payment of the purchase money, upon which, and not until then, the title was to pass. Upon the attempt being made to load the ties upon the cars, the plaintiff promptly asserted his right of possession by claim and delivery.

The line between an executory contract and a conditional sale is sometimes difficult to draw, but here it is clear that there was no sale to Hudson by plaintiff. Hudson was to do two things: He was to cut the ties and pay for them, and when these things were both (212) done, and not till then, the sale was to be consummated and Hudson was to be vested with the title and possession. The ties were not sold to Hudson and delivered to him upon condition that if not paid for the plaintiff could retake them. Bullock could acquire no title when Hudson himself had not acquired any, and could not do so under his agreement, until the ties were paid for.

It is probably more than a coincidence that deducting the cash payment ($95) which Bullock made to Hudson, the balance due by Bullock on the ties is $65, almost the exact amount due plaintiff for the ties.

No error.

THE POCOMOKE GUANO COMPANY v. J. W. BIDDLE, SHERIFF OF CRAVEN COUNTY.

(Filed 6 March, 1912.)

1. Taxation—Inspection Tax—Constitutional Law.

The levy of the inspection tax under Revisal, sec. 3955, is constitutional and valid.

2. Same—Property Tax.

Article V, sec. 3, of our Constitution imperatively requires that all real and personal property be taxed by a uniform rule according to its true value in money, and Revisal, sec. 3955, providing for the levy of an inspection tax, will not be so construed as to relieve manufacturers of fertilizers or fertilizing material, paying this inspection tax, from the payment of property tax required by the Constitution.

3. Same—Interstate Commerce.

While the State may not levy an *ad valorem* or other tax on personal property in transit in the course of interstate commerce, the principle does not apply when the property (fertilizers in this case) is stored within the State by a nonresident for the purposes of sale and distribution.

APPEAL from *Carter, J.*, at October Term, 1911, of CRAVEN.

This was a civil action instituted by the plaintiff to restrain the defendant sheriff from collecting certain State and county taxes levied on the property of the plaintiff, and for the purpose of having (213) said taxes declared illegal and void and having the same stricken from the tax books. The plaintiff and defendant submitted the matter to the court upon an agreed statement of facts. Judgment was rendered against the plaintiff, and it appealed.

Moore & Dunn, Peatross & Savage for plaintiff.
E. M. Green and R. A. Nunn for defendant.

BROWN, J. An analysis of the facts agreed shows:

1. That plaintiff, a Virginia corporation, doing a fertilizer business in this State, and paying taxes on its property in Virginia, owned personal property, valued at some $25,000, stored on 1 June, 1910, in a warehouse in Craven County. The property consisted of fertilizer and fertilizer materials.

2. That said property was not listed for taxation, and plaintiff has paid no tax thereon, but has paid the tonnage tax collected for the purpose of defraying expenses connected with the inspection of fertilizers, as provided for in section 3955, Revisal of 1905.

3. That said property was held by plaintiff until it had thereafter sold the same to various and sundry customers.

4. That the board of county commissioners for the county of Craven placed the said property on the delinquent tax list of said county, and by virtue of said tax list the sheriff of said county has demanded payment of the regular taxes thereon.

The plaintiff contends:

1. That section 3955 of the Revisal of 1905 exempts said property from said tax.

2. That said tax is illegal and void and is an interference with interstate commerce, "and plaintiff especially pleads the Federal statute applying to such interstate commerce and the Constitution of the United States regulating the same as a defense to the collection of the tax levied and assessed against it."

3. That said property is not liable for taxation both within the State of Virginia and the State of North Carolina.

4. That said tax is a double tax.

The plaintiff does not in this proceeding attack the constitutionality of the inspection tax levied under said section, and which has been collected regularly for many years. The right to levy such taxes has been sutained by the Supreme Court of the United States in (214) *Guano Co. v. Board of Agriculture,* 171 U. S., 345, and reaffirmed in the recent case of the *Red "C" Oil Co. v. Board of Agriculture.*

The plaintiff claims exemption from an *ad valorem* tax upon its property by reason of the following language contained in the statute:

"Whenever any manufacturer of fertilizers or fertilizing materials shall have paid the charges required by this section, his goods shall not be liable to any further tax, whether by city, town, or county," and it is a part of section 3955 of the Revisal of 1905.

Whatever may have been the intention of the General Assembly in employing language so broad and comprehensive, we are forced to the conclusion that under the Constitution of North Carolina all real and personal property owned and located within the borders of the State is subject to an *ad valorem tax,* and it is not to be supposed that the Legislature intended to violate the fundamental law of the State, Art. V, sec. 3, which requires in express terms that all real and personal property be taxed by a uniform rule according to its true value in money.

In this respect the Constitution "shows no favor and allows no discretion." *Wiley v. Commissioners,* 111 N. C., 397; *Puitt v. Commissioners,* 94 N. C., 709; *Vaughan v. Murfreesboro,* 96 N. C., 319.

The imperative demand to levy the property tax upon its assessed

value is in no way connected with the right to levy an inspection tax, or a tax on trades, professions, etc.

These principles of taxation have been discussed and enforced in many cases, and a further elaboration of them is now unnecessary.

We are of the opinion that the personal property of the plaintiff stored in North Carolina, and owned and located within its borders, is liable to the *ad valorem* tax imposed upon the property of the citizens of the State.

(215) It is undoubtedly true that personal property actually in transit is not subject to State taxation. *Kelly v. Rhoads,* 188 U. S., 1. In this case it is said:

"The law upon this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this Court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities."

After citing several cases, viz., *Brown v. Houston,* 114 U. S., 622, 29 L. Ed., 257; *Canal Co. v. Bates,* 156 U. S., 577; *Coe v. Errol,* 116 U. S., 517, and discussing them, *Mr. Justice Brown* continues:

"The substance of these cases is that while the property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another State, it becomes the subject of interstate commerce, and is exempt from local assessment."

The facts agreed show that the fertilizer sought to be taxed was not in transit, but had reached its destination, and was stored in Craven County for purposes of sale or distribution.

We think it unnecessary to discuss the matter more at length, as the authorities cited seem to dispose of plaintiff's contentions.

Affirmed.

Cited: *Guano Co. v. New Bern, post,* 355.

(216)

R. C. JEFFRESS v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 6 March, 1912.)

1. Railroads—Negligent Running of Trains—Defective Spark Arrester—Contributory Negligence—Combustible Matter.

When a passing locomotive of a defendant railroad company sets fire to combustible matter left by the plaintiff on his premises, and is thereby communicated to buildings on his lands and causes damage, the plaintiff's neglect in permitting the combustible material to remain there will not preclude his recovery, as the proximate cause, when the fire owed its origin to a defective spark arrester on the locomotive, or a negligent running thereof. *Wyatt v. R. R.*, 156 N. C., 314, cited and approved.

2. Appeal and Error—Contributory Negligence—Pleadings.

The question of contributory negligence will not be considered on appeal when not pleaded and no issue tendered presenting the question in the trial.

3. Railroads—Negligent Running of Trains—Defective Spark Arrester—Ordinary Risks—Former Recovery—Res Judicata.

An action to recover damages to plaintiff's land caused by a spark from defendant railroad company's locomotive alleged to have had a defective spark arrester at the time, and to have been negligently run, etc., does not involve an ordinary risk run by the plaintiff as an owner of lands adjoining the right of way, and a recovery had in a former action for risks of that character does not affect plaintiff's recovery for negligence of the character stated, which is sought in a subsequent action.

4. Railroads—Damages by Fire—Intervening Negligence—Second Fire—Proximate Cause.

When damages are claimed by the owner of lands adjoining the right of way of a railroad company, as caused by a spark from the negligent operation of defendant's locomotive or the use of a defective spark arrester, the doctrine of proximate cause as laid down in *Doggett v. R. R.*, 78 N. C., 311, has no application, when it appears that plaintiff's employee had extinguished the fire, and thereafter the damage complained of was caused by sparks from the locomotive setting out another fire.

5. Railroads— Negligence— Approved Appliances— "Modern Appliances"—Definition—Approved and in General Use.

In an action for damages by fire to plaintiff's land involving the question of the negligence of the defendant railroad company in the operation of its locomotive, or in its being equipped with a defective spark arrester, the use of the words "modern appliances," in connection with the spark arrester the defendant was required to use, does not necessarily mean the latest and best appliances, but the use of those "extending from a not very remote past to the present time"; "not antiquated or obsolete"; and construed with other parts of the charge in this case, *Held*, not reversible error.

6. Instructions—Construed as a Whole.

When the parts of a charge, construed with the other parts as a whole, lay down correct principles of law applicable to the evidence, no error will be found on appeal.

7. Appeal and Error—Instructions—"Contentions"—Objections—Practice.

It is the duty of counsel to call to the attention of the court, at the time, any statement of the contentions of the parties which is not supported by the evidence, or it will not be considered on appeal.

8. Railroads—Negligent Running—Defective Spark Arrester—Unusual Sparks—Evidence.

When the defense to an action for damages in setting fire to plaintiff's land by sparks from a passing locomotive of the defendant with a defective spark arrester is that the spark arrester was a proper one and did not throw any sparks, evidence is competent in showing that the locomotive was throwing an unusual quantity of sparks, that the locomotive set fire to a garment hanging in a garden nearby, and that the witness had to put her apron over her head to keep the cinders from the locomotive from burning her, about the time of the injury complained of.

9. Appeal and Error — Railroads — Negligent Running — Defective Spark Arrester—Instructions—Harmless Error.

An instruction in this case to the effect that the jury should answer the first issue, as to defendant's negligence, "No," if the spark arrester on defendant's locomotive, alleged to have set fire to and damaged plaintiff's lands, was in good condition and the train prudently operated, or if the foul condition on plaintiff's premises was the proximate cause of his loss, and that the issue could not be answered in plaintiff's favor unless the jury found that the locomotive was not properly equipped with a spark arrester and was not properly managed and operated, and this was the proximate cause: *Held*, not reversible error over defendant's exception, as it was more favorable to it than it was entitled to.

10. Railroads—Fire Damages to Lands—Issues—Measure of Damages—Depreciation—Evidence.

In an action for damages for the destruction of a house by fire alleged to have been caused by a spark from defendant's passing locomotive with a defective spark arrester, etc., the measure of damages is, "How much has the land been depreciated in value by the fire?" And evidence is competent which tends to show the size of the house, the quality and cost of the materials used in its construction, the workmanship and other relevant facts, bearing on the question of the decreased value of the land.

11. Railroads—Defective Spark Arrester—Inflammable Material—Contributory Negligence—Town Ordinance—Notice—Evidence.

When the negligence of a railroad company in causing damage by fire to lands adjoining its right of way is made to depend solely on the defendant's failure to provide a proper spark arrester, or to operate its

train prudently, under such circumstances that the plaintiff would not be barred of a recovery in failing to keep his premises free from combustible matter, an ordinance of a town introduced by the defendant, requiring that plaintiff remove this matter after notice from the town authorities, is irrelevant, but after its introduction the plaintiff may prove that the notice specified in the ordinance had not been given him.

APPEAL from *Whedbee, J.*, at December Term, 1911, of PITT. (218)

This is an action for the recovery of damages in the sum of $4,315.95, for the alleged negligent burning by the defendant of plaintiff's prize-house, or tobacco stemmery, in Greenville, N. C., on 31 January, 1910. The fire is alleged to have been caused by sparks from one of the defendant's engines while being operated on Pitt Street. The defendants deny liability. It was admitted, for the purposes of the trial, that the Norfolk Southern Railroad was liable to the plaintiff if the Norfolk and Southern Railroad Company and its receivers were liable.

The plaintiff owns a lot in Greennville, on Pitt and Tenth streets, fronting 333 feet on Pitt Street and 110 on Tenth Street. Pitt Street runs north and south. The lot is about two blocks from the Norfolk Southern depot and 100 to 150 feet from the cotton platform. The Norfolk Southern Railroad track runs down the middle of Pitt Street, which is 49 feet wide. It is 20 feet from the railroad to the Jeffress property line, but this distance includes the sidewalk. The prize-house of plaintiff was built in 1901. It is approximately 60 feet wide and 108.6 feet long, with an ell added, which is 40 feet by 40 feet. The nearest point of the building is about 45 feet from the railroad; the boiler-room is 25 feet. The railroad, including track and cross-ties, is 8 feet wide. The building caught fire about 12 o'clock noon and was totally destroyed. The building had been leased for several years to Skinner & House. The rest of the lot had been rented out the year before. At the time of the fire the vacant part of the lot was covered with cornstalks and grass. The fire was first discovered burning in the grass on the lot, and in this way reached the building. There was a city ordinance in force at the time, and had been in force for (219) several years, providing that, "Every occupant of a lot on any street shall keep the sidewalk clean and clear of weeds, grass, and other rank vegetation as far as such lot extends. If any rubbish, dirt, ashes, or other thing be placed or left without lawful authority upon such sidewalk or in the gutters or streets adjacent thereto, the occupant of such lot shall remove same. If, after written notice by the chief of police, or street commissioners, requiring him to remove the things prohibited by this ordinance, he shall fail for twenty-four hours to remove the same, he shall be fined $5 for each day thereafter it may so remain."

In August, 1907, the plaintiff instituted another action against the Norfolk and Southern Railroad Company for recovery of damages in the sum of $3,000 to this same lot, alleged to have been caused by the construction of this same railroad track down Pitt Street, alleging, among other elements of damage, "By reason of the frequent passing of the defendant's trains in such close proximity to plaintiff's property, plaintiff's property has become endangered from loss by fire arising from the constant issuing of smoke and sparks from defendant's engines, and has become annoying to the plaintiff and materially interferes with the operation of plaintiff's factory."

This action was tried at March Term, 1911, resulting in a judgment of $50 for the plaintiff, and this judgment was affirmed on appeal by plaintiff to Supreme Court at Fall Term, 1911.

There was evidence for the plaintiff tending to show that the defendant's freight train was passing along Pitt Street about 11:30 o'clock, and did some shifting on this street; that the engine was emitting sparks and that some of the sparks fell upon the vacant part of the Jeffress lot, or sidewalk, and that shortly thereafter the grass was burning in two places. The grass burned up near to the boiler-room, which was the nearest point to the street, when it was discovered by Archie Lockland, who had charge of the building and had the key to the same. He testified that he put the fire out and went home. In about twenty
(220) minutes the building was on fire. The building burned about 12 o'clock noon. There was also evidence for the plaintiff that the grass caught again from a spark from the engine, after Lockland had put it out, and that this was the fire that eventually burned the factory. The plaintiff's evidence showed that the grass caught on the plaintiff's lot, or sidewalk, and that the fire was communicated to the building by burning grass, the plaintiff himself testifying that the nearest burnt grass to the railroad track was within 20 or 25 feet of the track. All of the evidence tended to show that the fire was communicated to the building by the burning grass, and there was no evidence that it caught directly from a spark. The plaintiff's evidence tended to show that the building and its contents were worth between $8,500 and $9,000. He collected $4,225 insurance on the building and contents.

The evidence of the defendant was that the freight train, No. 30, pulled by Engine No. 115, came into Greenville about 11 o'clock A. M., and left about 11:40; that the engine was properly equipped with a spark arrester in general and approved use, and that the netting of the spark arrester was in fact smaller and finer than the standard, it being 3 holes to 1 inch of space instead of 2¾ holes to the inch. That this rendered the danger of sparks escaping much less, on account of the

fact that the netting would stop smaller sparks. That it stopped practically all sparks and would choke with sparks and cause the engineer to stop at stations and knock them out. That the spark arrester was in good condition on that date. There was evidence of the good condition of the spark arrester for a number of days both prior and subsequent to the fire, and that the engine was being run carefully and properly by a competent engineer. There was evidence for the defendant that the building and personal property were worth less than the amounts claimed by the plaintiff. There was other evidence for the plaintiff.

The defendant does not plead contributory negligence, and the issues and responses thereto are as follows:

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

2. If so, what damage, if any, in excess of the $4,225 fire insurance collected by the plaintiff, is plaintiff entitled to recover (221) of defendant Answer: $3,275.

There was a judgment in accordance with the verdict, and the defendant appealed.

F. G. James & Son and Harry Skinner for plaintiff.
Rouse & Land for defendant.

ALLEN, J. The exceptions appearing in the record present for our consideration the following contentions made by the defendant:

(1) That the plaintiff was negligent in permitting combustible matter to remain on his lot near the track of the defendant, and that this was the proximate cause of the injury to his property.

(2) That if, ordinarily, it would not be negligence in the plaintiff to permit combustible matter to remain on his lot, a higher duty should be imposed on him in this case, because he had recovered judgment against the defendant in another action on account of hazard to this property by the operation of defendant's trains, and had been thereby compensated for ordinary risks.

(3) That it being in evidence that the fire, after its origin, was under the control of an employee of the plaintiff, the defendant, although negligent in setting out the fire, would not be liable for the consequences which followed.

(4) That his Honor erroneously imposed the duty on the defendant of equipping its engine with a modern spark arrester.

(5) That his Honor stated as a contention of the plaintiff that the engine emitted an unusual quantity of sparks, when there was no evidence to support the contention.

(6) That his Honor, in a part of his charge, made the liability of

the defendant depend upon whether the plaintiff was negligent in permitting his lot to become and remain in a foul condition.

(7) That his Honor erroneously charged the jury that the measure of damage for burning the building was the difference in the value of the land before and after the fire.

(8) That his Honor erroneously permitted the tenant of the
(222) plaintiff to testify that he had received no notice, under the ordinance in evidence, to remove trash, etc., from the sidewalk.

(1) This contention of the defendant seems to be fully met by the decision in *Wyatt v. R. R.*, 156 N. C., 314, in which it was held that "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's negligence." If the rule was otherwise, the defendant has not pleaded contributory negligence, and no issue was tendered presenting this question; and this objection would also be applicable to the next contention of the defendant.

(2) The second proposition insisted upon may be admitted, and the liability of the defendant would not be affected, because negligence is not an ordinary risk, and his Honor told the jury in clear and direct terms that the plaintiff could not recover if the engine was properly equipped with a spark arrester and was prudently operated by a competent engineer, He imposed the burden on the plaintiff of proving negligence, and instructed the jury that they were confined to the consideration of the two acts of negligence alleged—the defective spark arrester and the negligent operation of the train—and if the defendant was negligent in these respects, as the jury has found, the prior negligent conduct of the plaintiff, if any, would not prevent a recovery. The question is analogous to one considered in *Arthur v. Henry,* 157 N. C., 393, where it was held that consent given by the plaintiff to the defendant to blast for rock near his home would not prevent a recovery for injuries resulting from negligence in the operations.

(3) This position finds support in *Doggett v. R. R.*, 78 N. C., 311, but it is not necessary for us to consider the facts and the reasoning in that case, because it appears from the evidence in this that two fires were set out by the engine of the defendant, and that it was the first fire which was under the control of an employee of the plaintiff, and that
(223) after he extinguished it and left the premises, the property of the plaintiff was destroyed by the second fire.

(4) When the charge of his Honor is considered as a whole, which it is our duty to do, the criticism of it, as presented by the fourth, fifth, and sixth contentions of the defendant, are not, in our opinion, sustained by the record.

It is true that the word "modern" is used in connection with the appliances which the defendant was required to furnish, but "modern appliances" do not necessarily mean "the latest and best appliances," which the defendant insists was the effect of the charge, and could not have been so understood by the jury.

The Century Dictionary defines "modern" as "pertaining to the present era, or to a period extending from a not very remote past to the passing time; not ancient or remote in time; not antiquated or obsolete," and says by way of illustration, that Modern History comprises the history of the world since the fall of the Roman Empire or the close of the Middle Ages, and that modern *fashions*, tastes, inventions, and science generally, refer to the comparatively brief period of from one to three or four generations.

His Honor told the jury that it was the duty of the defendant "to have its engines properly equipped with such appliances for the arresting of sparks as are in general and approved use—not such as will prevent any spark from escaping, but such appliances as are in general and common use, and that will subserve the purpose intended," and again, "If you find by the greater weight of the evidence the spark which set fire to the grass, and which fire was communicated to and destroyed the building, was caused by the failure of the defendant to properly equip its engine with a spark arrester that was modern and in common use, or they failed to properly operate or manage it, it would be negligence on the part of the defendant company."

If his Honor stated a contention of the parties not supported by evidence, it was the duty of counsel to call it to his attenion; but one of the witnesses testified that a shirt hanging in her garden was set on fire from the train; that as she approached the railroad crossing she had to put her apron over her head to keep the cinders from burning her, and that about that time sparks from the train set fire to the grass on the plaintiff's lot, which is, we think, some evidence that the (224) quantity of sparks was unusual, and particularly so when considered in connection with the evidence of the conductor of the defendant, that the spark arrester was in good condition and that the engine did not throw any sparks.

The part of the charge which the defendant thinks made the liability of the defendant depend upon the negligence of the plaintiff in permitting his lot to remain in a foul condition is where his Honor says:

"There is another aspect to this case which you will take into consideration. It is for you to say what the proximate cause was. If you find as a fact that the engine was properly equipped, properly managed and operated, and sparks were emitted that set fire to property off the right of way; that is to say, if sparks were emitted from the engine that was properly equipped, managed and operated, and fell upon the land of the plaintiff off the right of way, there would not be any breach of duty on the part of the defendant because his property was burned, and the defendant would not be responsible; if you should also find that the plaintiff allowed his premises to become so foul with combustible matter that no reasonably prudent man would allow it to stay in that condition near a railroad, and that the cause of the injury was not the negligence of the defendant, but the proximate cause was the negligent act of the plaintiff in allowing his lot to remain in a foul condition; and if you shall find from all the facts and circumstances and by the greater weight of the evidence that it was not the act of a reasonably prudent man having regard to the rights of others to permit the condition in his lot, and that it was a case of negligence on his part, then that would be a bar to recovery, and you would answer the first issue 'No.' If, however, you find that the engine was not equipped with a modern, proper spark arrester, and that it was not properly managed and operated, and that the proximate cause of the injury to the plaintiff's property was the negligence of the defendant to provide proper appliances and equipment to the engine, then it is your duty to answer that first issue 'Yes.'"

(225) This was, in effect, instructing the jury to answer the first issue "No" if the spark arrester was in good condition and the train prudently operated, or if the foul condition of the lot of the plaintiff was the proximate cause of his loss, and that the issue could not be answered in favor of the plaintiff unless the jury found that the engine was not properly equipped with a spark arrester and was not properly managed and operated, and that this was the proximate cause, which was more favorable to the defendant than it was entitled to.

(7) The measure of damage was stated correctly in the charge. *Williams v. L. Co.*, 154 N. C., 310. The house destroyed by the fire was a part of the land, and the injury was to the freehold. The inquiry, therefore, for the jury was, "How much has the land been depreciated in value by the fire?" which is but another way of ascertaining the difference in the value of the land before and after the fire.

It was, of course, competent to introduce evidence as to the size of the house, the quality and cost of the material used in its construction, the

workmanship, and other relevant facts, as bearing on the question of the decrease in value of the land.

(8) As the liability of the defendant was made to depend solely upon failure to provide a proper spark arrester, or to operate its train prudently, if these facts were found to exist, the prior negligence of the plaintiff, if any, would not have prevented a recovery, and in this view the ordinance introduced by the defendant, and the evidence of the tenant of the plaintiff that he had not been notified to remove trash from the sidewalk, would be irrelevant and harmless; but as the ordinance was admitted requiring notice to be given under certain conditions, it was not improper to permit the plaintiff to prove that the notice had not been given.

Upon a review of the whole record, we find

No error.

Cited: *S. v. Vann,* 162 N. C., 541; *S. v. Blackwell, ib.,* 684; *S. v. Fogleman,* 164 N. C., 461; *S. v. Cameron,* 166 N. C., 384; *Ferebee v. R. R.,* 167 N. C., 297; *Barefoot v. Lee,* 168 N. C., 90; *Lea v. Ins. Co., ib.,* 478; *Lloyd v. Venable, ib.,* 536; *S. v. Wade,* 169 N. C., 308.

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(226)

S. G. HIGHSMITH AND WIFE v. M. R. PAGE, S. C. PAGE, AND THE EUREKA LUMBER COMPANY.

(Filed 6 March, 1912.)

1. Deeds and Conveyances—Interpretation—Husband and Wife—Estates in Entireties—Survivorship—Tenants in Common.

While in a conveyance of lands to husband and wife, jointly, they will take and hold the estate by entireties, the survivor taking the whole, this character of an estate is not created when it appears by construction from the conveyance that it was not so intended, but that the parties were to take and hold their interests as tenants in common.

2. Deeds and Conveyances—Interpretation—Intent.

The court, in construing a conveyance of lands, 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 be found by any reasonable intendment.

3. Deeds and Conveyances—Intent—Interpretation—Husband and Wife—Tenants in Common—Descent and Distribution.

A deed of lands to husband and wife for a consideration the half of which was furnished by the latter from a sale of her own lands, made

to the husband and his heirs, and to the wife and her heirs, and to their heirs jointly, with the habendum expressed to the same effect, conveys to them an estate in common and not of entireties, the wife's interest descendible, at her death, to her heirs at law, subject to the curtesy of her surviving husband.

4. Deeds and Conveyances—Reformation—Equity—Fraud or Mistake—Proof Required—Questions for Jury.

For equity to correct a deed for mistake, it must be established by clear, strong, and convincing evidence, and it is for the jury to determine whether the proof meets the required standard according to the instructions from the court.

5. Same—Issues—Cloud on Title.

A deed of lands to husband and wife conveyed an estate in common and not in entireties. After the death of the wife, the husband, assuming title of the whole by way of survivorship, conveyed it to another. There was evidence tending to show that the lands in controversy should have been conveyed separately to the wife as her part of the land: *Held*, in this case, evidence sufficient for an issue to be submitted to the jury as to the mistake in the deed, and to sustain a suit to remove a cloud upon the title by the heirs at law of the wife.

(227) APPEAL from *Carter, J.*, at September Term, 1911, of PITT.

Action to reform a deed by reason of mistake, to remove cloud from title, and restrain cutting of timber. At the close of the testimony, on motion of defendant, there was judgment of nonsuit, and plaintiff excepted and appealed.

Julius Brown and Moore & Long for plaintiff.
Harry Skinner for defendant.

HOKE, J. On the trial it was made to appear that on 8 November, 1875, S. R. Ross and wife conveyed to M. R. Page and wife, Elizabeth, a tract of land lying in Pitt County, containing about 235 acres, more or less. The portions of the deed more directly relevant being in terms as follows:

"This deed made by S. R. Ross and wife, Margaret, of the county of Pitt and State of North Carolina, of the first part, to M. R. Page and Elizabeth Page, his wife, of the county and State aforesaid, witnesseth: That the said S. R. Ross and wife, for and in consideration of twelve hundred dollars ($1,200) to them in hand paid, one-half by M. R. Page and one-half by Elizabeth Page out of the sale of her own land, the receipt of which is hereby acknowledged, hath bargained and sold, and by this deed doth bargain, sell, and convey to the said M. R. Page, his heirs, and to Elizabeth Page, her heirs, and to their heirs and assigns,

jointly, the following described piece or parcel of land: Situate in the county of Pitt adjoining the lands of John H. Raules, J. M. Rollings, John Page, and others, and containing 235 acres, more or less, together with all the privileges and appurtenances thereto belonging or in any wise appertaining. To have and to hold the said piece or parcel of land, to them, the said M. R. Page, his heirs, and the said Elizabeth Page, her heirs, and to their heirs and assigns, in fee simple; and the said S. R. Ross and wife, for themselves, their heirs and executors and administrators, doth covenant and agree with the said M. R. Page, his heirs, and Elizabeth Page, his wife, and her heirs, and their heirs and assigns," etc.; that 125 acres of the land, including the dwelling-house and improvements, were situate on the east side of a canal or large ditch, and the remainder on the west side; that M. R. Page and wife, entered into possession, under the deed, and some time thereafter Elizabeth, the wife, died, leaving her surviving one child by a former hus- (228) band and three surviving children of another such child, and two children by the marriage with M. R. Page, to wit, Nana Highsmith, all of plaintiffs, and S. C. Page. It further appeared that M. R. Page also had a son, John, by a former wife, but the record does not disclose whether this son is now living. During the marriage, M. R. Page and Elizabeth, by mortgage, and afterwards by deed, conveyed away the portion of the land lying west of the canal, and after the death of said Elizabeth, to wit, in 1903, M. R. Page sold and conveyed the timber, of specified dimensions, on the 125 acres lying east of the canal, to the Eureka Lumber Company, one of the defendants, and later, in February, 1907, he sold to S. C. Page, his son by Elizabeth, the remainder in the 125 acres, subject to his own life estate therein and subject to the conveyance of the timber to the lumber company. There was also allegation, with evidence, on the part of plaintiff, tending to show that at or before the time of buying the Ross land, in 1875, Elizabeth Page, holding a tract of land as devisee of her former husband, had sold the same and paid the money received therefor as part of the purchase price for the land in controversy, and further that this was done with the understanding and agreement that the purchase of the Ross land, lying east of the canal, the part now in controversy, should belong and be conveyed to Elizabeth Page as her part. The present suit was instituted by the children and heirs at law of Elizabeth Page other than S. C. Page, against M. R. Page, S. C. Page, his son, and the Eureka Lumber Company, to reform and correct the deed; to restrain the cutting of timber by the lumber company and to remove the cloud from the title created by the deeds of M. R. Page to his codefendants.

Numerous and repeated decisions of our Court recognize and apply the principle that where land is conveyed to "husband and wife jointly, they will take and hold an estate by entireties, and that, on the death of one, the whole belongs to the survivor." *Morton v. Lumber Co.,* 154 N. C., 278; *Hood v. Mercer,* 150 N. C., 699; *Jones v. Smith,* 149 N. C., 579; *West v. R. R.,* 140 N. C., 620.

(229) It is also well established with us that where, in a conveyance to a husband and wife, it appears that no such estate was intended, but the parties were to take and hold their interests as tenants in common, the intent as expressed in the deed must be allowed to prevail. (*Isley v. Sellars,* 153 N. C., 374; *Stalcup v. Stalcup,* 137 N. C., 305; *Murer v. Brown,* 133 N. Y., 308), and that this intent must be arrived at from a perusal of the entire instrument. *Hendricks v. Furniture Co.,* 156 N. C., 569; *Triplett v. Williams,* 149 N. C., 394.

In *Hendrick's case* the correct rule was stated as follows: "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."

Applying this wholesome rule of interpretation, a perusal of the entire instrument will disclose that, while the deed, in its first clause, purports to be made to M. R. Page and Elizabeth Page, his wife, the parties, throughout the remaining portions of the deed, make it clear that an estate by entireties was not intended. It recites that one-half of the consideration was paid by M. R. Page and one-half by Elizabeth Page out of the sale of her own land, and the conveyance is then made to M. R. Page and his heirs and to Elizabeth Page and her heirs, and to their heirs jointly, and in the habendum and the warranty the parties are careful to specify that the same is made to M. R. and his heirs and to Elizabeth and her heirs and *their* heirs and assigns; the intent evidently being that the parties should take and hold as tenants in common, in equal interests, and that of Elizabeth should descend to her children as her heirs at law, subject to curtesy of her surviving husband, M. R. Page.

There was error, therefore, in the judgment of nonsuit, for on the face of the deed we are of opinion that the instrument as now expressed creates a tenancy in common between the husband and wife, and the plaintiffs, the heirs at law of Elizabeth, have an interest in the land which entitles them to maintain the action.

We are of opinion also, as stated, that there is evidence in the record requiring that an issue be submitted as to the alleged mistake in the original deed from S. R. Ross and wife. This, under our authori-

ties, must be established by clear, strong, and convincing evi- (230) dence, but where there is testimony sufficient to carry the case to the jury on such an issue, it is with them to determine whether the proof meets the required standard. The rule prevailing in such cases is very well stated in *Gray v. Jenkins,* 151 N. C., 80, as follows: "The evidence to reform a written deed must be clear, strong, and convincing, but when the testimony is sufficient to carry the case to the jury, as on an ordinary issue, the judge can only lay this down as a proper rule to guide the jury in their deliberations, and it is for them to determine whether, in a given case, the testimony meets the requirements of this rule as to the degree of proof."

The order of nonsuit will be set aside and the issues properly arising on the pleadings referred to a jury.

Reversed.

Cited: Eason v. Eason, 159 N. C., 541; *Beacom v. Amos,* 161 N. C., 366; *Ipock v. Gaskins, ib.,* 681.

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(231)

E. E. EUBANKS v. A. F. BECTON.

(Filed 6 March, 1912.)

1. Mortgages—Default in Part—Maturity of the Whole.

A mortgage on lands to secure a series of bonds for borrowed money, giving the mortgagee power and authority to sell the lands upon default in payment "of either of said sums of money or any part thereof" after advertisement, etc., and convey the lands to the purchaser in fee simple, "and out of the moneys arising from said sale to retain the principal and interest which shall then be due on the said bonds," is valid, and authorizes a sale under the power upon failure to pay any part, and before the maturity of the whole debt.

2. Mortgages—Foreclosure—Power of Sale—Strict Compliance—Notice of Sale—Invalid Sale.

When a power of sale is given in a mortgage, a strict compliance with the terms on which it is to be exercised is necessary; and when it is prescribed that the notice of sale be posted at the courthouse door and four other public places, a sale thereunder is invalid if the notice is posted at the courthouse door and three other public places. The effect of Revisal, sec. 641, was not before the Court in this case, and it was not construed.

3. Same—Purchaser—Notice.

A purchaser at a sale of lands under a mortgage with power of sale is a purchaser with notice of the terms under which the power of sale, as

therein expressed, must be exercised, and his deed is invalid when the terms of sale of the mortgage antedating Revisal, sec. 651 are not in strictness pursued.

4. Mortgages—Foreclosure—Invalid Sale—Purchaser—Rental of Mortgagor—Waiver—Knowledge.

In order to waive an irregularity in the exercise of the power of sale contained in a mortgage, it is necessary that the acts alleged as a waiver be committed with the knowledge of the one who does them; and a mortgagor after an invalid sale for failure of the mortgagee to strictly observe the terms thereof, without knowledge of the irregularity, does not waive it by subsequently renting the lands from the purchaser.

5. Same—Application of Rents.

The rents collected of the mortgagor who has rented from the purchaser of lands after an invalid sale, and who has not waived its irregularities, must be applied to the payment of the mortgage debt.

6. Mortgages—Foreclosure—Invalid Sale—Equitable Assignment.

A deed of mortgaged lands made to a purchaser at a foreclosure sale, which is inoperative, is valid only as an equitable assignment of the note and mortgage, and the mortgagor, nothing else appearing, is entitled to an accounting.

APPEAL from *Carter, J.*, at November Term, 1911, of JONES.

This is an action by the plaintiff as mortgagor, for an accounting and to redeem. The issues raised by the pleadings were by consent referred to Hon. F. A. Daniels, and the following facts are found by him, to which no exception is taken:

On 3 April, 1900, the defendant, Amos F. Becton, conveyed to the plaintiff, E. E. Eubanks, the tract of land described in the complaint, for the consideration of $1,000.

On the same day the plaintiff and his wife executed and delivered to said Becton their ten bonds for the purchase money, in different amounts and payable 1 January, 1901, and annually thereafter up to and including 1 January, 1910; and to secure the payment of the same they also executed and delivered to said defendant a mortgage upon the said land, which was duly proven and registered in said county, and in which it is provided, "that if default should be made *in the payment of either of said sums of money, or any part thereof, the said parties of the*
(232) *first part in such case do hereby authorize and fully empower the said party of the second part,* his heirs, executors, administrators, and assigns, to sell the said hereby granted premises at public outcry at the courthouse door in Trenton, Jones County, after first advertising the same for thirty days at the courthouse door and four other public places in Jones County, and convey the same to the purchaser in fee

simple, and out of the moneys arising from said sale to retain the principal and interest which shall then be due on the said bonds."

On 30 December, 1901, the first note not being paid, the defendant, purporting to act under the power of sale contained in the mortgage, offered for sale at the courthouse door in Trenton, North Carolina, the lands described in the said mortgages, after advertising the said sale by posting notices for thirty days at the courthouse door and three other public places in Jones County, when and where one J. A. Smith, being the highest bidder, was declared the purchaser at the price of $1,000; that the said Smith transferred his bid to the defendant Heath, who rented said land to the plaintiff Eubanks for the years 1902, 1903, and 1904, and received the rent therefor; that at the time of such renting the plaintiff did not know of any irregularity in the sale; that on 7 November, 1902, the said Becton executed a deed to said Heath, purporting to convey said lands, in consideration of $1,000, in which deed there is no reference to the said mortgage or the power contained therein; that about February, 1904, the said Becton executed another deed to the said Heath, purporting to convey said land, in which it is recited that the sale was made after advertisement at the courthouse door and three other public places, and that the deed is made pursuant to the execution of the power in said mortgage.

The referee stated the account between the parties to which there is no exception.

The report of the referee was confirmed, and from a judgment in accordance therewith the defendants appeal.

Rouse & Land and Shaw & Powers for plaintiff.
T. D. Warren, Loftin & Dawson, and A. D. Ward for defendant.

ALLEN, J. The right of the plaintiff to redeem depends upon (233) the validity of the sale made under the power contained in the mortgage, executed by him.

If the sale can be upheld, the defendant Heath is the owner of the land, and if not, the deed to him is operative only as an equitable assignment of the notes and mortgage, and the plaintiff, nothing else appearing, is entitled to an accounting.

The sale is attacked by the plaintiff upon two grounds: (1) That the mortgage, although containing a provision that the land may be sold upon failure to pay *either* note, does not provide that upon such failure the whole indebtedness shall become due, and that, therefore, no sale could be made until the maturity of the last note. (2) That the mortgage requires the notice of sale to be posted at the courthouse door

and *four* other public places, and it was in fact posted at the courthouse door and *three* other public places.

(1) The mortgage contains the express stipulation that the land may be sold upon failure to pay either note, and requires the proceeds of sale to be applied to "the principal and interest which shall be then due on the said bonds." The language is clear and the intention of the parties easily ascertained, and we must give effect to it. It is permissible to provide that the whole debt shall become due upon failure to pay any part, but not essential to the exercise of the power of sale. *Gore v. Davis,* 124 N. C., 234.

(2) The second question is more serious. Powers of sale in a mortgage are contractual, and as there are many opportunities for oppression in their enforcement, courts of equity are disposed to scrutinize them, and to hold the mortgagee to the letter of the contract. If a different view should prevail, and we could dispense with some stipulation in the power because we could not see that injury had ensued from failure to observe it, we could practically destroy the contract of the parties.

The view taken by the courts of such powers is illustrated by what is said in *Kornegay v. Spicer,* 76 N. C., 97: "The idea of allowing the mortgagee to foreclose the equity of redemption by a sale made by himself, instead of a decree for foreclosure and a sale made under the order of the court, was yielded to, after great hesitation, on the ground (234) that, in a plain case, when the mortgage debt was agreed on and nothing else was to be done except to sell the land, it would be a useless expense to force the parties to come into equity when there were no equities to be adjusted, and the mortgagor might be reasonably assumed to have agreed to let a sale be made after he should be in default. But this power of sale has always been watched with great jealousy." And in *Shew v. Call,* 119 N. C., 453: "Mortgages with power of sale are not looked upon with disfavor as they once were. But courts of equity, or of equitable jurisdiction, will still guard the rights of the mortgagor with jealous care." And in *Flemming v. Barden,* 127 N. C., 217: "The practice of inserting powers of sale in mortgages was recognized by this Court with great reluctance, and has always been regarded with extreme jealousy, but not now with the same disfavor."

In *Brett v. Davenport,* 151 N. C., 59, the effect of failure to advertise according to the terms of the mortgage was directly involved, and *Justice Hoke,* speaking to that question, says: "Again, it appears that at the time of the first sale, or attempted sale, the property had not been advertised 'according to law or as required by the terms of the deed of trust under which he had sold,' and on such facts it is very generally

held, uniformly, so far as we have examined, that a sale would have been invalid. In an instrument of this kind the law is that a statutory requirement or contract stipulation in regard to notice is of the substance, and unless complied with a sale is ineffective as a foreclosure, and even when consummated by deed the conveyance only operates to pass the legal title, subject to certain equitable rights in the purchaser, as of subrogation, etc., in case he has paid the purchase money in good faith."

The decisions in other States seem also to be practically uniform that there must be a strict compliance with the terms of the mortgage before the power can be exercised.

In 27 Cyc., 1465, the rule is stated that, "A power of sale contained in a mortgage or deed of trust must be strictly pursued, and all its terms and conditions complied with, in order to render the sale valid"; and again on page 1466: "It is essential to the validity of a sale under a power in a mortgage or deed of trust, to comply fully with its requirements as to giving notice of the sale"; and on page 1472: (235) "Directions of the statute or of the mortgage as to the length of time the notice must be published, or the number of times it must appear, are imperative, and a sale made without strict compliance therewith is invalid and passes no title"; and the text is supported by the cases cited in the notes. *Thornton v. Boyden,* 31 Ill., 210; *Bigler v. Waller,* 81 U. S., 304; *Hall v. Towne,* 45 Ill., 495; *Shillaber v. Robinson,* 97 U. S., 77; *Sears v. Livermore,* 17 Iowa, 297; *Preston v. Johnson,* 105 Va., 240.

In *Sears v. Livermore, supra,* it was held that a sale under the power in a mortgage was invalid, when the mortgage required the notice to be posted on the door of a hotel, and it was posted nearby, because of the refusal of the proprietor of the hotel to permit it to be placed on the door; and this was approved in *Preston v. Johnson, supra,* in which the Court quotes with approval what is said by Mr. Freeman in a note to *Tyler v. Herring,* 19 Am. St., 263, as follows: "Where the instrument creating the trust has given directions concerning the mode of sale, they must be substantially pursued. Any direction regarding the notice of sale is material, and the trustee is not at liberty to disobey it. His sale made without complying with it will, in most jurisdictions, be regarded as either absolutely void or as liable to be vacated upon complaint of any person interested in the execution of the trust."

In *Moore v. Dick,* 187 Mass., 208, a sale was declared void when the notice of sale, instead of being published in a certain weekly newspaper named in the power of sale, was published in a daily newspaper of another name, printed by the same proprietor and issued from the same office, and the Court says: "It is familiar law that one who sells under

a power must follow strictly its terms. If he fails to do so, there is no valid execution of the power, and the sale is void."

This case was approved in *Chace v. Morse,* 189 Mass., 561, and the Court there distinguishes between irregularities which avoid the sale and those that do not. The Court says: "The distinction between the two classes of cases has not been very clearly defined, and the decisions in the different jurisdictions do not entirely agree. It has repeatedly been said that, in order to make a valid sale under a power in a
(236) mortgage, the terms of the power must be strictly complied with. *Roarty v. Mitchell,* 7 Gray, 243; *Smith v. Provin,* 4 Allen, 516; *Bigler v. Waller,* 14 Wall., 297; *Shillaber v. Robinson,* 97 U. S., 68. Where the sale is to foreclose a mortgage for a breach of the condition, there is no authority to sell unless there is a breach, and an attempted sale would be without effect upon the right of redemption. So, where a certain notice is prescribed, a sale without any notice, or upon a notice lacking the essential requirements of the written power, would be void as a proceeding for foreclosure. *Moore v. Dick,* 187 Mass., 207. But if everything is done upon which jurisdiction and authority to make a sale depend, irregularities in the manner of doing it, or in the subsequent proceedings, which may affect injuriously the rights of the mortgagor, do not necessarily render the sale a nullity."

Perry on Trusts, sec. 602p and 602q, declares the same principle. It says: "It must be constantly borne in mind that the power of sale given in the deed or mortgage must be strictly followed in all its details. The power of transferring the property of one man to another must be followed strictly, literally, and precisely. Such a power admits of no substitution and of no equivalent, even in unimportant details. If the power contains the details, the parties have made them important; and no change can be made even if the mortgagor would be benefited thereby, nor if a statute provides a different manner. If the power is not executed as it is given, in all particulars, it is not executed at all, and the mortgagor still has his equity of redemption." "If the form of notice, and the manner of giving it, whether by posting in public places or by advertising in a newspaper, are prescribed in the power, they must be strictly followed; and if the particular place of notice is named, notice must be posted in that place; if the newspaper is named, publication of notice must be made in that paper. It is not necessary to give other notice of the sale than that prescribed in the power, but it is necessary to follow the power in good faith. If the notice named in the power cannot be given, as if the newspaper named has ceased to be published, the mortgagees cannot sell without recourse to a court of equity."

It will be noted that the mortgage before us and the sale there-

under antedate the act of 1905, which is now a part of section (237) 641 of the Revisal, providing that no sale shall be made under a mortgage, etc., thereafter executed, until notice of such sale shall be posted at the courthouse door and three other public places, and the effect of that statute is not before us.

We conclude, therefore, that we cannot disregard the requirements of the mortgage, and that the sale is invalid, because notice thereof was not given in accordance with its terms.

If the sale is invalid, the purchaser Heath had notice thereof, because it is recited in his deed that notice of sale was posted at the courthouse door and three other public places, and as the mortgage is a necessary link in his chain of title, he is charged with notice that it required a publication at four other public places. *Thompson v. Blair,* 7 N. C., 591; *Holmes v. Holmes,* 86 N. C., 209.

The defendants contend, however, that if it is held that it was necessary to publish the notice of sale at four other public places, the failure to do so is an irregularity, that the sale was not absolutely void, and that the plaintiff by acquiescence has ratified the sale, or by renting from the purchaser is estopped to deny its validity.

It is true that the mortgagor may, by acquiescence in the conduct of the sale, be precluded from questioning its irregularity, *Lunsford v. Speaks,* 112 N. C., 612, but there can be no acquiescence without knowledge, and it is a fact established in this case that the plaintiff did not know of the irregularity in the sale at the time he rented from the purchaser, nor until a short time before this action was commenced.

In *Pence v. Langdon,* 99 U. S., 578, it is said: "Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do," and the plaintiff cannot be held to be negligent in assuming the sale to be regular, when the presumption is that it was advertised according to law. *Lunsford v. Speaks,* 112 N. C., 612; *Cawfield v. Owens,* 129 N. C., 288. (238)

Nor does the rental of the land estop the plaintiff from asserting his equity to redeem. At the time he rented, he thought the sale was regular, and he entered into the contract of rental in ignorance of the fact that he had the right to redeem; but aside from this, the relation of mortgagor and mortgagee being established, a court of equity would give effect to such an agreement only so far as is necessary to protect the rights of the mortgagee.

The rights of the mortgagor in possession are almost identical with those of a vendee in a bond for title, and it has been held repeatedly that, while the vendee may, under some circumstances, rent from the vendor, and thereby confer the right to enforce payment of the rent under the landlord and tenant act, that this alone does not impair the equity in the vendee, and that the rents collected must be applied to the debt. *Taylor v. Taylor,* 112 N. C., 27; *Crinkley v. Edgerton,* 113 N. C., 444; *Jones v. Jones,* 117 N. C., 257.

We conclude, therefore, that there is no error, and the judgment must be affirmed.

This result does not seem to be unjust to the purchaser, as he has received more from the plaintiff and the land than he agreed to pay the mortgagee.

Affirmed.

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

COMMERCIAL AND FARMERS BANK v. SCOTLAND NECK BANK AND F. P. SHIELDS.

(Filed 20 December, 1911.)

1. Notes—Security—Subrogation—Agreement—Debtor and Creditor—Notice—Equity.

One advancing money to a debtor under an agreement that the latter is to take up a note of his secured creditor and hold the security as collateral to the note given for the money thus advanced is entitled to be subrogated to the first creditor's rights in the security upon the discharge of his note by payment in the absence of intervening equities, whether or not the holder of the first note had notice of the agreement.

2. Same.

A debtor who has entered into an agreement to take up a note with security in the hands of his creditor with money advanced for the purpose, and have the securities assigned as collateral to a note given for the money thus advanced, does not defeat the right of the one advancing the money to be subrogated to the rights of the holder of the first note in the securities, by having them assigned to himself, contrary to the agreement, and in the absence of intervening equities, especially, as in this case, when the debtor at once placed the securities in the hands of the creditor advancing the money for the purposes agreed upon.

3. Same—Trusts and Trustees.

Equity will not allow a debtor, who has had money advanced to him with which to take up his note secured by a mortgage under an agreement that the security will be held as collateral to his note given for the money advanced, to avail himself of a breach of trust in taking an assignment of the note and mortgage to himself and thereby defeat the right created by his agreement, upon the faith of which the money was advanced, but will regard the assignment of the security, if made to the debtor as being for the benefit of him to whom it justly belongs.

4. Same—Assignment for Creditors.

An assignee, in a conveyance for the benefit of creditors, takes subject to prior equities by which his assignor is bound.

5. Same—Registration—Notice.

A debtor secured a note by mortgage and subsequently made a deed of assignment for the benefit of his creditors, while the mortgage was outstanding and uncanceled of record. The land embraced in the mortgage was included in the deed of assignment: *Held*, the uncalceled mortgage was notice to the assignee of the rights of one who had advanced the money to the debtor to pay off the mortgage note and who had an equity to be subrogated to the rights of the holder thereof in the mortgaged premises.

APPEAL from *Ferguson, J.*, at August Term, 1911, of HALIFAX. (239)

This case was heard below upon facts agreed, as follows:

1. Both plaintiff and defendant Scotland Neck Bank are, and were at the time of the acts hereinafter set out, corporations of this State, doing a general banking business.

2. On 1 November, 1904, S. W. Morrisett and J. G. Morrisett, partners as Morrisett Bros., gave their note to defendant Scotland Neck Bank for $1,500, for borrowed money, and to secure the same, S. W. Morrisett and wife executed to the said Scotland Neck (240) Bank a mortgage on real estate in the town of Scotland Neck, N. C., which was duly recorded.

3. Some time after the maturity of the note and demand for payment, Morrisett Bros., through S. W. Morrisett, requested the plaintiff bank to take up said note and mortgage and carry the same for them, which plaintiff agreed to do, upon the distinct understanding and agreement between it and Morrisett Bros. that they should have the Scotland Neck Bank transfer and assign to plaintiff the note and mortgage as security for the amount so furnished by it.

4. In pursuance of said agreement, the plaintiff, on 2 October, 1905, furnished Morrisett Bros. with an amount of money sufficient to take up said note and mortgage (for which funds Morrisett Bros. executed to it their note), and Morrisett Bros., acting by and through said S. W.

Morrisett, on 4 October, 1905, with the funds so furnished by plaintiff, under the understanding and agreement aforesaid, paid the Scotland Neck Bank the amount of the note and mortgage, and, at the time of payment the Scotland Neck Bank, at the request of S. W. Morrisett, transferred directly to S. W. Morrisett the note and mortgage, indorsing on each the following:

Transferred to S. W. Morrisett without recourse.

SCOTLAND NECK BANK,

4 October, 1905. W. R. BOND, *Asst. Cashier.*

5. At the time of the payment for and transfer of the note and mortgage aforesaid, the Scotland Neck Bank had no notice of the understanding and agreement between plaintiff and Morrisett Bros. or S. W. Morrisett, and did not know from whom or how Morrisett Bros. obtained the funds with which the payment was made.

6. In making the payment and having the note and mortgage transferred to S. W. Morrisett, as aforesaid, it was the purpose and intention of Morrisett Bros. and S. W. Morrisett that plaintiff was to be the holder and owner of said note and mortgage, but, not desiring the Scotland Neck Bank to know from whom they obtained the money or of their dealings with the plaintiff bank, and being ignorant of any
(241) legal effect such transfer might have, had the transfer made directly to S. W. Morrisett, as aforesaid.

7. In furtherance of said intention and purpose, and in order to comply with the understanding between Morrisett Bros. and plaintiff, S. W. Morrisett, on the following day, 5 October, 1905, transferred and delivered to the plaintiff the note and mortgage as collateral security for the note of Morrisett Bros., which they executed for the funds furnished by plaintiff, said note being given on that date for $2,500 ($1,500 of which was for the money furnished by plaintiff to take up the note and mortgage held by the Scotland Neck Bank), the note since then having been renewed from time to time, the last renewal being dated 1 May, 1908.

8. There is now due on the $2,500 note the sum of $1,500 and interest, $1,000 having been paid on same; and said note, as well as the note and mortgage purchased from the Scotland Neck Bank, is long past due.

9. Some time after the execution of said notes and the payment and transfer of the note and mortgage, as hereinbefore set out, to wit, on 19 December, 1908, Morrisett Bros. duly executed to defendant F. P. Shields a deed of assignment for the benefit of ceditors (without preference), which was duly recorded, and in which was conveyed, with

other property, the real estate in Scotland Neck, N. C., which was conveyed in the mortgage by S. W. Morrisett to the Scotland Neck Bank.

10. That prior to the date of the deed of assignment, as well as afterwards, plaintiff has demanded of Morriset Bros. payment of their note, which has been refused.

11. Plaintiff has demanded of the Scotland Neck Bank that it foreclose the mortgage executed to it by S. W. Morrisett and wife, by selling the real estate therein conveyed, under the terms and provisions of the same, to satisfy the note of Morrisett Bros. secured by it, but said bank has refused and still refuses to do so. The said mortgage has not been canceled on the record.

12. Defendants contend that the transaction in regard to the (242) note and mortgage, and the transfer of the same to S. W. Morrisett by Scotland Neck Bank, as set forth in the foregoing statement of facts, was in law a payment of the note and a cancellation of the mortgage as to F. P. Shields, assignee under said deed of assignment, and as to him and the creditors of Morrisett Bros. the mortgage is not in force, while plaintiff contends that such payment and transfer of the note and mortgage did not have that effect and that the mortgage is still in force as against Shields, assignee, and all others, at least in equity, and is a subsisting security for the debt of Morrisett Bros. to it.

13. It is agreed that if the court shall be of the opinion that the payment of the said note and mortgage and transfer of the same by the Scotland Neck Bank to said S. W. Morrisett, as set out in the foregoing statement of facts, was not, as to defendant, F. P. Shields, assignee or grantee under the deed of assignment, a payment of the note and cancellation of this mortgage, and that said mortgage is in force as against Shields, as assignee, judgment shall be entered requiring the defendant Scotland Neck Bank to foreclose the mortgage according to the provisions and terms thereof, for the benefit of the plaintiff bank.

14. It is further agreed that the costs of the action be divided equally between plaintiff and defendant F. P. Shields, assignee.

The note for $2,500 given by Morrisett Bros. to the plaintiff refers to the other note and mortgage for $1,500, purchased from the Scotland Neck Bank as collateral security for its payment, and it is described therein as having been indorsed by S. W. Morrisett to the plaintiff for that purpose, and the note for $1,500 to the Scotland Neck Bank, secured by the mortgage, is indorsed as follows:

Transferred to Commercial and Farmers Bank (the plaintiff) as collateral. S. W. MORRISETT.

The court rendered the following judgment:

This cause coming on to be heard, and being heard and fully considered upon the facts agreed, the court is of the opinion that S. W.
(243) Morrisett, at the time he paid the money to the Scotland Neck Bank and took the assignment of said note and mortgage, was not the holder of the same in his own right or in the right of Morrisett Bros., but in the right of the Commercial and Farmers Bank, as trustee for said bank, and therefore it is ordered and adjudged that said note and mortgage was not discharged, but is in full force and effect; and it is thereupon ordered and adjudged that the Scotland Neck Bank foreclose said mortgage according to the provisions and terms thereof. It is further ordered that the plaintiff and the defendant F. P. Shields, assignee, each pay one-half of the cost.

G. S. FERGUSON, *Judge.*

Defendant F. P. Shields, assignee, excepted and appealed.

R. C. Dunn and Murray Allen for plaintiff.
Kitchin & Smith for defendants.

WALKER, J., after stating the case: The plaintiff's claim appeals very strongly to the conscience of the Court, and we think it is sustained by well-settled principles. The doctrine of subrogation rests upon principles of natural justice and equity, and there are numerous authorities which support the rule that one who, at the request of another, advances money to pay off a security or encumbrance, in which the latter is interested or to the discharge of which he is bound, under the agreement that he shall have the benefit of the creditor's security, is entitled to be subrogated to the rights of the creditor in the security; and some cases hold that, in the absence of an express agreement, one will be implied that the security shall subsist for the use and benefit of the lender of the money, and it will be so enforced. *Gans v. Thieme,* 93 N. Y., 225; *Levy v. Martin,* 48 Wis., 198; *Wilkins v. Gibson,* 113 Ga., 31. One who pays a debt at the instance of the debtor, under such circumstances that it appears to have been contemplated by the parties that he should become entitled to the benefit of the security for the debt held by the creditor from the debtor, may, as against the debtor and the debtor's estate, be subrogated to the benefit of such security and of the debt which he has discharged. And a party who has paid a debt at the request of the debtor, under circumstances which would oper-
(244) ate a fraud upon him if the debtor were afterwards allowed to insist that the security for the debt was discharged by this payment, may also be subrogated to the security, as against the debtor. But this subrogation will not be allowed against one interested in the

property held as security, who was a stranger to the transaction by which the payment was made and who was under no obligation for the payment of the debt, unless it appears that the payment was made, not as an extinguishment of the debt, but in reliance upon and as a purchase of the security. This is a species of conventional subrogation, being a subrogation by an implied convention or agreement. Accordingly, it will not be allowed if it appears not to have been intended by the parties, though this intention, if not expressed, may ordinarily be determined from the circumstances attending the transaction. Sheldon on Subrogation, sec. 274.

The authorities are entirely agreed, though, that where a person advances money to pay off a mortgage debt under an agreement with the owner of the equity of redemption or his representative that he shall hold the mortgage as security for his advance, but the mortgage, instead of being assigned to him, is discharged in whole or in part, he is yet entitled as against subsequent parties in interest to be subrogated to the rights of the mortgagee and to enforce the mortgage. Sheldon on Subrogation, sec. 19; 37 Cyc., 467, 471; *Crippen v. Chappel,* 35 Kansas, 495; *Fivel v. Zuber,* 67 Texas, 275. In the case last mentioned it is said that no different rule has been found except in Louisiana, where the law of the subject is governed by statute.

Numerous authorities are cited in support of the rule, and the following passage from Domat, in which the principle is clearly and strongly stated, is quoted with approval: "One may acquire the privilege of a creditor without substitution in the same manner as a mortgagee, by agreement with the debtor that he who shall pay for him shall have the privilege; and it makes no difference whether the payment be made to the creditor by him who lends the money or by the debtor with whom the money has been intrusted." (2 Strahan's Domat's Civil Law, Cushing's Ed., p. 698, sec. 1783.)

The subject is fully discussed in 1 Jones on Mortgages (6 Ed.), (245) sec. 872 *et seq.,* and all the authorities collected. It is there said that the principle is well settled that when the money is advanced, at the request of the debtor or creditor, with the agreement that an assignment should be made or that subrogation should take place, or, what is the same thing in law, that the lender should have the benefit of the security, in either of the cases it will be kept on foot for the repayment of the amount advanced by the lender; and there seems to be no ruling to the contrary.

Downer v. Miller, 15 Wis., 612, seems to be exactly like this case in all respects. It decides every point raised in favor of the plaintiff, viz., that there clearly exists the right of conventional subrogation, that the

express assent of the creditor, who received the money from the party claiming the right, is not necessary, and that the assignee takes subject to plaintiff's equity. Lyness was the creditor, Steever the debtor, and Miller the one who advanced the money and claimed the right of subrogation. The Court said: "Miller's rights, therefore, must depend entirely on the effect of the agreement between him and Steever, and that we deem sufficient to justify the judgment of the Circuit Court. That agreement was that Miller was to indorse for Steever so as to enable the latter to raise the money at the bank, but that the money was to be used, not to pay and extinguish the Lyness judgment, but to procure an assignment of it to Miller, to indemnify him as the indorser. To use the money thus obtained to pay the judgment and have it discharged would operate as a fraud upon Miller, and it is upon this ground that he was entitled to the relief given by the court below. It may be conceded that such relief could not have been given against any party who, relying upon the discharge of the Lyness judgment, has acquired an interest in the property for a valuable consideration, without notice of Miller's equitable rights. But the appellant here does not stand in such a position. His rights were subsequent and subject to the Lyness mortgage. . . . Nor is the fact that Lyness was not party to the agreement that his decree should be assigned for Miller's security, any reason why that agreement should not be enforced. It was a matter of indifference to him whether the decree was assigned or discharged, and (246) where justice between others requires it to be assigned, he should not be allowed to prevent it upon the supposed technical right to control his own decree. The enforcement of this agreement between Miller and Steever without reference to the question whether Lyness assented to it is entirely analogous to the principle of subrogation, where the assent or agreement of the creditor who gets the money is not essential to the right. If a surety pays a debt, he has a right to be subrogated to the securities of the creditor, and the latter would not be allowed to object, for it is a matter of indifference to him. It is equally true here, though Miller's right is not (strictly) that of subrogation, but grows out of the agreement between him and Steever. That agreement is one which should have been enforced even though Lyness had adhered to his refusal to assign the decree. But here he voluntarily consented in the end to make the assignment." *Shreve v. Hankinson,* 34 N. J. Eq., 76; 1 Pingrey on Mortgages, sec. 1175. "Where the amount due on mortgages is paid by a third person at the request of the mortgagor, and there is no understanding that they shall be considered satisfied, a court of equity will, for purposes of justice, keep the mortgages alive, and much more so if the party takes an assignment of the mortgages." *Tolman v.*

Smith, 85 Cal., 280; *Gans v. Thieme,* 93 N. Y., 232; *Yabie v. Stephens,* 36 Kan., 680; *Bacon v. Goodnow,* 59 N. H., 415.

The case of *Gans v. Thieme* is a very strong authority for the position that under the facts of this case, the plaintiff, who, at the request of Morrisett Bros., advanced the money to pay the debt owing to the defendant bank, is entitled to be subrogated to the rights of the latter in the debt and mortgage, as will appear from the following extract: "It is no doubt true, however, as the learned counsel for the respondents argues, that a volunteer cannot acquire either an equitable lien or the right to subrogation; *Sandford v. McLean,* 3 Paige, 122; *Wilkes v. Harper,* 1 N. Y., 586; 2 Barb. Ch., 338; but one who, at the request of another, advances his money to redeem or even pay off a security in which that other has an interest, or to the discharge of which he is bound, is not of that character, and in the absence of an express agreement one would be implied, if necessary, that it shall sub- (247) sist for his use, and it will be so enforced. But the doctrine of substitution may be applied although there is no contract, express or implied. It is said to rest 'on the basis of mere equity and benevolence'; *Cheeseborough v. Millard,* 1 Johns. Ch., 409; 1 Story's Equity Jurisprudence, sec. 943, and is resorted to for the purpose of doing justice between the parties."

Why should this not be the true doctrine, when the money is paid at the request of the debtor, with the agreement that the security should continue for the benefit of him who advanced the money? The creditor is not prejudiced in any way or to any extent. The debtor has made the promise and has derived a clear benefit by the payment to his creditor, and in a court of equity he will not be heard to say that the arrangement has failed by reason of the fact that he violated his instructions or agreement, if he did, and took an assignment to himself instead of the plaintiff. The mortgage has not been canceled, and even if it had been, a court of equity would not regard the cancellation as in the way of enforcing the undoubted right of the plaintiff to relief, provided there has intervened no new right acquired for value and without notice, which will be prejudiced if the lien is enforced. The law will not allow the debtor to avail himself of the breach of trust and thereby defeat the right created by his agreement, upon the faith of which the money was advanced, but will regard the assignment as made for the benefit of him to whom it justly belonged, as we have already shown. *Dudley v. Bergen,* 23 N. J. Eq., 397; *Russell v. Mixer,* 42 Cal., 475; *Cobb v. Dyer,* 69 Me., 494; *Seiberling v. Tipton,* 113 Mo., 373; *Brace v. Bonney,* 78 Mass. (12 Gray), 107. In *Russell v. Mixer, supra,* it is said: "The only question presented is, whether or not, upon the facts stated in the

amended complaint, the plaintiff is entitled to the relief he obtained. We think that there can be no doubt that he is. The agreement between Miller and himself was for an assignment and transfer of the mortgage; the mistake occurred wholly in the selection of the means by which this agreement was to be effectuated. There is no appreciable distinction between this case and that where a scrivener, through ignorance or (248) inattention, fails to select or prepare such an instrument as effectuates the previous agreement of parties, and relief is always decreed in that case. 1 Story Eq. Jur., sec. 115. Had the recorder here, upon being informed by the parties that the agreement between them was that the mortgage in question should be more effectually transferred to Russell, prepared a release, instead of an assignment, whether he did so through mere inattention to what he was doing, or through a misapprehension of its legal effect in the premises, there would be no doubt that equity would relieve against the mistake. The rule must be the same in a case where the parties have made the mistake for themselves, and without the aid of either scrivener or recorder."

But in *Moring v. Privott,* 146 N. C., 558, we find an authority which clearly sustains the plaintiff's right of subrogation. It is there said that subrogation is of equitable origin, not dependent upon contract, and is always invoked to prevent injustice. It is defined to be 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, . . . or that change 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 fiction, by force of which an obligation extinguished by a payment 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 subrogated is regarded as entitled to the same rights, and, indeed, as constituting one and the same person with the creditor whom he succeeds. Sheldon Sub., 2; 27 Am. & Eng. Enc., 206; *Davidson v. Gregory,* 132 N. C., 389; *Carter v. Jones,* 40 N. C., 196; *Springs v. Harven,* 56 N. C., 96.

But the Court, quoting from and approving *Robinson v. Leavitt,* 7 N. H., 99, further said: "There are cases in which a party who has paid money due upon a mortgage is entitled, for the purpose of effecting the substantial justice of the case, to be substituted in the place of the encumbrancer and treated as assignee of the mortgage, and is (249) enabled to hold the land as assignee, notwithstanding the mortgage itself has been canceled and the debt discharged. The true principle is that when money due upon a mortgage is paid it shall

operate as a discharge of the mortgage or in the nature of an assignment of it, as may best serve the purpose of justice and the just intent of the parties. Many cases state the rule in equity to be that the encumbrance shall be kept on foot or considered extinguished or merged, according to the intent or interest of the party paying the money. . . . And it makes no difference whether the party, on payment of the money, took an assignment of the mortgage or a release, or whether a discharge was made and the evidence of the debt canceled. The debt itself may still be held to subsist in him who paid the money, as assignee, so far as it ought to subsist, in the nature of a lien upon the land, and the mortgage be considered in force for his benefit, so far as he ought in justice to hold the land under it, as if it had been actually assigned to him." There are numerous authorities of like tenor.

Our recent decision in *Tripp v. Harris,* 154 N. C., 296, is directly in point. We there held that where the note secured by a mortgage is paid by a surety thereon, the note is satisfied, but an implied promise of the principal to reimburse the surety at once arises, and that he is subrogated to the rights of the creditor in all securities held by him, and he may, with or without any formal assignment, avail himself thereof for the purpose of indemnifying himself, and if the security be a mortgage, he may foreclose the same for his own benefit as a creditor of the principal.

Our case presents a much stronger equity in favor of the plaintiff, as there the mortgage was not canceled on the record or otherwise; there was an express agreement for subrogation; Morrisett received the note as agent for the plaintiff and had no authority in law or in fact to take an assignment to himself, and the next day he actually delivered note and mortgage, which he had received from the creditor, in execution of the agreement, to the plaintiff. The conduct of Morrisett shows conclusively that he did not take the assignment to himself for his own benefit and with the purpose of satisfying the debt and canceling the note, but for the use and benefit of the plaintiff bank, in accordance with the agreement between them, because he almost imme- (250) diately transferred and delivered the note and mortgage to it.

In *Liles v. Rogers,* 113 N. C., 197, this Court recognized the doctrine of conventional subrogation, and it is there said that where the money is paid to the creditor by another, at the request of the debtor, to discharge his obligation, the person who advanced the money is, in equity, subrogated to the rights of the creditor in the securities held by him.

We do not understand that the Morrisetts or the defendant bank are contesting the right of the plaintiff, the appeal having been taken by the assignee of the Morrisetts, and he stands in no better position than

his assignors would have held if the general assignment had not been made by them. "It may be said generally that an assignee succeeds only to the rights of his assignor and is affected by all equities against him, and takes the property subject to all such equities." *Justice Shepherd* thus states the rule in *Wallace v. Cohen,* 111 N. C., 104: "It is true, as laid down in *Southerland v. Fremont,* 107 N. C., 565, that such a trustee or mortgagee is a purchaser for value within the Statutes of 13 and 27 Elizabeth, but it is, in that case, conclusively determined, after some confusion in our decisions, that such a purchaser takes the property subject to any equity or other right that attached to the same in the hands of the debtor. This view is abundantly sustained, not only by our own previous decisions, but by the great weight of judicial authority. *Bassett v. Norsworthy,* White & Tudor's L. C. Eq., and notes. As applicable to the present case, the doctrine has been recognized and applied in a large number of decisions. 'In order to entitle one to protection as a *bona fide* purchaser in such a case, he must have advanced some new consideration, or incurred some new liability, on the faith of the fraudulent vendee's apparent ownership.' *Johnson v. Peck,* 1 Woodb. & M., 334; *McLeod v. Bank,* 42 Miss., 99; *Hyde v. Ellery,* 18 Md., 496; *Sargent v. Sturm,* 23 Cal., 359; *Ratcliffe v. Sangston,* 18 Md., 383; *Pope v. Pope,* 40 Miss., 516. Hence, 'an assignee of the fraudulent vendee for the benefit of creditors, incurring no new liability on the faith of his title, is not protected.' *Farley v. Lincoln,* 51 N. H., 577; *Harris v. Horner,* 30 Am. Dec., 182; *Stevens v. Brennan,*
(251) 79 N. Y., 254; *Montgomery v. Bucyrus,* 92 U. S., 257; *Donaldson v. Farmer,* 93 U. S., 361. These authorities with very many others we could cite, are directly in point, and sustain the right of the plaintiffs to recover without fixing the assignee with notice." This has always been the settled law in this State, and certainly since *Potts v. Blackwell,* 56 N. C., 449, was decided. This doctrine is so well established that it requires no further discussion. Besides, the record of an uncanceled mortgage upon real estate charges subsequent purchasers with notice of the encumbrance. *Smith v. Stark,* 3 Col., 453.

The court was right in giving judgment for the plaintiff, upon the case agreed.

Affirmed.

TABLE ROCK LUMBER COMPANY v. A. J. BRANCH.

(Filed 23 December, 1911.)

1. Appeal and Error—New Trial Ordered—General Terms—On All Issues.

While a new trial granted may, within the discretion of the court, be restricted to an issue entirely separate and distinct from the others when it is clear that there is no danger of complication, it is error for the trial judge to so restrict the trial, when a new trial, ordered by the Supreme Court, is general in its terms, for there should be a new trial of the whole case on all the issues.

2. Deeds and Conveyances—Clerk's Probate—Requisites—Probate Taken Before Other Officers.

It is only required for a valid probate that the clerk should certify to the proof of a deed taken before him under the statute, Revisal, sec. 1004, and it is only when he passes upon a probate taken before some other officer that he is required to certify to the correctness of the probate and certificate, and order the instrument to be registered (Revisal, sec. 999) according to the form prescribed by Revisal, sec. 1001, or one substantially the same.

3. Wills—Probate—"Duly Proven"—Inference—Burnt and Lost Records—Evidence—Practice.

Semble, an entry made of record in the minute-book of the county court regarding the probate of a certain will in the chain of title of a party claiming the lands involved, that the will was duly proven by the oath of two subscribing witnesses, according to law, would irresistibly imply that the testator signed the will in their presence and they in his; but in the case at bar the party may recover without this proof, and this question is adverted to only for the purpose of suggesting that if he wishes to rely upon the will, in a new trial ordered, he may perhaps restore the lost record under the provisions of Revisal, ch. 2.

4. Appeal and Error—New Trial in One—Same Result in the Other—Appeal Dismissed—Practice.

When both parties appeal, and in one appeal a new trial is ordered, an appeal as to the other will be dismissed when it appears that the questions are the same and the determination of the other case will necessarily dispose of both appeals.

APPEAL from *Long, J.*, at August Term, 1911, of BURKE. (252)

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

Avery & Ervin for plaintiff.

S. J. Ervin and Spainhour & Mull for defendant.

WALKER, J. This case has been before us several times and is reported in 150 N. C., 110, 240.

At the Fall Term, 1910, of this Court, we granted a new trial for newly discovered evidence. The appeal had been taken by the plaintiff, who had recovered in all respects at that trial, except as to the land within the boundary of what is known in the case as the Brite grant, containing 300 acres. When the case was heard the last time, the court held that the new trial was limited by the order of this Court, though general in its terms, to the Brite grant, and that the defendant could not reopen issues upon which he had lost at the former trial, and to this ruling defendant excepted. We think the Court erred in thus restricting the new trial. Our order, as we have said, was general in its terms, and extended to all the matters involved in the case. We were not asked to limit the new trial to any particular question, and did not do so. This Court, upon application, can grant a general or a partial new trial, as it may see fit under all the circumstances; but when a new trial is granted, nothing more being said, it means a new trial of the whole case—of all the issues, and not merely of one of them, or, as in this case, of a part of one. The new trial refers to the issue and is not re-
(253) stricted by the answer to the issue, unless the Court, in the order, confines its scope to a particular issue or a particular question.

It is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial. It will generally do so when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication. *Benton v. Collins,* 125 N. C., 83; *Rowe v. Lumber Co.,* 133 N. C., 433. In the last cited case we said: "The issue submitted at the first trial was, Are the plaintiffs the owners of the land in controversy or any part thereof, and if of any part, what part? The answer to that issue was 'No.' There were three tracts of land in dispute, and if an error was committed as to any of them this Court must of necessity give a new trial as to all, though there may have been no error committed as to one of them. This results from the form of the issue. If a separate and distinct issue had been submitted as to each tract, and an error had been committed as to one only, the Court even in that case could have given a general new trial; but in its discretion could have restricted the new trial to the issue or issues as to which the error was committed. When the issue is general, embracing within its scope several distinct pieces of property or tracts of land, the new trial must be general, because the issue and, consequently, the verdict are in their very nature indivisible. This seems to have been expressly decided. *Beam v. Jennings,* 96 N. C., 82; *Holmes v. Godwin,* 71 N. C., 306." Of course, in the latter part of the passage taken from that case we referred to a

verdict which merely gives a general answer, affirmative or negative, to the issue. In that case the issue was general in its terms and embraced several tracts of land, and the answer thereto was "No." Besides, in this case, there may be danger of doing injustice to the defendant by granting a partial new trial. But the fact remains, after all has been said, that we ordered a general and not a partial new trial, and the court should have tried the case below in accordance therewith. It was error not to do so, for which there must be another trial. (254)

Thee is one question we must decide before remanding the case. The plaintiff offered as evidence a deed from A. C. Avery and wife to John Cheever, dated 27 August, 1878, and defendant objected to it upon the ground that while the probate, as appears by the annexed certificate, is full and correct in form, there was no fiat or order of the clerk of the court, D. C. Pearson, for the registration thereof. The objection was overruled and the deed admitted. Defendant excepted. We think the ruling was correct. The statute does not seem to require an order to registration when the deed is proven before the clerk, but merely a certificate of the proof. Revisal, sec. 1004. When he passes upon a probate taken by some other officer, he must certify to the correctness of the probate and the certificate, and order the instrument to be registered (Revisal, sec. 999) according to the form prescribed by Revisal, sec. 1001, or one substantially the same.

The court excluded a copy of the will of George Hice, Sr., certified by W. S. Sudderth, clerk of the county court, to be a true and correct copy of his will on 12 November, 1855. The handwriting of Sudderth was duly proven by the examination of L. A. Bristol. The defendant then offered the minute-book of the county court, from which it appeared that the will of George Hice, Sr., had been offered for probate by his executor, G. W. B. Hice, who appeared by his attorney, W. W. Avery, and that a caveat filed thereto by Elizabeth Hice and an issue of *devisaviet vel non* ordered to be made up, which was done, and the case docketed for trial. The caveat was afterwards withdrawn and the executor qualified. Then appears this entry: "By consent of parties, the defendant, Elizabeth Hice, is permitted to withdraw the issue heretofore made in this case and confess judgment for the costs heretofore incurred. Whereupon the executor, George W. B. Hice, offered for probate the last will and testament of George Hice, which was duly proven by the oath of John Parks and Thomas Carleton, the two subscribing witnesses thereto, according to law. And the said G. W. B. Hice took the sundry oaths as executor, and letters testamentary issued. The said Elizabeth Hice, widow of George Hice, came into court in proper person and entered her dissent to the provisions of the said will, and refused

(255) to accept the legacy therein given her, and filed her petition for her year's allowance, which is granted. (See trial docket.)"

We are inclined to the opinion that the certified copy, as authenticated by the entries on the records of the court, was competent evidence of the due execution of the will, and that it should have been admitted. The plaintiff objected to it upon the ground that it did not appear by the records or the copy of the will that the two subscribing witnesses, named in the entry we have set forth, actually subscribed as witnesses in the presence of the testator, though it is admitted that it sufficiently appears that George Hice, Sr., signed the will in their presence. It is not stated expressly in the entry that he so signed the will, but only inferentially from the words, "which was duly proven by the oath of John Parks and Thomas Carleton, the two subscribing witnesses, according to law," and we do not see why the other fact may not as well be inferred from those words. They could not well be subscribing witnesses unless he signed or acknowledged his signature in their presence, and they, as witnesses, subscribed it in his presence. Revisal, sec. 3113; *In re Snow's Will,* 128 N. C., 100; *Burney v. Allen,* 125 N. C., 314; *Graham v. Graham,* 32 N. C., 219. The statement that the will was duly proven by the oath of the two subscribing witnesses, according to law, would seem to clearly imply, by irresistible inference, that there was legal proof of his signing in their presence and they in his, for otherwise the will would not have been duly proven. *Cochrane v. Improvement Co.,* 127 N. C., 386. No doubt a full certificate of probate was filed and recorded with the will, showing all the facts which should appear. It was admitted that the records of the court had been burned many years ago. We need not decide this question, though, as the defendant succeeded at the trial without the necessity of resorting to the will as evidence, so it is stated. We merely advert to it for the purpose of suggesting that if the defendant wishes again to rely upon the will as evidence, he may perhaps restore the lost record under the provisions of Revisal, ch. 2, entitled, "Burnt and Lost Records," and thereby avail himself of it as proof. It is too important and far-reaching a question to

(256) decide finally without a more extended argument and consideration of it.

We must regretfully order another trial of this much litigated case, because of the error in restricting the last trial to the consideration only of rights arising under the Brite grant.

New trial.

PLAINTIFF'S APPEAL.

WALKER, J. As we have ordered a new trial of this case in the consideration of the defendant's appeal, it is useless to pass upon the alleged errors which are assigned in the plaintiff's appeal. The rulings may be different on the next trial and the case presented in an entirely different aspect. Besides, the plaintiff will derive from the new trial granted in the other appeal all the advantage he now seeks. The whole matter is reopened for a new investigation, and we can do no more than this for him, should we review the rulings of the court to which he has excepted. If we sustained any one or all of his assignments, the result would be the same as it is now—that is, a new trial. We must, therefore, take the usual course in such cases and dismiss the appeal.

Appeal dismissed.

Cited: Buchanan v. Hedden, 169 N. C., 223.

J. B. HODGES v. R. L. SMITH.

(Filed 21 February, 1912.)

Vendor and Vendee—Deceit—False Warranty—Evidence—Damages—Questions for Jury.

In an action for damages for personal injuries caused by defendant's deceit and false warranty in the sale of a horse, there was evidence tending to show that the defendant falsely represented that the horse was kind and gentle, and that plaintiff, relying thereon, bought the horse, drove him twenty-five miles to his home, and a few days thereafter, while driving him to buggy, the horse began to kick and back and threw plaintiff out of the buggy and broke his leg: *Held,* a question for the jury as to whether defendant intended his statement as to the character of the horse to be a warranty, and whether the plaintiff, relying thereon, was thereby induced to buy, and whether, under the evidence, there was deceit and a breach of warranty on defendant's part.

APPEAL from *Cline, J.,* at October Term, 1911, of BEAUFORT. (257)

This action was brought to recover damages for deceit and false warranty in the sale of a horse. In his answer the defendant describes himself as "a regular horse and mule dealer, conducting a sales-stable at Greenville, N. C. The following is the plaintiff's version of the facts, as given in his testimony: "I live in Beaufort County, and am a farmer and house carpenter. I know R. L. Smith, the defendant.

I went to his stables in December, 1907. He has a large stable at Greenville. I saw Mr. Savage before I saw Mr. Smith. Savage was working with Smith. I told Mr. Savage that I wanted a horse, one that my father and mother could drive and that is gentle and all right. I told him that I had never bought a horse before. He showed me the horse in question and told me that he was all right. He priced the horse at $185 cash. I then saw Mr. Smith and told him about the conversation with Savage. He said he had a horse to sell; that was what he was there for. He said the horse was all right. I told Mr. Smith that I did not know anything about horses; that I wanted a quiet, gentle horse. He said that this one was a quiet, gentle horse; that any lady could drive him. I had Mr. Savage to look at my horse, and we traded. I gave $145 to boot, by mortgage on the horse traded for. Mr. Smith had the horse hitched to a break cart and driven a short distance in the stable. He said he had no buggy, but would hitch him to a cart. My brother was with me at the time. I had no experience in buying horses. I told Mr. Smith that I wanted a quiet, gentle horse that my father and mother could drive. He said this was a gentle horse that any lady could drive. I relied on what he said and did not know, except from what he said, whether the horse was gentle or not. After the trade was made, Mr. Smith had the horse hooked up and I drove him home, a distance of about twenty-five miles. The next day after that, I hitched the horse up again. Lum Whitaker was with me. We hitched him to a good buggy with a good harness, and drove him about two miles. The next day Whitaker and I hooked him up and drove
(258) him 125 yards, when he began to run and kick and threw me out of the buggy, breaking my leg. Whitaker stopped the horse by pulling him into a fence. I was laid up nearly all the year. I was in bed six weeks, flat on my back. I was then up and down until October or November. The doctor attended me nearly the whole time. My leg was dislocated and broken together. I was disabled the entire year, and it affects me yet. After I got hurt, John Hodges worked the horse for me beside an old team and broke him for me, and I drove him that fall. The horse was not worth anything to me. I reckon he was worth $150 or $175 on the market. I saw the horse after I got hurt. That fall I wrote Mr. Smith a letter, in November, 1908, and told him I could not pay for the horse and the interest on the mortgage, and to send for him, which he did. Before I was hurt I could do a man's work. At the time of the injury the horse was in the main public road near my house, and threw me out of the buggy. My doctor's bill was $100. I had to hire a man to work at 50 cents per day and board at 25 cents per day. The horse I traded to Smith was worth $50. I lost him and

lost my crop that year. My time was worth $1 per day. I have not been able to do a good day's work since. Was about 24 years old when I made this trade."

At the close of the testimony for the plaintiff, the court, on motion of the defendant, entered a judgment as of nonsuit, and the plaintiff appealed.

Small, McLean & McMullan for plaintiff.
F. G. James & Son for defendant.

WALKER, J. The defendant, in his answer, denies the plaintiff's allegations, the substance of which have been set out, and avers that he had recently bought the horse when he sold him to the plaintiff, and not knowing his qualities, he could not have warranted or represented that he was kind and gentle in harness, but told the plaintiff that the person who sold the horse to him represented him to be sound and safe, and he only expressed an opinion to the plaintiff, based upon such knowledge as he had thus acquired, that the horse would suit him, and that he made no warranty and practiced no deceit. The issue thus raised by the pleadings was not submitted to the jury and the defendant offered no testimony, so that the case must be considered solely upon the (259) evidence of the plaintiff.

We think the judge erred in ordering a nonsuit. The question involved in this case has frequently been decided by this Court against the contention of the defendant. As early as 1805, in *Thompson v. Tate,* 5 N. C., 97, it was held that a vendor of goods is liable, on an express or implied warranty, for affirming, at the time of the sale, that they possess a particular quality which would increase their value, if it turns out that the affirmation is not true, although he did not know such affirmation to be false, and with reference to this principle the Court said: "Upon this question there can be no doubt; the vendor is clearly liable." This must be read in the light of subsequent decisions.

In *Inge v. Bond,* 10 N. C., 101, *Chief Justice Taylor* drew the distinction between an affirmation as to the title of goods, where the law implies a warranty and the affirmation binds the vendor, and an affirmation as to their soundness, which will not amount to a warranty, unless it appears on the evidence to have been so intended. This is but the statement of the general rule that in order to make a contract the minds of the parties must agree upon the same thing, the intention or belief of one only not being sufficient for the purpose. The intention of both must be the same. It is for the jury to find what the intention was from the language used and the circumstances of the case. The law was

stated by *Chief Justice Nash,* in *Foggart v. Blackweller,* 26 N. C., 238, to be well settled, by numerous adjudications, "that there is no word or set form of words required to constitute a warranty in the sale of personal property, but wherever the words used, taken in connection with the attendant circumstances, show that it was a part of the contract with the parties that there should be a warranty, they will suffice. 4 A. & E., 473; *Pwon v. Barkham,* 31 Cob. L., 5; B. & A., 240; Shepherd *v. Kain,;* 2 Nev. & Mann., 446; *Freeman v. Burke,* 28 C. L. These authorities show that every affirmation, made at the time of the sale of personals, is a warranty, provided it appears to have been so
(260) intended by the parties. A bare affirmation, merely expressive of the judgment or opinion of the vendor, will not amount to a warranty; and the reason is, a warranty subjects the vendor to all losses arising from its failure, however innocent he may be, and this responsibility the law will not throw upon him by implication, except as to the title of the property. As it respects the value or soundness of the article sold, the law implies no warranty. The leading case in this State upon the subject of the warranty of personals is that of *Erwin v. Maxwell,* 7 N. C., 241. In that case the plaintiff asked the defendant if the horse he was about to let him have was sound, to which the latter answered that he was. *Chief Justice Taylor,* in discussing the subject, says: 'To make an affirmation at the time of the sale a warranty, it must appear by evidence to be so intended, and not to have been a mere matter of judgment or opinion.' In the case of *Ayres v. Parks,* 10 N. C., 59, the Court says: 'An affirmation at the time of the sale is a warranty, provided it appears in evidence to have been so intended. Whether it was so intended is a matter of fact to be left to the jury.' The last case on this subject is that of *Baum v. Stevens,* 24 N. C., 411. In its leading features it strongly resembles this."

It was stated in *Baum v. Stevens* that the true doctrine was established in *Erwin v. Maxwell.* The cases are collected in *McKinnon v. McIntosh,* 98 N. C., 89, and the rule is thus deduced from them and the other authorities: "The defendant had a right to have the question whether the force and effect of the affirmations 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., 238; *Bell v.*

Jeffreys, 35 N. C., 356; *Henson v. King,* 48 N. C., 419; *Lewis* (261) *v. Rountree,* 78 N. C., 323; *Baum v. Stevens,* 24 N. C., 411."

See, also, *Henson v. King,* 48 N. C., 419; *Lewis v. Rountree,* 78 N. C., 323. The question was presented in *Horton v. Green,* 66 N. C., 596, and the Court said that "a representation simply of soundness does not import absolutely a stipulation of the existence of that quality, but a representation may be made in such terms and under such circumstances as to denote that it was not intended merely as a representation, but that it entered into the bargain itself. In *Ayres v. Parks,* 10 N. C., 59, *Hall, J.,* says: 'Whether an affirmation at the time of sale was intended as a warranty is a matter of fact to be left to the judge.' 'Of necessity, in verbal contracts,' says *Chief Justice Ruffin,* 'greater latitude must be allowed to evidence to establish the words and the meaning of parties. The evidence may consist of everything which tends to establish that the vendor meant to convey the impression that he was binding himself for the soundness of the article and that the vendee relied on what was passing as a stipulation.' Among these circumstances, even the tones, looks, gestures, and the whole manner of the transaction, with all surroundings, would be competent evidence for the jury to consider in making up their verdict. The doctrine upon special contracts of personalty, and whether the question of warranty is to be decided by the court or left to the jury with proper instructions, has been too long and too thoroughly settled in our State to be now overturned by decisions in other courts. We adhere to the decisions of our own Court upon these questions." That case was approved in *Beasley v. Surles,* 140 N. C., 605, and the following language of *Chief Justice Ruffin,* in *Baum v. Stevens, supra,* was adopted: "It is certain that warrant is not an indispensable term in contracts respecting personalty, as it is in conveyances of freehold. It is also true that a representation simply of soundness does not import absolutely a stipulation of the existence of that quality. But the representation may be made in such terms and under such circumstances as to denote that it was not intended merely as a representation, but that it entered into the bargain itself. . . . The evidence may consist of everything which tends to establish that the vendor meant to convey the impression that he was binding himself for the soundness of the article, and that the vendee relied (262) on what was passing as a stipulation. Among these circumstances would, of course, be the understanding, at the time, of the bystanders who witnessed the transaction, and the facts on which the impressions of these persons were founded." After further discussion, he concludes: "These, we think, were all matters properly belonging to the jury, to whom they should have been submitted, with instructions

that, if they collected therefrom that the defendant did not merely mean to express an opinion, but to assert positively that the negro was sound, and that bidders should, upon the faith of that assertion, bid for the negro as sound, then it would amount to a warranty; otherwise not." The same principle was stated and applied in *Wrenn v. Morgan,* 148 N. C., 101, and *Harris v. Cannady,* 149 N. C., 81, with a full citation of the cases in this Court, and the rule was thus formulated by *Justice Hoke:* "It is accepted law that to hold a bargainor in a sale responsible for a warranty, it is not necessary that this should be given in express terms, but that an affirmation of a material fact, made by a seller at the time of the sale and as an inducement thereto and accepted and relied on by the buyer, will amount to a warranty. Tiffany on Sales, 162." We find in Tiffany on Sales, at p. 162, a statement of the rule apparently corresponding with that adopted by this Court: "No form of words is necessary to create a warranty. Whether the words amount to a warranty is a question of the intention of the parties. The affirmation of a fact made by the seller as an inducement to the sale, if the buyer relies upon it, will amount to a warranty. A statement of opinion or a mere commendatory expression will not. Whether a statement is an affirmation of fact, or whether it is simply a statement of opinion or a commendatory expression, often depends on the nature of the sale and the circumstances of the case."

Applying the principle as thus gathered from the authorities, the court erred in not submitting the case to the jury to find the facts and to pass upon the question of warranty. The language of the parties, as used at the time of the transaction, is quite as strong to show a (263) warranty as any to be found in the cases we have cited. The defendant was a dealer in horses, and by the testimony as we now have it, he, at least, affirmed that the horse he sold to the plaintiff was of the description he wanted—kind and gentle in harness, and so well-broken that even a lady could drive him with safety. The plaintiff says that he relied upon that representation and bought the horse believing it to be true, and being induced thereby to buy. The jury must decide whether it was intended and accepted as a warranty, and also, upon the evidence, whether there has been a breach thereof, there being evidence of a breach for them to consider.

We have so recently discussed the law in regard to the question as to the deceit that it will be sufficient merely to refer to the case. *Whitmire v. Heath,* 155 N. C., 304. We have also recently considered very fully all the questions now presented, deceit and warranty, in *Robertson v. Halton,* 156 N. C., 215. See, also, *Unitype Co. v. Ashcraft,* 155 N. C., 63. The case of *Allen v. Truesdale,* 135 Mass., 75, is much like this

one. It was there held that if a person buys a horse, in reliance upon a false representation by the seller that the horse is safe and not afraid of the cars, and is injured by reason of the horse being frightened by the cars and running, he may maintain an action against the seller for such injuries; and the facts that the accident did not occur until five weeks after the sale, during which time the horse had been driven safely on several occasions, and that the horse, after being frightened, ran three-fourths of a mile, and then turned from the highway towards a place where it had been accustomed to stand, and in doing so overturned the vehicle in which the buyer was riding, are not, as matter of law, conclusive that the vice of the horse did not cause the injury, but are for the jury, citing *Langridge v. Levy,* 2 Mees. & Wils. (Exch.), 519. More to the point, upon facts somewhat similar to those in this case, is *Smith v. Green,* L. R. (1875-6), 1 C. P. Div., 92.

The question of damages is also discussed in *Robertson v. Holton, supra.*

The nonsuit is set aside and a new trial ordered.

New trial.

Cited: *S. c.,* 159 N. C., 526; *Fields v. Brown,* 160 N. C., 299; *Winn v. Finch,* 171 N. C., 275.

(264)

LAURA SPENCER v. JOHN FISHER.

(Filed 28 February, 1912.)

Intoxicating Liquors—Sale to Minors—Pleadings—Allegations—Interpretation of Statutes.

To sustain an action for exemplary damages under the provisions of the Revisal, sec. 3525, for the sale of intoxicating liquors to minors prohibited by the Revisal, sec. 3524, it is necessary that the person to whom the sale was made be "unmarried," as well as "under the age of 21 years," etc.

APPEAL by plaintiff from *Foushee, J.,* at February Term, 1911, of CRAVEN.

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

W. B. McIver for plaintiff.
Guion & Guion for defendant.

CLARK, C. J. This is an action by Laura Spencer, the mother of Carl Spencer, against a banking company and Fisher, its cashier. The

complaint alleges that Carl Spencer, the son of the plaintiff, who is a widow, is a minor 17 years of age, and that in April, 1911, a wholesale whiskey dealer in Richmond, Va., shipped nine cases of whiskey to New Bern, N. C., consigned to "order of the shipper," and that said shipper forwarded bills of lading, one for each case, to the defendant with sight draft attached, with the request to "Notify Carl Spencer." That the defendant Fisher was notified by the uncle of said Carl that he was a minor, and said uncle forbade the delivery to him of said bills of lading, but that, notwithstanding, upon payment by said Carl of said drafts, Fisher delivered to him said bills of lading "whereby the title to the whiskey passed to the said Carl Spencer."

The complaint avers that this was a sale of the whiskey to said Carl Spencer in violation of Revisal, 3524, and this action is brought to recover exemplary damages under Revisal, 3525. The court sustained the demurrer that "the complaint did not state a cause of action," and dismissed the action.

(265) The complaint fails to aver that Carl Spencer was "an unmarried person," as required by Revisal, 3524, and hence the judgment dismissing the action must be affirmed. The court, it is true, might have allowed an amendment in this respect, in its discretion, but it seems that it was not asked for.

Action dismissed.

I. M. MIZZELL v. BRANNING MANUFACTURING COMPANY.

(Filed 21 February, 1912.)

1. Railroads—Rights of Way—Burning—Negligence—Evidence.

The plaintiff having introduced evidence tending to show that his lands had been burnt over and damaged by fire communicated to it by a high wind from a right of way whereon straw, trash, tree-tops, etc., had been permitted to accumulate, and which was being burnt over by the defendant, it was for the jury to consider, in this case, upon the issue of negligence, the condition of the right of way, the time of the year, the state of the weather, whether the defendant's agents could sooner have employed the method which had proved sufficient for extinguishing the fire, and all the attendant circumstances; and though the evidence was slight, it was held to be sufficient.

2. Appeal and Error—Instructions—Presumptions.

When the charge of the court is not made a part of the case on appeal, an exception that it incorrectly instructed upon the evidence will not be considered.

3. Railroads — Rights of Way — Burning—Negligence—Evidence—Presumptions—Prima Facie Case.

When in an action to recover damages to his lands caused from the defendant's burning off its right of way, the plaintiff has shown his damage from the cause alleged, which ordinarily does not produce damage, he makes out a *prima facie* case of negligence, which cannot be repelled but by proof of care, or some extraordinary accident which makes care useless.

4. Burnings—Interpretation of Statutes.

Revisal, sec. 3346, does not apply to the burning off of a right of way by a railroad company whereon straw, trash, tree-tops, and stubble had been allowed to accumulate; nor does the statute apply unless the firing is voluntary or intentional, and not merely accidental or necessary.

5. Appeal and Error—Jurors—Relationship—Motion in Supreme Court.

Quære, whether a motion for a new trial, made in this Court for the first time, should be granted because of the relationship of a party to the action to a juror, who had denied such relationship when challenged, the relationship being afterwards discovered.

6. Nonsuit—Evidence, How Considered.

Upon a motion to nonsuit, the whole evidence will be construed in the light most favorable to the plaintiff.

APPEAL from *Justice, J.*, at September Term, 1911, of BERTIE. (266)

This action was brought to recover damages for burning timber on the plaintiff's land. The defendant's servants, under the instructions of the section-master of its railway, were "burning off" the right of way, where much straw, trash, tree-tops, and stubble had been allowed to accumulate. It was in March, 1910, when it was very dry, and a high wind arose and swept the fire into the dry tree-tops nearby, from which and the right of way it was carried to the plaintiff's land, and burned over his land.

One of the plaintiff's witnesses testified: "It was very dry, and the wind got up about 12 o'clock. Fire got out from where we were burning. We were firing and whipping out. It got out behind us in tree-tops and made a big fire. We tried to put it out, but couldn't. It got out about 12 o'clock and burned till night. This fire burned on plaintiff's land. White and others stopped it by firing against it. White is superintendent of defendant's road. He brought his hands. Foreman was there and three others." He also said that it was a big fire and the wind caused the trouble. There was other evidence in the case not necessary to be stated.

The charge of the court is not set out in the record, except the special instructions given at the request of the defendant. Its counsel asked the court to charge the jury as follows:

1. If they believe the evidence, they will answer this issue in favor of the defendant—that is to say, the second issue "No."

2. Under the evidence, the plaintiffs cannot recover in this cause.

3. The defendant is no more liable than any other citizen of Bertie County would be under the same circumstances; and if the defendant was ordinarily careful in burning over its right of way, and the fire got out by reason of an unforeseen wind, then there can be no
(267) recovery against the defendant, and you will answer the second issue "No."

4. If the jury find from the evidence in the case that the employees of the defendant exercised reasonable and prudent care in burning off the right of way, and by unexpected rise of wind the fire got beyond their control and burned over the lands of the plaintiffs, you will answer the second issue "No."

The court gave the instructions contained in the third and fourth prayers, and refused the others, and defendant excepted.

We find this statement in the case: "The other evidence was as to the amount of damages, and is not pertinent to this appeal, as only one question is presented, and that is the refusal of the judge to nonsuit the plaintiff."

The jury returned the following verdict:

1. Are plaintiffs the owners of the land described in the complaint? Answer: Yes.

2. Did defendant wrongfully and negligently injure the plaintiff's land, as alleged in the complaint? Answer: Yes.

3. What damages, if any, are the plaintiffs entitled to recover of the defendant? Answer: $750.

A motion for a new trial having been overruled and judgment entered upon the verdict, the defendant appealed.

Walter R. Johnston and John H. Kerr for plaintiff.
Winston & Matthews for defendant.

WALKER, J. The case does not make it very clear whether the expression, "the other evidence was as to the amount of damages," refers only to the plaintiff's evidence or to the entire evidence. If the former is the true meaning, we could not decide that there is no evidence of negligence, without knowing what was the evidence introduced by the defendant, for on a motion to nonsuit, the plaintiff has the right to have all of the evidence considered by us in the view most favorable to him. The appellant should have relieved us of any uncertainty in this respect. But the evidence, as stated in the case on appeal, was properly submitted

to the jury, and under proper instructions, as we must assume, the charge of the court not having been made a part of the case.

The defendant's counsel seem to have understood that it was (268) necessary for the judge to find, upon the evidence, that the burning on the right of way was done carefully, and that there was no negligence of the defendant in burning the stubble and other combustible material, which contributed to the injury of which the plaintiff complains.

The instructions asked for as regards the rising of the wind, which carried the live sparks into the dry tops of the trees and to the plaintiff's land, where his timber was burned, were given as requested by the defendant, and the court, in the general charge, may have instructed the jury even more favorably for the defendant.

Whether, upon the evidence, the defendant acted with ordinary care and prudence, was a question for the jury, and they could consider all the circumstances, the condition of the right of way, the time of the year, the state of the weather, the fact that defendant's servants left fire behind them that might spread to plaintiff's land by force of the wind or otherwise, and any other fact or circumstance bearing upon the question of due care. The evidence of negligence may have been slight, but we cannot say that there was none. It was the province of the jury to weigh it, under proper instructions of the court as to what would constitute negligence. "When the plaintiff shows damage resulting from the act of the defendant, which act, with the exercise of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence which cannot be repelled but by proof of care, or some extraordinary accident which makes care useless." *Chaffin v. Lawrence,* 50 N. C., 179; *Aycock v. R. R.,* 89 N. C., 321; *Haynes v. Gas Co.,* 114 N. C., 203; and especially *Moore v. Parker,* 91 N. C., 275.

Whether, in dealing with a dangerous agency, the defendant used ordinary precaution to protect adjacent property, and whether, when the danger became imminent, it resorted to such means as the situation suggested to prevent the injury, were questions for the jury. It seems that Superintendent White stopped the conflagration by "firing against it." It might well be argued that had this method been employed in the beginning, or sooner than it was, the spread of the fire would have been prevented, and, at least, the loss to the plaintiff would (269) have been diminished.

We do not think Revisal, sec. 3346, applies to the facts. The defendant did not "set fire to any woods," within the meaning of that statute. The statute refers to woodland. *Averitt v. Murrell,* 49 N. C., 322. It was held in *Achenbach v. Johnston,* 84 N. C., 264, that "a field grown up in broomsedge and wiregrass" was not woods within the intent of

the statute, and it was said that *Hall v. Cranford,* 50 N. C., 3, stretched the doctrine of liberal construction, in order to reach the mischief intended to be remedied, as far as it is safe to follow; and we concur in that view. Nor does the statute apply unless the firing is voluntary or intentional, and not merely accidental or necessary. *Averitt v. Murrell,* 49 N. C., 322; *Tyson v. Roseberry,* 8 N. C., 60; *Lamb v. Sloan,* 94 N. C., 534.

Defendant moved in this Court for a new trial, alleging that the jurors were asked if any of them were related to the plaintiff, to which they answered "No," and that since the trial it has been ascertained that one of the jurors was so related. We will not decide the question as to whether the motion should be made in this Court or in the court below, for assuming that we have jurisdiction, it is addressed to the discretion of the court, as we have so often held, and we would not be disposed, under the facts and circumstances of this case, to exercise our discretion in favor of the defendant and grant a new trial for the reason assigned. *S. v. Maultsby,* 130 N. C., 664; *S. v. Lipscomb,* 134 N. C., 689, and cases cited.

No error.

Cited: Hardy v. Lumber Co., 160 N. C., 117; *Poe v. Telegraph Co., ib.,* 316; *Aman v. Lumber Co., ib.,* 373; *Guano Co. v. Mercantile Co.,* 168 N. C., 225.

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(270)

CARY P. WESTON v. JOHN L. ROPER LUMBER COMPANY.

(Filed 21 February, 1912.)

1. Injunction—Trespass—Contempt of Court.

A party going upon lands claimed by plaintiff, described in the complaint by metes and bounds, after an injunction had been issued thereon and cutting timber in violation of the order granted, commits a contempt of court.

2. Injunction—Contempt of Court—Duty of Party Enjoined.

An injunction of the courts must be obeyed implicitly, according to its spirit and in good faith; and the party enjoined must do nothing, directly or indirectly, that will render the order ineffectual, either in whole or in part.

3. Injunction—How Considered—Contempt of Court.

In deciding whether there has been an actual breach of an injunction, it is important to consider the objects for which relief was granted, as

well as the circumstances attending it, and the violation of the spirit of an order or writ, even though its strict letter may not have been disregarded, is disobedience of the mandate of the court.

4. Injunction—Contempt—Motive.

A party having been enjoined from cutting timber on lands the title to which was in dispute, cannot justify his disobedience to the order upon the ground of a proper motive; for the motive, whether good or bad, is not material.

5. Injunction—Trespass—Location—Specific Findings.

A party who has violated the mandate of an injunction by cutting timber upon the lands described, cannot complain that the findings of the lower court imposing the punishment were not more specific or more in accordance with the probative force and full significance of the evidence, when they are favorable to him.

6. Injunction—Contempt of Court—Advice of Counsel—Punishment.

The defense in a proceeding for contempt of court in the violation of the mandate of an injunction, that the party enjoined acted under the advice of counsel, will not avail the respondent, and it will only be considered by the judge in imposing the punishment for the disobedience of the order.

APPEAL from *Cline, J.*, at CAMDEN Court, 5 September, 1911.

This is a proceeding for contempt. Respondents were attached for contempt, convicted and fined $250 each for disobeying an injunction order of the court.

The complaint alleges ownership by plaintiffs of two tracts (271) of land, known as Lots Nos. 1 and 4 in the division of New Lebanon. It is conceded that the defendant owns lots designated as Nos. 2 and 3 in the division, and upon the complaint, used as an affidavit, *Judge Whedbee* restrained defendant, its servants, agents, and employees, from going upon the land described in the complaint, for any purpose. It was further ordered that the defendant appear before *Judge Ward* and show cause why the restraining order should not be continued.

At the hearing the injunction was modified by *Judge Ward* as follows: "It is ordered that the temporary restraining order heretofore granted be changed and modified so that the defendant, its servants and agents, may continue the use and operation of its logging railroad as now located over and upon the land described in the complaint, pending the hearing of this cause upon its merits; and said restraining order is vacated in so far as it prevents the use and operation of said railroad by the defendant. On motion of the plaintiff, it is ordered that the injunction heretofore granted as to the cutting and removal of the timber from the land described in the complaint be continued to the hearing, except that defendant may remove the logs cut and now lying upon the land."

It appears from the case that, upon application of the plaintiff, which was supported by affidavits to the effect that the respondents had violated the injunction order by cutting timber on the land in dispute, *Judge Ward* issued an order to the respondents to show cause, before *Judge E. B. Cline,* why they should not be attached for contempt. This order was served, and at the hearing *Judge Cline* found the facts, and among others that the respondents had cut timber on land claimed by the plaintiff, "being the land covered and protected by the former order of injunction; and, further, that they continued to cut the timber on said land after the order of *Judge Ward* had been served upon them."

Judge Cline, therefore, adjudged them in contempt, and imposed a fine of $250 upon each of them. Respondents excepted and appealed.

Aycock & Winston for plaintiff.

A. D. McLean, J. K. Wilson, and W. M. Bond for defendant.

(272) WALKER, J. It is apparent from the findings of *Judge Cline* that the respondents undertook, by themselves and without the acquiescence of the plaintiff or the sanction of the court, to convey and locate the lines of Tract No. 1, and upon their own location of the boundaries to cut timber within what his Honor designates in his findings as "disputed territory." There was a contest between the parties as to the location of the land, and the injunction was issued in order to preserve the *status quo* until the dispute could be settled. It cannot well be questionned that respondents knew that they were cutting timber on the land *claimed* by the plaintiff—that is, on the land in controversy. The plaintiff, in his complaint, alleged that he owned Lots 1 and 2 of the land known as New Lebanon, and that defendants had entered thereon and cut therefrom a large quantity of timber, and were still engaged in doing so. The land claimed by the plaintiff, if we stop at the complaint, is that described as the land upon which the defendant and its corespondent and superintendent, at that time, were cutting timber. They were restrained by the order of *Judge Whedbee* from cutting any more on that land, and, by the modified order of *Judge Ward,* from cutting any timber from *that* land, or removing any except that already cut.

In the affidavits of J. T. Ansell and J. J. Watson, it was alleged that they were still cutting timber at that place, and upon those affidavits, *Judge Ward* issued his second order, requiring them to show cause why they should not be attached for contempt for disobeying the order in the manner stated in said affidavits. Even after this warning, they continued to cut at the same place. In addition to this, *Judge Cline* has

found as facts that they proceeded arbitrarily to locate the line and then cut timber on Tract No. 1, as claimed by the plaintiff, and in disregard of the order forbidding them to do so. If such a proceeding should be permitted, the orders of the court could easily be set at naught and the rights of parties litigant greatly prejudiced.

This case is not unlike *Davis v. Fiber Co.*, 150 N. C., 84, (273) in which, referring to a similar state of facts, *Justice Hoke* said: "The court finds, and there was ample evidence to sustain the finding, as follows: 'I find that since the restraining order made as aforesaid was duly served upon the said Champion Fiber Company, it and its superintendent of the woods department, Harry Rotha, under the advice of counsel, have undertaken to arbitrarily locate the Cathcart line to suit their own purposes, and have willfully and intentionally continued to cut and carry away timber trees situate and being on the land claimed by plaintiffs and embaced in the restraining order, just as they were doing before the issung of said order.' And on this finding we are of opinion that the defendants were properly adjudged guilty of contempt. It is contended that the preliminary restraining order is not sufficiently definite in its terms to authorize the judgment, but we cannot take that view of the order when considered in connection with the evidence in the case and the findings of the judge thereon. The description of the land was fully set forth in the complaint by metes and bounds. The allegations in the complaint that the 'defendants had wrongfully entered and trespassed upon said lands,' by fair and reasonable intendment could only refer to the location as claimed by plaintiffs."

We have high authority for saying that a party enjoined must not do the prohibited thing, nor permit it to be done by his connivance, nor effect it by trick or evasion. He must do nothing, directly or indirectly, that will render the order ineffectual, either wholly or partially so. The order of the court must be obeyed implicitly, according to its spirit and in good faith. Rapalje on Contempt, sec. 40. The motive for violating the order is not considered in passing upon the question of contempt, and the respondent cannot purge himself by a disavowal of any wrong intent. It is the fact of his obedience that alone will be considered. Section 42. *Baker v. Cordon,* 86 N. C., 116. In deciding whether there has been an actual breach of an injunction, it is important to consider the objects for which relief was granted, as well as the circumstances attending it, and it is to be observed that the violation of the spirit of an order or writ, even though its strict letter may not have been disregarded, is a breach of the mandate of the court.

2 High on Injunctions (4 Ed.), sec. 1446; *Campbell v. Tarbell,* (274)

55 Vermont, 455; *Loder v. Arnold,* 15 Jur., 117. The respondents may have honestly believed that the land, upon which they cut the timber, belonged to the defendant; but that is not the question. They had been forbidden to cut on land in dispute until the controversy was settled, and this order they violated. Having found this fact, the motive, whether good or bad, for doing the forbidden thing became immaterial. The court might well have found from the affidavits that the respondents had cut timber on Lot No. 1, as described in the complaint, but they cannot complain that the finding was not more specific or more in accordance with the probative force and full significance of the evidence, as the finding, if thus defective, is in that respect favorable to them. Nor will the advice of counsel avail the respondents in justification of their conduct. It may be considered by the judge in imposing punishment for the disobedience of the order, but it is no defense to the rule. Rapalje, sec. 49. When a party acts upon the advice of his attorney in such a case, he does so at his peril. It was suggested by plaintiff's counsel that the respondents did not make a full disclosure to their attorney; but however this may be, they cannot profit by the advice if they actually violated the order.
Affirmed.

Cited: Lodge v. Gibbs, 159 N. C., 73.

ARMOUR FERTILIZER WORKS v. CHARLES McLAWHORN.

(Filed 28 February, 1912.)

1. Vendor and Vendee—Fertilizer—Deficient in Quality—Measure of Damages—Interpretation of Statutes.

When it is ascertained by analysis of the Department of Agriculture that fertilizer sold by a manufacturer was deficient in quality, the damages sustained is the difference in the price of the fertilizer actually sold and what it should have been. Revisal, sec. 3949.

2. Same—Damages to Crop—Evidence Speculative.

A user of fertilizer of a deficient quality, furnished by a manufacturer, cannot recover damages for an alleged inferiority of his crop on that account; and evidence that where other fertilizers had been used the crop was better, is inadmissible, as it involves soil and weather conditions, cultivation, and other matters of a speculative character.

3. Vendor and Vendee—Fertilizer—Deficient in Quality—Duty of Vendee—Measure of Damages.

After a user of fertilizer has been informed by the Department of Agriculture that the fertilizer furnished by the manufacturer is deficient in quality, it is his duty to buy fertilizing material or ingredients to make good the deficiency, and, upon his failing to do so, an abatement in the price by reason of the deficiency is his measure of damages.

4. Contracts, Written—Fertilizer—Representations—Parol Evidence.

Evidence of a parol agreement that a purchaser of fertilizer was to pay nothing for it if the vendor's representations were not found to be true upon analysis of the Department of Agriculture, is inadmissible to contradict the written contract of sale subsequently and unconditionally executed.

APPEAL by defendant from *Carter, J.*, at September Term, (275) 1911, of PITT.

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

L. I. Moore and Harry Skinner for plaintiff.

F. G. James & Son, F. C. Harding, and Albion Dunn for defendant.

CLARK, C. J. Under a written contract with the defendant as a *del credere* agent, the plaintiff shipped him certain fertilizers at prices specified in said contract, which the answer admits that he duly received. The defendant used a portion of these fertilizers himself, sold some to his tenants and a large portion to other persons. For nearly all that which he sold he has collected payment, except from his relatives, who are solvent. The fertilizers were analyzed by the Agricultural Department at the request of the defendant and a small deficiency in quality found, for which the defendant has received the proper abatement in price.

The defendant assigns twenty-four errors, but in his brief (276) abandons the first five and groups the other assignments into four classes. The first class, consisting of the 6th, 19th, and 20th assignments of error, are to the holding of the judge, upon the pleadings, that no defense was open to the defendant except to show total failure of consideration. The deficiency in value was allowed him in abatement of price. The claim of consequential damages resulting in the alleged shortage in his crop was properly disallowed by the court. *Carson v. Bunting*, 54 N. C., 532, where the Court holds that the measure of damages is in the abatement of the price, as is also provided by Revisal, 3949.

Assignments of error 8, 9, 10, and 11 are to the refusal of the judge to allow defendant to prove on the question of damages the difference in the looks and nature of crops on different farms on which this fertilizer was used, and the crops under which he used other fertilizers. This is essentially the same point as one above discussed. To consider the variety of soil and attendant circumstances would be purely speculative. The only pertinency of such evidence would be the inference that the ingredients were not as represented. This would be too remote, depending upon the nature of soil, weather, cultivation, and the like. The best evidence is the analysis by the Agricultural Department. When the defendant ascertained therefrom the deficiency in the quality of the fertilizers, it was his duty to have bought fertilizing materials or ingredients to make good the deficiency. Not having done so, he can properly claim only the abatement of the price by reason of such deficiency, and that he has been allowed.

Assignments of error 7 and 15 are to the refusal of the judge to allow defendant to prove that at or before the time he signed the contract it was agreed that if the analysis of the Department of Agriculture should show that the fertilizer did not come up to the representations as to the quantity of each ingredient set out in the contract he should not pay anything. In *Walker v. Venters,* 148 N. C., 388, it is said: "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-estab-
(277) lished rule that a contemporaneous oral agreement shall not contradict that which is written. The written word abides." This has been cited with approval in *Bowser v. Tarry,* 156 N. C., 38. If the alleged oral contract was prior to the writing, the latter governs.

Assignments of error 12 and 13 are because the court sustained the plaintiff's objection to the defendant giving his reasons for refusing to execute his notes or pay the claim of the plaintiff. These are not pressed by the defendant in his brief, which states that the ruling of the court upon the other exceptions renders it unnecessary.

The defendant relies strenuously upon *Pratt v. Chaffin,* 136 N. C., 350. But we do not think that case is in point. There it was in evidence that the contract was not to be effective until it had been approved by another party, and hence the contract was incomplete until this condition precedent was complied with. In this case, the defendant undertakes to sustain the proposition that the terms of the contract which required him to pay so much money per ton can be contradicted by a prior parol agreement that he was not to pay anything at all unless the ingredients came up to the full analysis set out in the contract. The

court properly held that he could not show such agreement to contradict the written contract, and that his remedy was to abate the price to the extent of the deficiency, and that he could only defeat recovery altogether by showing a total failure of consideration.

No error.

Cited: *Ober v. Katzenstein,* 160 N. C., 441; *Mfg. Co.* v. *Mfg. Co.,* 161 N. C., 434; *Carson v. Ins. Co., ib.,* 447; *Tomlinson v. Morgan,* 166 N. C., 562; *Guano Co. v. Livestock,* 168 N. C., 447, 450; *Carter v. McGee,* 168 N. C., 80.

J. J. BAXTER v. MRS. D. A. IRVIN.

(Filed 28 February, 1912.)

1. Judgments Non Obstante—Pleadings—Confession and Avoidance.

A judgment *non obstante veredicto* may be allowed only where the answer has confessed a cause of action and has set up matters in avoidance which were insufficient, although found true, to constitute a defense or a bar to the action.

2. Same—Evidence—Practice.

Upon a motion for judgment *non obstante veredicto,* it must appear from the plea and verdict, and not from the evidence, that the plaintiff is entitled to the judgment.

3. Judgments Non Obstante—Motion, When Made.

A motion for judgment *non obstante verdicto* must be made after verdict.

4. Judgments Non Obstante—Demurrer—Instructions—Practice.

When in defense of an action to recover rents the defendant denies the plaintiff's allegations and alleges a breach of contract as a bar to the action, the answer raises the general issue, and, before verdict, the objecting party should either demur to the evidence, if it is insufficient, or request the judge to direct a verdict in his favor because of its insufficiency.

5. Courts, Justices'—Pleadings—Practice—Interpretation of Statutes.

While we liberally construe pleadings filed in the court of a justice of the peace, they must substantially conform to the statutory requirements, *i. e.,* there shall be a complaint and answer (Revisal, sec. 451); if oral, the justice may enter the substance on his docket, and, if written, the pleadings may be filed and reference made to them on the docket (section 1458); the complaint must state the facts constituting the cause of action, and the answer may contain a denial of the complaint or any part thereof, and also a statement of any evidence constituting a defense or counterclaim (Revisal, secs. 1459, 1460).

6. Same—Judgment Non Obstante—Justice's Court—Appeal.

If the answer in the court of a justice of the peace raises the general issue, and there is no plea of confession and avoidance, a motion for judgment *non obstante veredicto* will not lie on appeal in the Superior Court after verdict.

(278) APPEAL by plaintiff from *Whedbee, J.*, at November Term, 1911, of CRAVEN.

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

R. A. Nunn for plaintiff.

D. E. Henderson and A. D. Ward for defendant.

WALKER, J. This action was brought in the court of a justice of the peace of Craven County to recover the sum of $100, with interest from 31 July, 1910, and the plaintiff complained in that court that it was due by contract for the rent of space in a storeroom. The defendant "denied the indebtedness, and alleged a breach of the contract by way of defense." The plaintiff recovered in the justice's court, and
(279) defendant appealed to the Superior Court, where there was a trial by jury. Both parties introduced evidence, and the jury returned a verdict for the defendant. Plaintiff thereupon moved for judgment *non obstante veredicto.* The charge of the court is not in the record, and it appears that no exceptions were taken during the course of the trial, before the verdict was rendered. The court overruled the motion for judgment, and the plaintiff appealed to this Court from a judgment for defendant.

We think the ruling of his Honor was correct. At common law a judgment *non obstante veredicto* would be allowed only when the plea confessed a cause of action and set up matters in avoidance which were insufficient, although found true, to constitute either a defense or a bar to the action. *Moye v. Petway,* 76 N. C., 327; *Ward v. Phillips,* 89 N. C., 215; *Walker v. Scott,* 106 N. C., 56; *Riddle v. Germanton,* 117 N. C., 388. It was said in *Moye v. Petway, supra,* that the motion for such a judgment must, of course, be made after verdict, and the practice in such cases is very restricted. The motion will not be granted unless it appears from the plea and the verdict, and not from the evidence, that the plaintiff is entitled to the judgment. Before the verdict, the plaintiff could take judgment as on *"nil dicit,"* or as if there had been no plea or defense, treating the plea, or now the answer, as a sham one, and even if he traversed the matter relied on in avoidance, and the issue was found against him, he was still allowed to take judgment, not-

withstanding the verdict, the practice having been adopted to discourage sham pleas and defenses. No such case is presented in this record. The plaintiff alleged that the defendant is indebted to him for rent, in the sum of $100, and the defendant simply denied the allegation and alleged a breach of the contract as a bar to the action. This was not a plea by confession and avoidance, for it was tantamount to the general issue, or a direct traverse of the plaintiff's allegation. If there is no evidence to establish the plaintiff's case, the defendant should either demur to the evidence or request the court to charge the jury that there is no evidence, and that, therefore, they should answer the issue in favor of the defendant; and likewise, if there is no evidence to establish the defense, the plaintiff should request the court to give a similar (280) charge in his favor; but this must be done before verdict, and, as said by *Chief Justice Pearson* in *Moye v. Petway, supra,* this practice "has not the slightest bearing upon a motion for judgment *non obstante veredicto,* which is made by the plaintiff, after verdict, for insufficiency of the defendant's matter in avoidance. There are no two matters of practice more entirely different in all respects." In addition to this, it is familiar learning that any defect or insufficiency in the evidence must be called to the attention of the court, by a prayer for instructions, before verdict, so that cases may be tried on their true merits, and to prevent the loss of rights by mere inadvertence. *Sutton v. Walters,* 118 N. C., 495; *S. v. Kiger,* 115 N. C., 746; *S. v. Hart,* 116 N. C., 977. The party is not allowed to take two chances, that is he may not speculate on the verdict, hoping that it will be in his favor, and, if he loses or is disappointed in his expectation, move after verdict to set it aside because of a failure or defect of proof, when, if he had called the attention of the court to the matter before the case was submitted to the jury, his adversary might have remedied the defect or supplied the missing evidence.

The defendant's counsel contended, though, that this rule of practice or procedure should not apply to cases in the court of a justice of the peace, for the reason that no pleadings are there required, or, rather, no formal pleadings; but this, we think, is a misapprehension. It is true that the pleadings in that court may be oral, but it is expressly provided, by Revisal, sec. 457, that the "pleadings in the courts of justices of the peace shall be (1) the complaint of the plaintiff; (2) the answer of the defendant," and by section 1458, that "the pleadings may be either oral or written; if oral, the substance may be entered by the justice on his docket; if written, they may be filed by the justice and reference to them be made on his docket." It is further provided by section 1459 and section 1460, that "the complaint must state in a plain and direct

manner the facts constituting the cause of action," and "the answer may contain a denial of the complaint or any part thereof, and also a statement, in a plain and direct manner, of any evidence constituting a defense or counterclaim." This Court has been liberal in construing pleadings filed in a justice's court, but, nevertheless, they (281) should conform to the requirements of the statute. Illustration of the degree of particularity required in justice's courts in found in the requirement that "the general issue entered on the justice's docket will be considered as (merely) a general denial of plaintiff's cause of action" *Blackwell v. Dibbrell,* 103 N. C., 270; that the pendency of another action must be specially pleaded in the answer or deemed to be waived (*Montague v. Brown,* 104 N. C., 163; *Hawkins v. Hughes,* 87 N. C., 115); that a former judgment must be specially pleaded, as it will not be considered under an answer merely denying indebtedness to the plaintiff. *Smith v. Lumber Co.,* 140 N. C., 375; *Harrison v. Hoff,* 102 N. C., 1236; *Blackwell v. Dibbrell, supra.* It appears in this case that the general issue was pleaded, and on the face of the answer there is no suggestion of any confession of the plaintiff's claim, with a statement of matter in avoidance. The case must, therefore, be governed by the general rule of practice, and we cannot examine the evidence for the purpose of determining whether there was a confession of the indebtedness and insufficient matter pleaded in avoidance.

No error.

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JOE TERRELL v. CITY OF WASHINGTON.

(Filed 28 February, 1912.)

1. Cities and Towns—Business Enterprises—Electricity—Negligence—Master and Servant—Liability.

When a city manufactures and sells electricity to its citizens for lighting and other purposes, it is not therein performing a governmental function, and is held to the same degree of care in respect to its employees and other persons as is required of a private corporation or individual.

2. Master and Servant—Cities and Towns — Electricity — Poles — Duty of Master.

It is the duty of a corporation engaged in the manufacture and supply of electricity to select sound and suitable poles for the purpose of stringing their lines of electric wires.

3. Master and Servant—Cities and Towns—Electricity—Defective Poles—Inspection—Negligence—Evidence.

When it appears that an employee in the discharge of his duties to an electrical company has been injured by a pole of the company falling with him, which outwardly and from appearance was sound at the time, but was so decayed below the level of the ground that it would easily crumble between the fingers, and that it broke off beneath the ground, and had only been in use a small fraction of the time they usually lasted for the purpose, it is sufficient evidence that the employer has not exercised that degree of care in the original selection of the poles which the law requires.

4. Master and Servant—Cities and Towns—Defective Poles—Duty to Supervise—Negligence.

It is the duty of a city when engaged in furnishing electricity for lights and other purposes, not only to select sound and suitable poles on which to string its wires, but by proper and reasonable supervision to keep them sound and safe for the protection of its employees who are required to work on them.

5. Same—Notice, Actual or Constructive.

A city engaged in the business of furnishing electricity to its citizens for light and other purposes, is liable to an employee who is injured without his contributory fault by reason of a defect in a pole which fell with and injured him, of which the proper officers of the city knew, or should have known by ordinary care in inspecting the pole when originally placed in the ground.

6. Master and Servant—Cities and Towns—Electricity—Defective Poles—Negligence—Burden of Proof.

In order to hold a city liable for an injury to an employee occasioned by a defect in a pole of its line of wires conveying electricity to its citizens, which the city was engaged in the business of furnishing, it is required that the plaintiff prove that the city had actual notice of the particular defect, or notice thereof implied from the existing circumstances and conditions.

7. Master and Servant—Cities and Towns—Electricity—Defective Poles—Contributory Negligence.

An employee of a city engaged in the business of furnishing electricity is held not to be guilty of contributory negligence in climbing a defective pole, which fell with him to his injury, when the outside of the pole appeared to be sound and the defect was only to have been discovered by digging below the surface of the ground.

8. Same—Safety Assumed.

An employee of a city engaged in the business of furnishing electricity, whose duty it is, in the scope of his employment, to climb poles used in connection with carrying the wires and supporting the lights, has the right to assume that the city has exercised the supervision and caused the inspection of its poles that it was its duty to have done, and may

assume that they are safe for the performance of his duties, in the absence of knowledge and warning to the contrary.

9. Instructions More Favorable—Harmless Error.

It is not reversible error for the court to instruct the jury more favorably to the objecting party than he is entitled to under the evidence.

10. Master and Servant—Cities and Towns—Electricity—Defective Poles—Duty of Master—Negligence—Verdict—Interpretation.

When there is evidence that a city, engaged in the business of supplying its citizens with electricity, has negligently failed to properly safeguard its poles with a guy wire, which fell with and injured an employee whose duty it was to climb the pole, because of a defect in the pole which was only discernible by digging below the surface of the ground, and which under usual circumstances would not have happened if the pole had been sound when it was placed, and when, under a proper charge, the jury have found that the defendant was negligent, the verdict, in effect, was a finding that the defendant had negligently failed in its duty to properly and carefully inspect the pole originally, before it was placed in the ground, and eliminates the question as to whether the employee was negligent in climbing the pole under the existing conditions, or failed in his duty to examine the pole beforehand.

11. Legislation—Limitation of Time to Present Claims—Incapacity of Party—Interpretation of Statutes.

A legislative requirement in the charter of a city that an employee injured in the scope of his employment by the negligence of the city must present his claim within a certain time is not construed to apply when the injured employee has been physically or mentally incapacitated by the injury received to comply with the provision.

(283) APPEAL from *Cline, J.*, at October Term, 1911, of BEAUFORT.

This action was brought to recover damages for injuries alleged to have been caused by the defendant's negligence. Plaintiff was employed by the defendant as a lineman, in connection with the operation of its electric lighting plant, and on the day of his injury he was (284) directed by his foreman to climb one of the poles for the purpose of repairing or removing one of the wires attached thereto. In order to perform his work it was necessary for the defendant to wear spurs or spikes on his feet, and to fasten himself with his belt to the pole, and while he was near the top, doing his work, the pole fell to the ground, rebounded, and caused him serious injury, by reason of which he became unconscious and was confined to the hospital under medical treatment for a long time. There was evidence tending to show that the pole was rotten and in very bad condition several inches under the ground, and that it broke three or four inches below the surface of the ground. It was a juniper pole and should have lasted, so as to be

used with perfect safety, from six to twenty years, and it had been standing only three years when it fell with the plaintiff. There was no rule or custom imposing upon the plaintiff the duty of inspection before ascending the pole, and there was nothing in its appearance calculated to put him on notice as to its condition. Above the ground it seemed to be sound and trustworthy, except, as one of the witnesses testifies, at the very top it was rotten; but that part of it which he was required to use was apparently sound and safe.

There is ample evidence in the record to show that the pole was not one which should have been selected in the beginning, and after ordinary inspection, as sufficiently sound and strong for the uses to which it was intended to be applied. An arc light was suspended from the pole by a wire, the other end of which was attached to another pole on the opposite side of the street.

A witness for the plaintiff gave the following description of the pole: "I looked at the pole after he fell. I do not know what became of it. The pole was rotten. It was as rotten as it could be. It broke off between three and four inches under the ground. They did not have any guy wires supporting the pole at that time. They did not have any braces of any sort on it to support it. It had the strain of the light on it. They did not have anything on it to relieve that strain; they only had the pole set back like this. It was leaning from the lamp. The lamp pulled it in the street. If it had not been for the lamp on (285) it, it would have fallen like it started. It was a juniper pole. It was rotten between three and four inches below the ground. It was rotten on the outside." This witness further stated that the pole was not rotten above the ground, and that if an inspection had been made, it would have been taken down, and that no inspection was made to his knowledge.

Another witness gave this description of the pole: "The pole was broken off three or four inches under the ground and was decayed or rotten. You could take little pieces of the wood in your hands and break it up into dust. It had heart that looked sound, but you could take it in your hands and break it up. No one passing there could tell whether the pole was rotten or not, on account of the shell on the outside being hard. You could not tell whether the pole was rotten by the outside, nor unless you pried into the skin on the outside. You could tell by digging around it. There were no guy wires or braces supporting the pole."

The defendant introduced the affidavit of Manly Pearson, made a few days after the pole fell, and therein, among other things, he made this statement: "There was grass grown around the pole at the bottom.

Pole seemed to be solid. Showed no appearance of decay above ground or above grass. Pole broke off about three inches underground. Where pole broke, that is, place on pole, it was rotten and decayed: you could stick your finger in it; it was spongy, soft, thoroughly decayed; and the only solid spot in the pole was a streak in center, the heart, about an inch or so in diameter. There was no support to poles. There were no 'guy' wires on poles. The only wire on pole that fell was wire running from it across street to other pole, from the center of which in the middle of street was suspended an electric 'arc' light, weight about 50 pounds. Distance from pole to pole about 40 feet. There was a powerful strain on poles, pulling against each other, and weight of light, and no supports, 'guy' wires, or anything behind poles to resist this pressure. I have been engaged in this kind of work for eighteen years. Have worked in South Carolina, Georgia, Alabama, and other States, and most all poles had 'guy' wires on back of poles to support them. These 'guy' wires are necessary to hold
(286) poles in position. It is not customary for a lineman to examine poles under the ground, when working on them. That is always done by another man."

There was evidence to the effect that it was not customary to guy poles like the one in question with no more strain on them than it had, and that the appearance of the pole above the ground did not indicate that it was rotten or unsound, and the city did not have its poles inspected except in a casual or general way, "that is, by passing and looking at them." If the pole had been guyed, it would not have fallen, though there was evidence it was not customary to guy such poles.

There was much additional evidence introduced by the parties to sustain their respective contentions, but it is not necessary to an understanding of the case that we should set it out.

The court, among other instructions, charged the jury as follows:

If Terrell was an experienced lineman, and there was no regular pole inspector employed by the defendant, the duty of inspecting a pole, as to its safe or dangerous condition, rested as much upon the plaintiff, Terrell, as it did upon the defendant town; and if you find from the evidence that the plaintiff was a person of ordinary information and had experience in the business in which he was engaged, and the town employed no regular or special pole inspector, then he assumed the risk of the breaking of any pole which he was called upon in the line of his duty to climb, not due to any defect in the original setting, and the town owed him no duty to inspect it and inform him of its defects, or to keep it sound; and if you find these to be the facts, you will answer the first issue (as to negligence) "No."

If you find from the evidence that the pole, at the time it was set in the ground, was sufficiently sound and solid and of sufficient size not to have broken with the plaintiff and was properly erected, as has been explained to you, and you should further find that the plaintiff was an experienced lineman, then the changes by time and exposure produced in the pole was a risk the plaintiff assumed, and you will answer the first issue "No." If you find from the evidence that the pole which broke and fell with the plaintiff was properly set originally, and the breaking was not from any negligence in the original setting, (287) but only from failure to keep it inspected and examined, and the plaintiff was an experienced lineman, you will answer the first issue "No." If you find that the plaintiff had the experience which I have spoken of, as a lineman, and that the pole was properly erected in the first instance, as I have heretofore fully instructed you, then I say that no further duty of its inspection from time to time rested upon the town; and if under such circumstances he was hurt by the falling of the pole, it would not be negligence attributable to the defendant, and you would answer this first issue "No." Or if the pole fell because there was some rottenness in it and below the surface of the ground, and it was concealed by reason of any hard shell on the outside of the pole, so that if the ordinary inspection of poles of this kind, either by the defendant or the plaintiff, or both of them, would not have disclosed the defect and the consequent danger in climbing it, as it was, and because of this hidden defect in the pole, when it was subjected to the additional weight of his body and the necessary movements of his arms, and handling the wires, etc., it fell and injured him, his fall would be an accident for which no one would be blamable in law, and in such case you will answer the first issue "No."

The jury rendered a verdict for the plaintiff, and judgment having been entered thereon, the defendant appealed.

A. M. Simmons and Small, McLean & McMullan for plaintiff.
Ward & Grimes and H. C. Carter, Jr., for defendant.

WALKER, J., after stating the case: The court, in addition to the instructions we have taken from the charge, told the jury that if the defendant set a pole in the ground which was unsound or unfit for use, or the defectiveness of which it could have ascertained at the time by the exercise of ordinary care, and also failed to brace or guy the pole, if the jury found that persons of ordinary prudence used the guy or brace under such circumstances, they would answer the first issue, as to the defendant's negligence, in the affirmative, provided they also found

that the pole fell with the plaintiff, and its fall was caused
(288) directly and immediately by its unsoundness and the failure of defendant to brace the same, and that guys or braces were appliances which were approved and in general use for securing a pole like this one in a safe position. It is evident that the jury found, under the evidence and the instructions of the court, that the pole was originally defective, either to the actual or constructive knowledge of the defendant, and was not such a one as should have been used for the purpose to which it was applied.

We emphasize the foregoing instruction of the court and the fact found by the jury to distinguish this case *in limine* from those cited by the defendant's counsel as authorities for his contention that the duty of inspection rested upon the plaintiff and not upon the defendant. We believe that they all hold that this principle does not apply if the pole was originally unsound and unfit for use, and that it is the duty of a telegraph or telephone or electric light company, when it selects a pole for use in its line, to inspect it for the purpose of ascertaining if it is sound and fit. By parity of reason the same is the duty and obligation of a city to its employees when it constructs and operates an electric light plant of its own, for it is not a public or governmental function, but a private and corporate duty, in the discharge of which the municipality will be held to the same degree of liability as an individual in like circumstances. *Fisher v. New Bern,* 140 N. C., 506.

But we are of the opinion that a city does not perform its whole duty by merely selecting a sound and safe pole in the beginning, but it must, by proper and reasonable inspection, keep it sound and safe for the use of its employees and the protection of the public, and in this respect we can perceive no valid reason why its duty should be less strict than is generally required of a master to exercise reasonable precaution for the safety of his servant. This general duty has been thoroughly settled by the authorities. The master personally owes to his servants the duty of using ordinary care and diligence to provide for their use reasonably safe instrumentalities of service. Among these are a reasonably safe place in which to do their work or to stay while waiting orders, reasonably safe ways of entrance and departure, an adequate
(289) supply of sound and safe materials, implements and accommodations, with such other appliances as may reasonably be required to insure their safety while at their work or passing over his premises to or from work. These things must, moreover, be adapted to the work in hand. It is not enough that they should be good, under ordinary conditions. They must be suitable for the work to which they are applied by the master, and properly adjusted to each other. If, therefore, the

master knows or would have known if he had used ordinary care to ascertain the facts, that the buildings, ways, machinery, tools, or materials which he provides for the use of his servants are unsafe, and a servant, without contributory fault, suffers injury thereby, the master is liable therefor, although he is not thus liable, in the absence of actual or constructive notice.

The master is not entitled to time to discover defects in things which are defective when put in use. He should examine them *before* putting them in use. He cannot evade his responsibility in these respects by simply giving general orders that servants shall examine for themselves, before using the place, material, etc., furnished by him. The fact that a servant could, by care and caution, so operate a defective and dangerous machine as not to produce injury to his fellow-servants does not exempt the master from his liability for an omission to exercise reasonable care and prudence in furnishing safe and suitable appliances. The master fails to supply a "safe place" for work if he allows work to be conducted there habitually in a manner needlessly dangerous to servants. The master is also personally bound from time to time, to inspect and examine all instrumentalities furnished by him, and to use ordinary care, diligence, and skill to keep them in good and safe condition. The duty of inspection is affirmative and must be continuously fulfilled and positively performed. Such duty is not discharged by giving directions for its performance, or by promulgating rules requiring it to be performed, or by employing competent and careful persons for that purpose. The master is not responsible for the want of repairs when he has neither actual nor constructive notice of their need; and this notice is not presumed, but must be proved by the servant. And it must be proved that he was chargeable with notice of the particular defect (290) complained of. But he is chargeable with constructive notice of whatever, by the use of ordinary care and diligence, he might have discovered and thereby avoided the danger incident thereto. He is entitled to reasonable time, after notice of a defect, within which to make repairs, and if, during that period or while he is repairing, an injury occurs to a servant, the question of a master's negligence depends upon his diligence under all the circumstances. This statement of the law has been adopted in Sh. and Redf. on Negligence (5 Ed.), sec. 194, and in the main is sustained by our own decisions. *Cotton v. R. R.*, 149 N. C., 227, and cases cited; *Leak v. R. R.*, 124 N. C., 455.

We think the principle applies to the case in hand. The question in one form was presented in *Harton v. Telephone Co.*, 146 N. C., 429, and we then said: "The duty of reasonably careful construction is followed by like care in maintenance and inspection. Joyce Elec. Law,

605. The duty of inspection, in regard to its frequency, cannot be made definite, but regard must be had to the character of the soil, the condition of the weather, the season of the year, and such other conditions as may affect the security of the poles and the safety of the traveling public."

It is contended, however, by the defendant that the duty of inspection belonged to the plaintiff, and his failure to discover the defect in the pole was his own and not its fault. The proof is that the unsoundness of the pole was not apparent to the naked eye. It was below the ground and would not be discovered except by digging around the pole and removing the earth which concealed it.

We cannot yield assent to the argument, at least under the circumstances of this case, that such a duty was imposed upon the plaintiff in caring for his own safety, and we discover nothing in the evidence to indicate that the plaintiff was guilty of any contributory negligence. In *Barkley v. Waste Co.*, 147 N. C., 585, *Justice Brown,* in discussing the liability of the defendant for injuries to one of its employees who, while performing his work, fell from a defective scaffold and was (291) injured, said: "The defendant owed to its employees, who were directed to work on the scaffold, the duty to exercise due care in selecting materials reasonably suitable and safe for its construction. 2 Labatt, sec. 614; Bushwell on Personal Injuries, secs. 193, 391, 392; 4 Thompson Neg., sec. 3957, note 30; *Starwick v. Butler,* 93 Wis., 430; *Bridge Co. v. Castleberry,* 131 Fed., 181. If defendant delegated the performance of this duty to Michael, it is responsible for the manner in which he discharged it. *Tanner v. Lumber Co.*, 140 N. C., 475; *Avery v. Lumber Co.*, 146 N. C., 592; *McCarthy v. Clafin,* 99 Me., 298. The evidence of witness Wooten is to the effect that the scaffold was built of old material that was scorched in the fire when the building was burned. There is also evidence that the wood was knotty, and that the piece which gave way broke at a knot. These facts, if true, do not *per se* constitute negligence, but we think they are some evidence to be considered by the jury as bearing upon the inquiry as to whether the defendant exercised reasonable care in selecting material suitable for the construction of a lofty scaffold upon which its servants were required to work. We fail to see any evidence of contributory negligence. The plaintiff took no part in selecting the material or in erecting the scaffold, and knew nothing of the character of the material out of which it was constructed. The scaffold was a completed instrument and supposed to be safe when plaintiff was directed to work upon it. The fact that he made only a casual examination does not make plaintiff culpable. He had a right to rely upon the assurance of the foreman that the scaffold

was safe, as he was unacquainted with either the character of the construction or the quality of the material. *Liedke v. Moran,* 43 Wash., 428; *Swanson v. Jenks,* 92 N. Y., 382.

There are two propositions stated in the quotation: (1) That the condition of the material, or lumber which entered into the construction of the scaffold was at least evidence of negligence. (2) That the plaintiff was not required, himself, to make more than a casual examination of the scaffold, and his failure to do so was not contributory negligence, as he had the right to rely on the assurance of the (292) foreman that the scaffold was "all right," that is, a safe one. There is no substantial or practical difference between the two cases. We do not see why a master should be excused for setting an unsound and unsafe pole or for permitting it to become and remain so, when he would not be, under similar circumstances, for erecting a scaffold, both having been constructed for the use of his servant.

There is one difference between the two cases, for in the case of the scaffold the servant was expressly told that it was safe, while in the case of the pole he was given an implied assurance that it was sound and safe, when he was ordered to climb it for the purpose of removing or adjusting the wires; but this is a difference in form and not in substance.

It is a general rule that the servant, in the absence of any warning from his master, or knowledge of a defect, has a right to rely upon the safety of the instruments and appliances which he is required to use in the service, because it may fairly be presumed that the master has performed his primary duty, that is, care in the original selection and subsequent inspection of such instrumentalities.

In *Electric Co. v. Kelly,* 57 N. J. L., 100, the company was held not to be liable for injuries to the plaintiff, Kelly, produced by the falling of a pole, but for the reason that the fall was caused by a weakness in the pole, brought about by a previous fall or by a defect which the evidence showed was not discovered by "the most rigid scrutiny." But in deciding that case the Court, by *Justice Magie,* said very much that is applicable to our case: "There was no pretense in this case that the company had been guilty of any willful wrong to Kelly. His claim was, and is, that the injury he received was the result of a breach of a duty which the company owed him. The better view of a master's duty to a servant is that which, taking into consideration the well-settled doctrine that a servant, by accepting employment, consents to take the risk of all dangers obviously or naturally incident to such employment, imposes on the master a positive duty to take reasonable care and precaution not to subject the servant to other or greater dangers. The rule thus formulated is of wide application, but, with reference to such (293)

cases as that now under consideration, may be thus stated: The master must take reasonable care to have the tools and appliances with which, and the places on or about which, the servant is to be employed, reasonably safe for the work the latter is employed to do. Shear & Red. Negl., secs. 92, 93; Smith M. & S. 236; *Harrison v. R. R. Co.,* 2 Vroom, 293; *Hutchinson v. R. R.,* 5 Exch., 343. Applying the rule thus stated to the case before us, it is obvious that, to justify the submission to the jury of the liability of the company to Kelly, the facts established must have warranted the inference that the breaking of the pole, which was the cause of his injury, resulted from a breach of the company's duty to him in respect to that pole. The company did not guarantee the safety of the pole, nor was it the duty to provide a sufficient pole, as was erroneously held below. Its duty was less extensive and would have been satisfied if it had taken reasonable care to provide a pole of sufficient strength to bear the strain of the wires and the weight of the servant employed thereon to do what was required to fit them for the service of the company."

While there is no evidence in this case upon the question whether the company made any inspection or not, the court virtually told the jury that it was not its duty to do so, if plaintiff was an experienced lineman (of which there was no doubt), and the duty of inspection was his, provided the pole was not originally defective. This instruction was, in our view, favorable to the defendant, because it made its duty "less extensive" than in law it really was. The city was required to inspect its poles at reasonable intervals of time, for the safety of its employees and the public, as we have shown, and its failure to do so was negligence, and nothing appears in the evidence to show that it was not the proximate cause of the injury. If it had made the proper inspection, the rottenness of the pole below the surface of the ground could easily have been discovered, for the wood was so badly decayed that it would crumble in the hand under the slightest pressure. *Edison Co. v. Street Railway Co.,* 17 Texas Civil App., was a case in which it appeared that one Dixon, the appellee, who was a lineman or repairer, was injured by the falling of a pole belonging to another company, but used, with its permission, by the defendant, appellant. The pole proved to be rotten near its base and broke in two and Dixon fell with it to the ground and was injured. In an elaborate opinion, the Court reviews the facts and the law, and comes to this conclusion: "Where the defect in the materials or resources of the work are obvious and known to the servant, or he had the same opportunities of knowing that the master had, and he is injured by reason of such defects, he cannot recover, for the reason that he assumed the

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risk in undertaking the work. But where, as in this case, the master could, by the use of ordinary care in testing the condition or strength of the pole, have ascertained its defect, and its defect was not known to appellee, and was obvious to him, the master is guilty of a breach of duty to his servant, and is liable for the consequences of it." The following facts, among others, were found by the lower court in that case: "On 28 December, 1895, appellee, J. W. Dixon, with other hands, was employed by appellant to take down and remove a feed wire from the poles on the west side of Pine Street and put the same in a new position. on its poles on the east side of that street. It was necessary for the appellee, in the pursuance of his employment, to climb the poles for the purpose of detaching the feed wire from the brackets to which it was attached, and for that purpose he climbed one of the poles on the west side of Pine Street, and while engaged in loosening the feed wire from the brackets at the top of the pole, it broke near its lower end, and appellee was thereby with great force and violence thrown upon the ground and seriously injured. The place where the pole broke was rotten at and from its center near to its circumference, the unsound part at that place being surrounded only by a thin shell of sound wood, through which hacks had been cut before the pole was erected. On account of its rottenness, the pole was unfit and unsafe for the purpose for which it was used, and too weak to sustain appellee's weight in the performance of his duty in taking down the wire. Its defective condition was not obvious or patent to the eye, and appellee was unaware of it. By the exercise of ordinary care and inspection, which it was appellant's duty to appellee to perform, it could, by testing (295) the pole in the ordinary manner, have ascertained its defects and known the danger to any one in discharging the duty it had employed the appellee to perform." The Court held that "In failing to discharge its duty in inspecting and ascertaining the defect in the pole, which it could have done by the use of ordinary care, it was negligent, and this negligence was the proximate cause of appellee's injury. The appellee was guilty of no ngeligence contributing in any way to the accident." This judgment, as we have seen, was affirmed on appeal.

In *Telegraph Co. v. Wonghter,* 56 Ark., 206, the Court held, upon a state of facts much like those in this case, that it was the duty of the defendant (plaintiff in error) to have used reasonable care and diligence by an inspection to discover latent defects, and if ascertained to exist, then to warn its employee of the probable danger in ascending the pole. These are the words of the Court: "While he does not insure the safety of his servants, yet he is bound to take heed that he does not, through his own want of care and prudence, expose them to unreasonable risks or

dangers, either from the character of the tools with which he supplies them or the place in which he requires them to operate. He is in duty bound not to expose them to danger of which he knows or has reason to know they are not aware. Before ordering them to perform any service, he should warn them fully of the latent dangers incident thereto, if there be any, of which he knows, or in the exercise of proper diligence ought to know; and this duty 'extends even to patent dangers when he knows the servant, by reason either of his youth or his inexperience, is not aware of the danger to which he is exposed, or . . . which are unknown to the servant from any cause, and which cannot readily be ascertained except by a person possessed of peculiar knowledge, which he has no reason to suppose the servant possesses,' " citing many authorities. The appellate Court awarded a new trial in that case, because the instruction of the lower court made it the absolute duty of the company to discover the defect, without any regard to the question of care or diligence in attempting to do so.

(296) Unless we hold that the duty of seeing that this pole was in proper condition rested upon the plaintiff Terrell (and we have shown that the contrary is the true rule), *Ward v. Telegraph Co.*, 71 N. Y., 81, is in point, and is to this effect: "The defendant had the right to place its line in the street, and hence it can be made responsible for the accident only by proof of culpable negligence on its part, either in the construction of the line or its maintenance. If the post which broke and fell was originally not reasonably sufficient, or if it was permitted carelessly to become and be insufficiently by decay, then responsibility attaches to the defendant for the accident."

Applying the law to facts similar to those in this case, the Court in *McGuire v. Telephone Co.*, 167 N. Y., 208, said: "If the pole had injured a passer-by, it would be no answer for the defendant to say that it did not own the pole. It was bound, both as to third parties and as to its own workmen, to erect and maintain a reasonably safe structure, and it had no right to use for that purpose an unsafe appliance, whether its own or that of a third party. By using the pole as part of its line, it adopted it as its own. As it would have been liable had the pole when first used been decayed and insufficient for the purpose of carrying its wires and supporting its linemen, it was equally liable when the pole subsequently became unsafe from decay, which reasonable inspection would have discovered. The duty of the defendant was just as great to safely maintain as to safely construct, and that duty cannot be delegated so as to exempt the master from liability." As said by the Court in the case just cited, "If each lineman was to dig around and test every pole before he ascended it, a large part of his time would be taken up

by this work alone, and repeated tests would soon impair the stability of the pole itself"; and from this consideration it was deduced by the Court that the advantage to the company in undertaking itself to make the inspection is plain.

There are authorities in other jurisdictions which hold that it is the lineman's duty to make the inspection, but the ruling in most of them if not all of them was influenced by facts or considerations not applicable to the case at bar. The uncontroverted proof shows conclusively, we think, that the pole was not originally sound, and consequently (297) not safe. In fact, we do not see why a casual inspection in the beginning would not have discovered its defective condition, for it had scarcely survived one-sixth of its allotted span of life, and when it was broken, it had become decayed and rotten almost entirely through its base. The lineman had no reason whatever to suspect its bad condition and was not required by his contract or any custom or usage to inspect the pole before he climbed it to adjust the wires, but had every right to rely upon the original careful selection and inspection of his employer. *Clairain v. Telegraph Co.*, 40 La., 178; *McDonald v. Telegraph Co.*, 22 R. I., 131.

We conclude, therefore, that the motion of the defendant to nonsuit the plaintiff was properly overruled, and that there was no error in refusing the peremptory instructions it requested, to find for the defendant. There was evidence that the pole had not been inspected by defendant; that it fell three years after it was first set in the ground, when it should have lasted from six to sixteen or twenty years; that its condition, on inspection after it fell, was found to be very bad, it being rotten to the core; that the strain on it was apparently not sufficient to have broken a sound pole. These and other facts and circumstances, of which there was some evidence, were sufficient to carry the case to the jury, it being a primary and nondelegable duty of the master to see that his servants are not subjected to unnecessary risk or hazard by any failure on his part, in the exercise of due and proper care, to furnish a plant with instrumentalities adapted to the performance of the work, and reasonably sound, safe, at least in original structure; and this the defendant failed to do.

One other question calls for notice. The defendant alleged that the claim of the plaintiff had not been presented within the time fixed by its charter. But the jury have found, under proper instructions, that by reason of his injuries, which affected him both mentally and physically, the plaintiff was unable, during that period, to transact ordinary business or to present his claim, and that he did so within a reasonable time after he was restored sufficiently to do so. This, we think,

(298) excused the delay. The general rule in such cases seems to be that in order to excuse a strict compliance with the provision, it must be shown that there is such physical or mental incapacity as to make it impossible for the injured person, by any ordinary means at his command, to procure service of the notice or a filing of the claim, whichever is required, and if there is an actual incapacity, it can make no practical difference in reason whether it is mental or physical in its nature. *Born v. Spokane,* 27 Wash., 719; *Barclay v. Boslin,* 167 Mass., 597. It may very properly be said that it would, in truth, shock the sense of justice and right if this provision was construed so as to hold the notice of the plaintiff's claim insufficient under the circumstances. It is an accepted maxim that the law does not seek to compel that to be done which is impossible. It cannot reasonably be presumed that the intention of the Legislature in exacting this charter would lead to any such unjust conclusion, and it is a fundamental canon of interpretation that a thing which is within the letter of a statute is not within the statute itself, unless it is within the intention of the makers. *Walden v. Jamestown,* 178 N. Y., 213. Speaking of a similar statute, the Court said in *Forsyth v. Oswego,* 191 N. Y., 441: "In the absence of any explanation of plaintiff's delay in this respect, the direction of the statute would have been conclusive and final. There was an explanation, however, and it was for the jury to say whether it was credible and satisfactory. If the plaintiff was, as he claimed, physically and mentally unable to prepare and present his claim, or to give directions for its preparation and presentation during the whole of the three months within which he was required by the defendant's charter to present it, then he was entitled to a reasonable additional time in which to comply with the charter in that regard. This is because the law does not seek to compel that which is impossible." Numerous cases support this reasonable doctrine. *Everhardt v. Seattle,* 33 Wash., 664; *Williams v. Port Chester,* 89 N. Y. Suppl. (*s. c.,* 97 App. Div., 84 and Aff., 183 N. Y., 550); *Webster v. Beaver Dam,* 84 Fed., 280; *Hungerford v. Waverly,* 109 N. Y. Suppl., 438. The Court in *Green v. Port Jervis,* 66 N. Y. Suppl., 1042, used strong language upon the subject:
(299) "The provision of the charter requiring preliminary notice of an intention to sue attaches only, as has been said, as a condition precedent to the commencement of an action against the village, *Reining v. Buffalo,* 102 N. Y., 308, 6 N. E., 792; *Curry v. Buffalo,* 135 N. Y., 366, and if compliance with the condition is rendered temporarily impossible by the wrongful act of the defendant, it would be monstrous to allow the defendant to assert that fact as a defense to the action. The requirement of notice necessarily presupposes the existence of an

individual capable of giving it, and not one deprived of that power by the operation of the very wrong to be redressed. That the defendant should be permitted to take advantage of its own wrong is clearly not within the purview of the law." On this branch of the case we decide, upon principles of reason and justice and from high authority, that under the facts as presented the defendant cannot rely upon the failure to give notice of the claim within the time limited as a bar to the action.

The other assignments of error, we think, are without merit.

No error.

Cited: *Woodie v. Wilkesboro,* 159 N. C., 356; *Harrington v. Greenville, ib.,* 636; *Pender v. Salisbury,* 160 N. C., 365; *Hartsell v. Asheville,* 164 N. C., 196; *Tate v. Mirror Co.,* 165 N. C., 279; *Hartsell v. Asheville,* 166 N. C., 634.

W. K. PHILLIPS ET AL. v. SHERROD DENTON ET AL.

(Filed 6 March, 1912.)

1. Executors and Administrators—Sale to Make Assets—Lost Papers—Entries of Records—Regularity of Proceedings — Evidence — Judgment—Collateral Attack.

When the original papers in proceedings by an administrator to sell lands of the deceased to pay debts have been lost, the regularity of the proceedings may be established by entries thereof on the minute docket of the court, and when therefrom it is made to appear that the parties were properly before the court, minors being represented by guardians *ad litem,* and in all other respects the proceedings were conducted according to the due course and practice of the courts, the judgment entered cannot be collaterally attacked.

2. Executors and Administrators—Sale to Make Assets—Lost Papers—Entries of Record—Regularity of Proceedings—Evidence Sufficient.

The validity of a deed made by an administrator in proceedings for the sale of lands to make assets to pay debts being in controversy, and it being shown that the original papers had been lost, the entries on the minute docket of the court *Held* sufficient to sustain the regularity of the proceedings, which show the appointment of the administrator, who gave a satisfactory bond, and qualified; his account of sale of the land, which was received and ordered recorded; his charging himself with the proceeds of sale of the land in his final account; that service was admitted of the petition to sell the lands, the prayer was granted and decree filed, and that the report of sale was returned and confirmed.

3. Deeds and Conveyances—Dower Excluded—Definite Description—Evidence Sufficient.

When it appears that the deceased owned but one tract of land, which the administrator sold and conveyed in proceedings to pay his debts,

subject to dower, and the deed described the land as that from which the dower tract was taken, the allotment of the dower may be examined to ascertain the land intended to be conveyed; and it therein appearing that both the dower tract and the lands from which it was taken were described by metes and bounds, these descriptions are sufficient to admit of parol identification of the lands thereunder.

4. Executors and Administrators—Sale to Make Assets—Deeds and Conveyances—Recitation of Powers.

Where an administrator acts under an order to sell land to make assets to pay debts and in accordance therewith sells the lands and executes his deed to the purchaser, it is not necessary that he recite the order in the execution of his deed for the deed to be valid, for by implication power is conferred by the order.

(300) APPEAL from *Ferguson, J.*, at October Term, 1911, of FRANKLIN.

This action was brought to recover a tract of land, which was originally owned by Sherrod Denton and was sold by John Chamblee, his administrator, under an order of court, to pay debts of the intestate. Plaintiffs having proved that the papers in the proceeding for the sale of the land, entitled John Chamblee, administrator, v. Heirs of Sherrod Denton, had been lost, introduced in evidence the entries in the case on the minutes of the court, as follows:

(301) December Term, 1859: "John Chamblee is appointed administrator of Sherrod Denton and he enters into bond in the sum of $500, with James Baker and Henry Baker as sureties, which is accepted by the court, and he qualifies accordingly."

March Term, 1860: "John Chamblee makes his return of account of sale of Sherrod Denton, which is received by the court and ordered to be recorded."

In his final account, he charged himself with $131.25, proceeds of sale of land, 16 May, 1860.

March Term, 1860: "Petition to sell land to pay debts. Service admitted. Prayer granted and decree filed."

June Term, 1860: "Petition to sell land to pay debts. Prayer granted. Decree filed. Report of sale returned and confirmed."

They then introduced a deed from John Chamblee, administrator of Sherrod Denton, to T. H. Mann, reciting a consideration of $131.25, paid by Mann, and conveying to him a tract of land in said county containing, by estimate, 87½ acres, 30 of which had been allotted to Mary Denton, the widow of Sherrod Denton, as her dower. They next offered a deed from T. H. Mann to John Chamblee, executed six years after the first deed. The land in controversy is the part of the entire tract which was allotted as dower to Mary Denton, she having died

before this suit was commenced. Plaintiffs then introduced the record of the dower proceedings, which showed that the petition was filed, a copy of petition issued, N. S. Patterson appointed guardian *ad litem* for infants, service admitted, prayer granted, writ of dower ordered to be issued, jury ordered, report returned and confirmed. The acceptance of service for the infant defendants by N. S. Patterson, their guardian, was also indorsed on the petition for the assignment of dower. A survey of the land was ordered in the dower proceedings, and the report of the surveyors showed that the tract contained 87 acres, which was described by metes and bounds, and the dower land, taken therefrom, contained 29 acres, also described by metes and bounds. The defendants agreed that if parol evidence was admissible to aid the description in the administrator's deed and locate the land, and the records sufficient to authorize a sale of the land to pay debts, the judge should charge the jury to answer the issue in favor of the plaintiffs, it being admitted that the deed to Mann covered the *locus in quo*. The judge, being of opinion with the plaintiffs upon the points reserved, instructed (302) the jury to answer the issue accordingly, and judgment having been entered for the plaintiffs upon the verdict, the defendants appealed.

W. M. Person and W. H. Yarborough, Jr., for plaintiffs.
Thomas B. Wilder and T. T. Hicks for defendant.

WALKER, J., after stating the case: There is no suggestion of any fraud in this case, nor is it alleged that John Chamblee bought the land at his own sale through T. H. Mann, who acted for him. It appears that the proceeding to sell the land was brought against the widow, who is now dead, and the children of Sherrod Denton, who were then minors and represented by their guardian *ad litem*. There is enough, in the fragments of the record that remain, to indicate that the proceeding was conducted with regularity. The original papers have been lost, and we will not presume, in their absence, that the court disregarded the rules of procedure and gave its decree without properly guarding the rights of the defendants. It affirmatively appears that they were represented by a guardian, and the presumption is that the court proceeded in the case according to its usual course and practice. We cannot, in this suit, permit a collateral attack upon the judgment in that case.

The subject was fully considered by us in *Rackley v. Roberts,* 147 N. C., 201, and we do not see any substantial difference in the facts of the two cases. If there is any, it is in favor of the validity of the proceedings in *Chamblee v. Denton,* which the defendants now assail, for there is no allegation of fraud or collusion in the sale of the land, as

there was in the case cited. In *Rackley v. Roberts, supra,* we relied much upon the authority of *Sumner v. Sessoms,* 94 N. C., 376, in which *Chief Justice Smith* thus stated the law governing such cases: "A guardian *ad litem* was appointed for the infant defendant, whose acceptance and presence in court must be assumed, in the absence of any indication in the record to the contrary, from the fact that the court took jurisdiction of the cause and rendered judgment. It is true, the record produced does not show that notice was served on the infant or (303) upon her guardian *ad litem,* nor does the contrary appear in the record, which, so far as we have it, is silent on the point. The jurisdiction is presumed to have been acquired by the exercise of it, and, if not, the judgment must stand and cannot be treated as a nullity until so declared in some impeaching proceeding instituted and directed to that end. The irregularity, if such there be, may in this mode be such as to warrant a judgment declaring it null; but it remains in force until this is done. The voluntary appearance of counsel in a cause dispenses with the service of process upon his adult client. The presence of a next friend or guardian *ad litem* to represent an infant party, as the case may be, and his recognition by the court in proceeding with the cause, preclude an inquiry into his authority in a collateral proceeding and require remedial relief to be sought in the manner suggested, wherein the true facts may be ascertained. This method of procedure, so essential to the security of titles dependent upon a trust in the integrity and force of judicial action, taken within the sphere of its jurisdiction, is recognized in *White v. Alberson,* 14 N. C., 241; *Skinner v. Moore,* 19 N. C., 138; *Keaton v. Banks,* 32 N. C., 384, and numerous other cases, some of which are referred to in *Hare v. Holloman, supra,* and all of which recognize the imputed errors and imperfections as affecting the regularity and not the efficacy of the judicial action taken." The proceeding alleged in that case to have been irregular was commenced in 1870, after the adoption of the new procedure. *Carter v. Rountree,* 109 N. C., 29.

We further said in *Rackley v. Roberts:* "While it may not be necessary to the decision of this appeal, as we view it, to consider what may be the rights of Mrs. Roberts as an innocent purchaser, for all the facts in regard to that question are not now before us, it may be well to refer again to the general doctrine settled by this Court, to the effect that, when there is a purchase under a judgment, the purchaser need only inquire if, upon the face of the record, the court apparently has jurisdiction of the parties and the subject-matter, in order to be protected, provided he buys in good faith and without notice of any actual defect," citing numerous cases. See *Glisson v. Glisson,* 153 N. C.,

185, which was a motion to set aside the judgment attacked in (304) *Rackley v. Roberts.* The question is there fully discussed by *Justice Brown.* His Honor was correct in holding that the proceeding in *Chamblee v. Denton* supported the judgment in that case and the sale and deed made by the administrator. *Coffin v. Cook,* 106 N. C., 376.

The description in the deed from Chamblee to Mann was sufficient. In the first place, so far as appears, the intestate of John Chamblee owned but one tract of land, and it was his land which was sold to pay his debts. In order to make a valid sale of the whole of it, the allotment of the widow's dower was first made and then the entire tract sold, subject to this dower. This appears from the language of the deed. The description is of the land from which the dower tract was taken, and this is sufficient reference to the allotment of the dower to permit an examination of it for the purpose of ascertaining what land was intended to be conveyed. When we look into the record of this allotment, we find that the entire tract is described by its metes and bounds, and also the dower tract, and this makes clear and definite the description in the deed. In other words, it appears on the face of the deed that it was the purpose of the parties to convey all the land of Sherrod Denton, except the dower interest, or the life estate of the widow, in the land set off to her in the larger tract, both being described in the proceedings by metes and bounds. The tract conveyed by the deed necessarily adjoined the dower land, the latter having been a part of it. It would not be difficult to locate the land of Sherrod Denton adjoining the dower tract, as he had only one tract of land, even if we disregarded the additional description, "adjoining the land of Rebecca Denton's old tract, and others," which increases the certainty of a true location. In the latter view of the description, the ruling of the court is sustained by *Perry v. Scott,* 109 N. C., 374.

The defendants further contend that the deed of Chamblee, administrator, to Mann does not convey the land, because it fails to recite the power under and by virtue of which it was executed, or to refer to the order of the court directing a conveyance of the land to the purchaser. The same objection was made to the executor's deed in *Coffin v. Cook, supra,* and held to be untenable. It was there said that where the executor actually exercised the power given by an order of the (305) court in the execution of the deed, but failed to recite the order, the implication of the law is that he was acting under authority conferred by the order.

This disposes of all the exceptions which require any special attention.

No error.

W. B. MOORE v. GENERAL ACCIDENT, FIRE AND LIFE INSURANCE CORPORATION

(Filed 6 March, 1912.)

Insurance, Accident—Policy Contract—Limitation of Liability—Diseases—Interpretation of Policy.

When an accident insurance contract provides for the payment of a loss for an injury received while riding on a railway passenger coach, and on the second page of the policy there is a provision limiting the liability of the insurer if the disability is due to an accident caused by or resulting from paralysis and certain other diseases, it is construed to mean that when an accident is the ultimate cause of paralysis, or of one of the other diseases named, which accrues at a more or less remote period of time after the injury has been received, the liability of the insurer is limited by the provision, but not when the paralysis, etc., is a direct incident and a part of the injury effected through the accident insured against.

APPEAL by defendant from *Ferguson, J.*, at November Term, 1911, of NASH.

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

F. S. Spruill for plaintiff.
Brooks & Taylor for defendant.

CLARK, C. J. The plaintiff, an illiterate man, took out an accident policy of insurance in the defendant company. On the first page thereof, in large type, defendant insured the plaintiff "at the rate of $50 per month for a period not exceeding twenty-four consecutive
(306) months, against total loss of time resulting directly and independently of all other causes from bodily injuries effected through external, violent, and accidental means, and which wholly and continuously, from the date of the accident, disable and prevent the assured from performing every duty pertaining to any business or occupation." And further, on the same page, the policy undertook to pay double indemnity "if such injuries are sustained by the assured while riding as a passenger within the inclosed part of any railroad passenger car provided for the exclusive use of passengers and propelled by steam."

In December, 1908, the plaintiff was seriously injured while a passenger on a railroad. The first issue was in the exact language of the first quotation from the policy above set out, to which the jury responded "Yes."

The defendant claimed that the plaintiff had received $20 in full compromise and settlement of said injuries, to which the jury responded "No."

The defendant further relied upon a provision inside the policy as follows: "In the event of disability due to either accident or illness caused by or resulting wholly or in part, directly or indirectly, in tuberculosis, rheumatism, paralysis, apoplexy, orchitis, neuritis, locomotor ataxia, lumbago, lame back, strains, sciatica, vaccination, Bright's disease, dementia, insanity, hernia . . . the limit of the company's liability shall be an indemnity for the period disabled, not exceeding four weeks in any one year, at the rate which would otherwise be payable under this policy, anything herein to the contrary notwithstanding." The defendant pleads that the plaintiff suffered with paralysis which was produced by his injury, and therefore it is liable to the plaintiff only in a sum not exceeding that which would otherwise be due for a disability not exceeding four weeks in any one year. This paragraph, if construed as the defendant claims, is in direct contradiction of the terms and purpose of the insurance as stated in the first quotation above given from the front page of the policy.

We do not think that this would be a just construction. Here the paralysis is a direct incident and a part of the "bodily injury effected through external, volent or accidental means," and to hold that in such case the insurance is reduced to a very small part of the (307) sum stipulated for would be in effect to destroy the insurance. To say that such was the intent of the defendant company in executing the policy would be to charge it with fraud. The only reasonable and just construction is that when an accident or illness is the ultimate cause of paralysis or of one of the other diseases named, which diseases accrue at a more or less remote period of time after the injury, then the liability of the insurance company is reduced to compensation for disability not exceeding four weeks in any one year, and the same reduction could be claimed when one of those excepted diseases causes the injury.

The jury found that the plaintiff had complied with every condition in his policy; that the statements made in his application for insurance were true, and that though the plaintiff had received $20 from the defendant, that there had not been a valid and full compromise for the injuries sustained; that the plaintiff's cause of action accrued prior to the institution of this action, and that the plaintiff was entitled to recover $2,380, with interest—that is, indemnity at the rate of $100 per month for twenty-four months, less $20 received.

We have examined all the exceptions in the record carefully, but excepting the propositions of law above discussed, the case was almost entirely dependent upon the disputed matters of fact which the jury have found in favor of the plaintiff, under a correct charge as to the law.

No error.

HOWARD HERRICK, JR., v. NORFOLK-SOUTHERN RAILROAD COMPANY.

(Filed 6 March, 1912.)

1. Removal of Causes — Federal Courts — Diversity of Citizenship — Filing Petition and Bond—Practice.

The mere filing of a petition and bond for the removal of a suit from the State to the Federal court, on the ground of diversity of citizenship, does not effect a transfer, unless it appears by the petition that the petitioner has the right to remove it.

2. Same—Jurisdiction—Questions of Law.

When a nonresident defendant of this State files his petition with sufficient allegations and bond in a court of this State for the removal of a cause to the Federal court, the jurisdiction of the State court ends, leaving only to the judge of the State court the right to pass upon the sufficiency of the petition and the bond.

3. Same—Appeal and Error.

When the State court errs in retaining jurisdiction of a cause sought to be removed to a Federal court by a nonresident defendant, the Supreme Court of the United States can, upon writ of error review its decision, when affirmed by the highest appellant court of the State.

4. Removal of Causes—Federal Court—Diversity of Citizenship—Questions of Law—Issues of Fact—Jurisdiction.

When a proper petition and sufficient bond for removal of a cause from the State to the Federal court has been duly filed by a nonresident defendant in the State court, the latter court cannot pass upon an issue of fact as to whether the defendant was a nonresident, as such an issue is determinable only in the Federal court.

(308) APPEAL from *Ferguson, J.*, at December Term, 1911, of MARTIN.

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

H. W. Stubbs for plaintiff.
W. B. Rodman for defendant.

WALKER, J. This action was brought by the plaintiff, Howard Herrick, who sues by his next friend, John C. Lamb, to recover damages for injuries to the infant plaintiff, alleged to have been caused by the negligence of the defendant on its electric railway in Virginia Beach, State of Virginia. The damages are laid at $25,000. Before the plea or answer was due, or the time allowed by law for filing the same had expired, the defendant presented its verified petition to the court, alleging that it is a corporation chartered under the laws of the State of Virginia,

and a citizen and resident of that State, the plaintiff and his next friend being citizens of this State, and in other respects containing all the essential averments required by the removal act of Congress. It tendered a bond with sufficient surety for entering the case in the Circuit Court of the United States for the Eastern District of this State, (309) and upon the papers thus filed in the State court, it prayed that the cause be removed to the said Circuit Court for trial. *Judge Ferguson,* then presiding in the State court, ordered the case to be removed according to the prayer of the petition, and the plaintiff excepted and appealed.

The contention of the plaintiff is that the defendant is not a corporation and resident of the State of Virginia, but a corporation of North Carolina and Virginia, and he so alleges in his complaint. He also files certain papers, duly certified by the Secretary of State, for the purpose of sustaining his allegation. Even if the certificates do tend to establish the fact, which we gravely doubt, this issue cannot be tried in the State court. The law upon this question is well settled. It is true that a State court is not bound to surrender its jurisdiction of a suit on a petition for removal, until a case has been made, which on its face shows that the petitioner has a right to the transfer. The mere filing of a petition for the removal of a suit which is not removable does not work a transfer, and in order to accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal, which being made to appear in the record, and the necessary security having been given, the power of the State court in the case ends, and that of the Federal court begins. The State court, of course, may decide, on the face of the record, whether the case is a removable one. The law upon this subject has been so fully and conclusively stated by the Court having the jurisdiction under the Constitution to declare finally what it shall be, that we will content ourselves by referring to one of its latest decisions dealing with the question. In *R. R. v. Dunn,* 122 U. S., 513, it has stated the true rule explicitly, as follows: "The assignment of errors presents but a single question, and that is, whether, as after the petition for removal had been filed the record showed on its face that the State court ought to proceed no further, it was competent for that court to allow an issue of fact to be made up on the statements in the petition, and to retain the suit because on that issue the railway company had not shown by testimony that the plaintiff (310) was actually a citizen of Minnesota. It must be confessed that previous to the cases of *Stone v. South Carolina,* 117 U. S., 432 (29: 962), and *Carson v. Hyatt,* 118 U. S., 279; (*ante,* 167), decided at the last term, the utterances of this Court on that question had not always

been as clear and distinct as they might have been. Thus in *Gordon v. Longest,* 41 U. S., 16 Pet., 97, in speaking of removals under section 12 of the Judiciary Act of 1789, it was said, p. 104: 'It must be made to appear to the satisfaction of the State court that the defendant is an alien, or a citizen of some other State than that in which the suit was brought'; and in *R. R. v. Ramsey,* 89 U. S., 22 Wall., 328, that, 'If upon the hearing of the petition it is sustained by the proof, the State court can proceed no further.' In other cases expressions of a similar character are found, which seem to imply that the State courts were at liberty to consider the actual facts, as well as the law arising on the face of the record, after the presentation of the petition for removal. At the last term it was found that this question had become a practical one, about which there was a difference of opinion in the State courts, and to some extent in the circuit courts; and so, in deciding *Stone v. South Carolina,* we took occasion to say, 'All issues of fact made upon the petition for removal must be tried in the circuit court, but the State court is at liberty to determine for itself whether, on the face of the record, a removal has been effected.' It is true, as was remarked by the Supreme Judicial Court of Massachusetts in *Amy v. Manning,* 144 Mass., 153, that this was not necessary to the decision in that case; but it was said on full consideration and with the view of announcing the opinion of the Court on that subject. Only two weeks after that case was decided, *Carson v. Hyatt* came up for determination, in which the precise question was directly presented, as the allegation of citizenship in the petition for removal was contradicted by a statement in the answer, and it became necessary to determine what the fact really was. We there affirmed what had been said in *Stone v. South Carolina,* and decided that it was error in the State court to proceed further with
(311) the suit after the petition for removal was filed, because the circuit court alone had jurisdiction to try the question of fact which was involved. This rule was again recognized at this term in *Carson v. Dunham,* 121 U. S., 421 (*ante,* 992), and is in entire harmony with all that had been previously decided, though not with all that had been said in the opinions in some of the cases. To our minds, it is the true rule and calculated to produce less inconvenience than any other. The theory on which it rests is that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents, then, to the State court a pure question of law, and that is, whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of

the suit. That question the State court has the right to decide for itself; and if it errs in keeping the case, and the highest court of the State affirms its decision, this Court has jurisdiction to correct the error, considering for that purpose only the part of the record which ends with the petition for removal. *Stone v. South Carolina,* 117 U. S., 432 (*supra*), and cases there cited." *Crehore v. R. R.,* 131 U. S., 240; *R. R. v. Daughtry,* 138 U. S., 298. The rule, as thus formulated, has been recognized by this Court as the authoritative and controlling one in *Springs v. R. R.,* 130 N. C., 186. The cases to the same effect are collected in 5 Digest U. S. Supreme Court Reports, pp. 5100 and 5101. In *R. R. v. Daughtry, supra,* the very question now before us was involved and the Court held it to be "thoroughly settled" by the decisions that issues of fact raised upon petitions for removal must be tried in the Federal Court. The issue in that case was one of diverse citizenship. The matter was fully discussed at the last term by *Justice Hoke* in *Rea v. Mirror Co., ante,* 24, and we then reached the same conclusion as herein stated.

It therefore follows that the Superior Court, to which the petition for removal was presented, did not have the power to pass upon the issue of fact as to the diverse citizenship of the parties, and properly left that issue, if it has been sufficiently raised in the record, (312) to the determination of the United States Court.

The ruling of the court was correct.

Affirmed.

Cited: *Hurst v. R. R.,* 162 N. C., 369, 379; *Smith v. Quarries Co.,* 164 N. C., 353; *Lloyd v. R. R.,* 166 N. C., 28, 37; *Cox v. R. R., ib.,* 659, 662; *Hyder v. R. R.,* 167 N. C., 587; *Cogdill v. Clayton,* 170 N. C., 528.

H. L. BLOUNT v. AGNES BLOUNT.

(Filed 6 March, 1912.)

1. Appeal and Error—Motion for Judgment—Fragmentary Appeal—Practice.

A nonsuit and appeal taken by plaintiff upon the refusal of the trial judge to grant his motion for judgment upon the pleadings and order a reference is premature and fragmentary, and will be dismissed.

2. Appeal and Error—Motion for Judgment—Exceptions—Final Judgment—Practice.

Upon the refusal of the trial judge to grant plaintiff's motion for judgment upon the pleadings and order a reference, he should have noted an exception to be reviewed upon appeal from final judgment.

BLOUNT *v.* BLOUNT.

APPEAL from *Carter, J.*, at September Term, 1911, of PITT.

The plaintiff moved the court for a judgment against the defendant upon the face of the pleadings, and for reference to ascertain the amount due by the defendant to the plaintiff. His Honor held that the plaintiff was not entitled to a judgment against the defendant upon the pleadings, and also stated that if the plaintiff was entitled to a judgment, the cause was a proper cause for reference. Upon this intimation of the court, the plaintiff submitted to a nonsuit and appealed to the Supreme Court.

Guion & Guion, F. C. Harding, and Harry Skinner for plaintiff.
Jarvis & Blow and Albion Dunn for defendant.

BROWN, J. We are unable to pass upon the question so earnestly pressed by the learned counsel for the plaintiff. The appeal of
(313) the plaintiff is fragmentary and premature, and the motion of the defendant to dimiss the appeal for that reason must be granted.

In the first place, the plaintiff voluntarily submitted to a nonsuit, and thus put himself out of court. It is not a case of involuntary nonsuit submitted to for the purpose of testing the correctness of a ruling which is vital to the plaintiff's cause. The refusal of the trial judge to grant a judgment upon the pleadings and order a reference did not affect a substantial right of the plaintiff, or terminate his case.

Instead of voluntarily going out of court, he should have noted his exception and proceeded with the trial of the cause, and if judgment was finally rendered against the plaintiff, he could then have reviewed the ruling of the judge. *Hayes v. R. R.*, 140 N. C., 131; *Midgett v. Manufacturing Co.*, 140 N. C., 362. In this last case it is stated that an intimation of an opinion by the judge adverse to the plaintiff upon some proposition of law which does not take the case from the jury, and which leaves open essential matters of fact still to be determined, will not justify the plaintiff in suffering a nonsuit and appeal. Such nonsuits are premature, and the appeals will be dismissed.

Appeal dismissed.

Cited: Robinson v. Daughtry, 171 N. C., 203.

(314)

STATE BOARD OF EDUCATION v. ROANOKE RAILROAD AND LUMBER COMPANY.

(Filed 6 March, 1912.)

1. State's Lands—Grants—Interpretation of Statutes—Swamp Lands— Statute of Limitations—Adverse Possession.

Until barred by adverse possession the statute of limitations does not run against the State (Revisal, sec. 4048) in an action to recover swamp and marsh lands from a claimant holding under a grant which is invalid according to the provisions of the Revisal, sec. 1693 (3).

2. State's Lands—Grants—Swamp Lands—Interpretation of Statutes—Evidence—Opinion—Personal Knowledge.

In an action involving the question as to whether the *locus in quo* are swamp lands, etc., within the meaning of Revisal, sec. 1693 (3), it is competent for witnesses to testify, upon their own observation, as to whether the lands were swamp lands or not, subject to the cross-examination of the opposing party, leaving the truth of the matter for the jury to determine.

3. State's Lands—Void Grants—Swamp Lands.

An instruction in this case held correct, that if the jury found from the evidence as a fact that the lands in controversy were swamp lands and in a swamp of over 2,000 acres, prior to and at the time the defendant's claims were taken out, they would not be subject to entry, and defendant's grant would be void. Revisal, sec. 1693 (3).

4. State's Lands—Swamp Lands—Definition—Interpretation of Statutes.

After giving definitions as to the meaning of the term "swamp lands," and quoting from that given in Revisal, sec. 1695, and instructing the jury that the statutory definition would not apply against the defendant who held under a grant prior to that time, the court said that he did not mean to lay down any fixed rule for the jury to determine whether the lands in controversy were swamp lands, but only to assist them in ascertaining the common and generally accepted definition: *Held*, no error.

5. State's Lands—Swamp Lands—Definition—Knolls or High Places—Interpretation of Statutes.

A tract of land within the area of swamp lands coming within the meaning of Revisal, sec. 1693 (3), need not necessarily be free from knolls or higher and drier places; for when, taken as a whole, the general effect is that of swamp lands, the provisions of the statute apply which withdraw them from the granting authority conferred on the State officials.

6. State's Lands—Swamp Lands—Burden of Proof—Evidence—Quantum of Proof.

Upon the issue as to whether the lands granted to the defendant were swamp within the meaning of the Revisal, sec. 1693 (3), the burden

is upon plaintiffs, in this case the State Board of Education, to establish the affirmative by the preponderance of the evidence, and by "clear, strong, and convincing proof."

7. State's Lands—Swamp Lands—Void Grants—Ownership—Presumptions.

Grants of swamp lands within the meaning of Revisal, 1693 (3), are void under the Revisal, sec. 4047, and the law presumes the board of education is the owner of them.

8. Instructions—Substance of Special Prayers.

It is not necessary that correct requests for special instruction be given in their exact language.

(315) APPEAL by defendant from *Cline, J.*, at Fall Term, 1911, of WASHINGTON.

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

W. M. Bond, W. M. Bond, Jr., and Ward & Grimes for plaintiff.
A. C. Gaylord and Small, MacLean & McMullan for defendant.

CLARK, C. J. Revisal, 1693 (3), withdraws from being granted by the State all "marsh or swamp land, where the quantity of land in any one marsh or swamp exceeds 2,000 acres, or where, if of less quantity, the same has been surveyed by the State, or by the State Board of Education, with a view to draining and reclaiming the same." This is an action to declare void certain grants embracing land which it is claimed came within the terms of the above section, and also to recover damages for timber cut by defendants on said land. The plaintiff did not ask to recover damages for timber cut more than three years before suit brought, and as to the action for the land, the plaintiff is not barred by the statute of limitations, which does not run in such cases, Revisal, 4048, unless the State would have been barred by adverse possession, which is not the case here.

The first five exceptions are because the witnesses, who stated that they were familiar with the land, upon being asked what kind of land it was, answered that it was "swamp land." This being a matter of personal observation, as to a fact within the knowledge of the witness, the answer was competent, subject to cross-examination by the defendant. It is true, the jury must find the issue, but the answer of the witness was competent to be submitted to them. *Britt v. R. R.*, 148 N. C., 40.

The court charged the jury: "If this was swamp land and in a swamp of over 2,000 acres, prior to and at the time the grants under which the

defendant's claims were taken out, then the lands were not subject to entry and grant, and the defendant's said grants would be void and of no effect, for in such case there was no power and authority to grant same." The exception to this charge cannot be sustained. (316) It complies with Revisal, 1693 (3).

The court charged the jury: "Was the land in question swamp land as is generally called and known? Some authorities have defined swamp land as wet, spongy ground, soft, low-ground, saturated with water, but not usually covered with it; marshy ground away from the seashore; another, as land the greater part of which is wet and unfit for cultivation, land which requires draining in order to make it fit for successful or useful cultivation." Exception 7 was to this charge and cannot be sustained. The court went on to quote the statutory definition of swamp land enacted 4 March, 1891, now Revisal, 1695, and told the jury that this statutory definition would not apply against the defendant, who held under a grant issued prior to that date, and further added that as to the definition given above, the court did not mean to lay down any hard or fast rule by which the jury were to determine whether the lands in question were swamp land, but merely to give it as assistance to them in ascertaining what was the common and generally accepted definition of the words "swamp land."

The court charged the jury: "It is not necessary that every bit of the land in controversy should be swamp land in order to enable the plaintiff to recover, that is to say, if there be some knolls or higher and drier places in this piece of land that, taken by themselves, might not be deemed swamp, yet if they had swamp land around them in sufficient quantity so that the latter largely prevailed, and taking the whole body, by and large, the general effect was to make and call the land swamp land, then the knolls or higher ground could be taken in as a part of the whole." The eighth exception was to this charge, and cannot be sustained.

The ninth exception is because the court did not instruct the jury that the grants could be vacated only by "clear, strong, and convincing evidence." There was no prayer to this effect, and it could not have been given if asked. The charge put the burden on the plaintiff to make out his case by the preponderance and the greater weight of the evidence, and this is the correct rule in this case. *Board* (317) *of Education v. Makely,* 139 N. C., 34. The court properly charged the jury to answer the issues "No" unless by the greater weight of the evidence the plaintiff had shown that the land covered by the grants were swamp lands and part of a swamp of more than 2,000 acres.

The statute provides that when it is shown that the land is swamp

land and within a swamp of more than 2,000 acres, the law presumes that the Board of Education is the owner thereof, because grants of such land are void and unauthorized. Revisal, 4047; *Board of Education v. Makely, supra.*

The prayers of the defendant so far as they were correct were given in substance in the charge. It was not necessary that they should have been given in the exact language asked for, if given in substance. *Horton v. R. R.,* 145 N. C., 132.

No error.

Cited: Weston v. Lumber Co., 162 N. C., 167; *Lewis v. Fountain,* 168 N. C., 279.

R. C. JACKSON v. AYDEN LUMBER COMPANY.

(Filed 27 March, 1912.)

1. Master and Servant—Negligence—Logging Machines—Evidence.

Evidence that defendant's employee was injured at defendant's skidder, which was drawing in a log, by the wire rope, which was used for the purpose, slipping over a stump 2 feet high, around which it was being worked, at a distance from the skidder of 25 feet, the angle of the rope from the top of the skidder to the stump being about 90 degrees; that the recoil of the rope struck a small elm, which it broke and hurled on the plaintiff to his injury, where he was engaged in the scope of his employment, is sufficient upon the question of actionable negligence, as this situation was liable to cause the cable to slip over the stump unless a notch had been cut into the stump to prevent it, or other available means had been used to that end.

2. Master and Servant—Logging Machines—Contributory Negligence—Evidence.

The plaintiff was employed by the defendant to look after the engines used to operate a skidder and loading machine for logs. On this occasion he had stopped his engine, notified the skidder engineman where he was going, and went in front of the operations to talk to his superintendent about some repairs necessary for an engine, and while there was injured by the negligent use of a rope for hauling up a log for loading on a railroad car, which was being operated without the customary signals or warnings: *Held,* (1) the case was properly submitted on this evidence to the jury on the issue of contributory negligence; (2) the plaintiff was injured in the course of his employment and is entitled to recover under the fellow-servant act.

3. Appeal and Error—Instructions—Vague Exceptions.

An exception that the trial judge "failed to state in a plain and correct manner the evidence, and declare and explain the law arising thereon as required in the statute, Revisal, 535," is too general and cannot be sustained.

BROWN, J., dissenting; WALKER, J., concurring in dissent.

APPEAL from *Cline, J.*, at October Term, 1911, of WASHING- (318) TON.

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

Ward & Grimes for plaintiff.
F. C. Harding, Davis & Davis for defendant.

CLARK, C. J. The defendant in operating its railroad for hauling out logs used two kinds of machines, one a skidder to draw in the logs and the other a loading machine to lift them up on the cars. The plaintiff's duties were to look after the engines of both these machines, to keep them in repair and to operate the loading engine. The superintendent came through the woods, across the railroad, in front of the operations. The plaintiff stopped his engine and went up the track a few yards to meet and confer with him about repairs on one of the engines. They sat down together on a log on the opposite side of the track. The plaintiff had notified the skidder engineman where he was going. The skidder kept up its operations to bring in a gum log. In order to get a log to the car, which it could not draw along the track for fear of tearing up the cross-ties, it had to be swung to a side position by a rope from the skidder around a fulcrum stationed to one side of the track. This rope was a wire cable and wound around a drum 25 or 30 feet above the floor of the skidder. From this elevation the cable was placed over a stump about 2 feet high, 25 feet from (319) the track, and carried around the gum log, to which it was attached by grab-irons, so that the power of the engine would swing the log around the stump, when it would be dragged straight to the side of the skidder. When the power was put on the engine the rope slipped over the stump and the cable in its rebound struck a small elm tree, which it broke and hurled across the track on plaintiff's back and neck, seriously injuring him. The exceptions are for the refusal to nonsuit and for errors in the charge. But they all present practically the same questions, to wit: (1) Was there evidence of negligence on the part of the defendant? (2) Was the plaintiff guilty of contributory

negligence? (3) Was the plaintiff within the scope of his employment at the time?

There was evidence which, if believed, tended to show negligence on the part of the defendant. The rope was thrown around a stump less than 2 feet high, standing 25 feet from the skidder. This rope went to the skidder at an angle of about 90 degrees. Such a situation was liable to cause the cable to slip over the stump unless a notch was cut in it deep enough to prevent this. There was also evidence that a tree had been left nearby for the purpose of being used as a fulcrum, but this stump was used instead, probably because it was less trouble to lift the wire over the top of the stump. From this evidence the jury might well find that the defendant was negligent.

Upon the evidence, the jury found that the plaintiff was not guilty of contributory negligence. He was talking to the superintendent about the business and on the opposite side of the track. There was evidence that it was usual to blow a signal when the engine began to pull on a log under such circumstances, and testimony tending to show that such signal was not given.

The plaintiff was at the scene of operations and engaged in consulting the superintendent and was therefore in the scope of his employment.

The defendant relies strenuously upon *Twiddy v. Lumber Co.*, 154 N. C., 237, which held that the fellow-servant act does not extend to employees of a lumber company who are not connected with the
(320) operation of a railroad of the company. In that case there was "no evidence that the plaintiff was part of the train crew or directly engaged in operating the skidder or the loader." In that case it was further said, quoting with approval from *Nicholson v. R. R.*, 138 N. C., 516: "In *Mott v. R. R.*, 131 N. C., 237, it was sought to curtail and restrict the act so that it should apply only to railroad employees engaged in operating trains, but the Court held to the contrary, and said 'the language of the statute is both comprehensive and explicit.' It embraces injuries sustained by (quoting the act) 'any servant or employee of any railroad company . . . in the course of his services or employment with said company.' The plaintiff was an employee and was injured in the course of his services or employment." In *Mott's case* the plaintiff, working in the repair shops, recovered damages for the negligence of a fellow-servant while removing a red-hot tire from an engine. In *Sigmon v. R. R.*, 135 N. C., 184, it was held that a railroad employee injured in the course of his service or employment with such corporation is entitled to recover under the follow-servant act, whether running trains or rendering any other service.

These and other like cases are cited in *Twiddy v. Lumber Co., supra.*

In that case it was held that Twiddy could not recover because it was not shown that he was "a part of the train crew, nor that he was directly engaged in operating either the skidder or loader," and "could in no proper sense be considered an employee of the railroad or in any department of it." In the present case the plaintiff was directly engaged in the operation of the railroad for the purpose of hauling logs, which was its business, and while so engaged and in the scope of his employment he was injured, as the jury finds, by the negligence of a fellow-servant.

The last assignment of error, that his Honor "failed to state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon, as required in the statute" (Revisal, 535), is too general and cannot be sustained. *Davis v. Keen,* 142 N. C., 496.

No error.

BROWN, J., dissenting: I am of opinion, upon examination of (321) the evidence in this case, that the injury of the plaintiff cannot fairly be attributed to any negligent act upon the part of the defendant company. On the contrary, I think it was a pure accident, which reasonable foresight could not guard against.

At the time plaintiff was struck by the cable, he was away from his place of duty, and the evidence does not show any reason or justification for it. The plaintiff was the engineer in charge of the skidder engines on the platform.

On the occasion when the plaintiff was hurt by the slipping of the rope over the stump, he had left his post of duty and had walked up the track a distance of 40 yards to meet one Robertson, and they were sitting upon a log 6 feet from the track and on the opposite side of the track from where the log was being "snaked" in. There is no evidence whatever that the plaintiff left his post of duty in the company's service, or to perform any duty for it. *Holland v. R. R.,* 143 N. C., 437; *Patterson v. Lumber Co.,* 145 N. C., 42.

Assuming that the evidence discloses that the plaintiff was injured by the negligent act of some one, it is plain to my mind that it was the act of a fellow-servant, for which the defendant is not responsible.

The plaintiff was not injured in the conduct of any railroad operations. It is well known that a log skidder is no part of a railroad outfit. It is used and operated by lumber companies that have no railroad tracks and transport their logs by water.

At the time of the injury the witness Corey says that the men gave him the signal to take up the slack in the rope, which he did, and then

Ellis flagged Corey to go ahead. Then Corey started the engine again, and drew the rope tight, which caused it to slip over the top of the stump and strike the elm tree, about 8 inches in diameter, and threw the tree over on the plaintiff, who was 20 or 25 feet from it.

No human foresight could guard against such an accident as this, but if it was any one's duty to do it, it was Corey's, and he was the fellow-servant of Robertson.

This Court has held in many decisions that these lumber roads to the extent that they operate railroads are to be considered as rail-
(322) roads, and that the statute denies them the benefit of the fellow-servant doctrine; but this ruling does not extend to employees of lumber companies while they are engaged in the operation of their logging and lumbering plants. This question is discussed at large by *Mr. Justice Hoke* in the case of *Twiddy v. Lumber Co.*, 154 N. C., 237, which is on all-fours with the case at bar, and should govern its decision.

I am authorized to say that *Justice Walker* concurs in this dissent.

Cited: *Buchanan v. Lumber Co.*, 168 N. C., 43; *Williams v. R. R.*, *ib.*, 362.

SARAH SKIPPER, ADMINISTRATRIX, v. KINGSDALE LUMBER COMPANY AND CHARLESTON RAILROAD COMPANY.

(Filed 27 March, 1912.)

1. Appeal and Error—Concise Statement—Stenographer's Notes—Practice.

When the appellant has set out in the case on appeal the transcribed stenographer's notes of the trial, he fails to prepare "a concise statement of the case as required by the Revisal, 591," and his appeal will be dismissed under Rule 22 of the Supreme Court, when upon examination no error is found in the record proper.

2. Same—Nonsuit—Suit in Forma Pauperis.

When an appeal is taken by defendant from an overruling of its motion to nonsuit upon the evidence, the evidence should be sent up in a narrative form, and the requirement that all the evidence should be sent up on appeals of this character, though the action is *in forma pauperis*, does not excuse the appellant in sending up the transcribed stenographer's notes in a voluminous record. The object of an opinion by the Supreme Court discussed by CLARK, C. J.

3. Master and Servant—Collision—Presumptions—Evidence—Negligence.

When it is shown that an employee of a railroad company was killed in a collision on defendant's road while engaged in the performance of his duties, a presumption of negligence is raised, and a nonsuit upon the evidence should not be granted.

SKIPPER *v.* LUMBER CO.

APPEAL by defendant from *Carter, J.,* at December Term, (323) 1911, of ROBESON.

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

Thomas L. Johnson and H. F. Seawell for plaintiff.

Rountree & Carr, R. C. Lawrence, and McLean, Varser & McLean for defendants.

CLARK, C. J. The plaintiff moves to dismiss because the case on appeal has not been settled in the manner required by Revisal, 591, which requires that the appellant "shall cause to be prepared a *concise* statement of the case on appeal." Instead of that, the entire evidence from the stenographer's notes, covering 157 printed pages, has been dumped into the record in the form of question and answer, though this has been condemned in repeated decisions of this Court. *Cressler v. Asheville,* 138 N. C., 486, and numerous other cases. In *Bucken v. R. R.,* 157 N. C., 443, *Brown, J.,* said: "At the end of the stenographer's notes is this entry: 'It is agreed that the record proper and stenographer's notes shall constitute the case on appeal.' There is no other attempt to make out a case on appeal, as required by law. This is in direct violation of the rule of this Court (No. 22) and of its express decision in *Cressler v. Asheville,* 138 N. C., 483. That such of the evidence as is necessary to present the assignment of errors could easily have been stated in condensed narrative form is manifested by the fact that the counsel for plaintiff and defendants have set out in their respective briefs very clear and brief statements of the evidence, which substantially agree. Under the circumstances of the case, we will make an exception and not dismiss the appeal, but we will be compelled to do so in future, unless our rule is observed."

The defendant seeks to excuse itself upon the ground:

1. That this being a nonsuit, it was necessary to set out all the evidence. Even if it were so, that would not excuse setting out the evidence in form of question and answer. Besides the intestate of the plaintiff having been killed in a derailment, a *prima facie* case of negligence was made out and a nonsuit could not have been ordered. *Wright v. R. R.,* 127 N. C., 229; *Marcom v. R. R.,* 126 N. C., 200; *Kinney v. R. R.,* 122 N. C., 961; *Grant v. R. R.,* 108 N. C., 470; *Bird v. Leather Co.,* 143 N. C., 284. (324)

2. The defendant contends that as the plaintiff sues *in forma pauperis,* the costs of the extra record and printing could in no event be taxed against the plaintiff. But this does not excuse the nonobserv-

ance of the rules of the Court, nor justify dumping an unnecessary volume of matter upon the Court and the opposite counsel for examination.

In accordance with what was laid down in *Bucken v. R. R., supra,* we must dismiss the appeal, or, rather, affirm the judgment, there being no error on the face of the record proper; but, nevertheless, at the request of counsel for defendant, we have carefully examined the entire record and the assignments of error.

There were seventy-seven exceptions taken, which in the assignments of error are reduced to fifty-two and in the defendant's brief are still further reduced to twenty-one. Forty-seven of the exceptions were to the admission of evidence, some of which are based upon objections entered by plaintiff and not by defendant. We do not find that any of them require discussion. The exceptions for failure to nonsuit and to set aside the verdict were properly abandoned. The six exceptions for refusal of the court to instruct the jury as requested by defendant cannot be sustained. *McNeill v. R. R.,* 130 N. C., 256. If granted, they would have required of the plaintiff an unusual and highly technical proof of the negligence of the defendant. The eighteen exceptions to the charge of the court are also without merit.

The object of an opinion is to lay down a rule for the guidance of trial judges and of counsel in other cases. There can be no benefit in cumbering our reports with the discussion of exceptions in matters that are plain or that have already been repeatedly passed upon by the Court. Such exceptions bear testimony to the earnestness and zeal of counsel, but when we find, upon careful examination, that the discussion of the assignments of error set out in the record would present no new principle nor a new application of an old one, but will be merely a recog-
(325) nition of what has already been often decided, we feel that it is our duty to refrain. Counsel have done all in this case that their well-known ability could accomplish for their client. The intestate of the plaintiff was killed in a derailment which, if the evidence was believed, was caused by a loose chain on a car which caught an obstruction as the train was in rapid motion, pulling out a sway-bar, which threw the car from the track, causing the wreck in which the defendant was instantly killed. There was no other theory advanced in the pleadings or on the trial, and the investigation, aside from well-settled principles of the law, presented only issues of fact, which the jury have determined.

Affirmed.

Cited: Brewer v. Mfg. Co., 161 N. C., 212; *Tilghman v. R. R.,* 167 N. C., 167.

GEORGE O. GAYLORD v. MRS. M. E. McCOY.

(Filed 27 March, 1912.)

Defendants gave plaintiffs an option on lands known as the M. place, the same on which Mrs. M. "resides at the present time," giving the adjoining owners by name, containing 1,500 acres, more or less, lying "on the waters of Mill Creek, near the waters of Hood Creek," with further specification that it "is all of the lands owned by Mrs. M." and certain others, "in the county of Brunswick, State of North Carolina." When the purchase money was tendered, the defendants offered a deed leaving out the further specifications that it was all the lands owned by Mrs. M. and the certain others in Brunswick County, and it was *Held*, (1) the words of the further specification were merely words of description without obligation on defendant's part to convey such land if outside of the boundaries specified in the option; (2) parol evidence was competent to show what lands were embraced within the description in the option of the M. place on which Mrs. M. resided at that time, upon plaintiff's contention that the option called for 66 acres more than the deed conveyed.

APPEAL by defendants from *Whedbee, J.*, at August Term, 1911, of BRUNSWICK.

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

Rountree & Carr for plaintiff. (326)
John D. Bellamy, E. Bryan, and C. Ed. Taylor for defendants.

CLARK, C. J. On 1 July, 1899, the defendants executed to the plaintiff an option by which they agreed to convey to the plaintiff in consideration of $9,000, to be paid on or before 3 November, 1909, the following property:

"All that certain tract or parcel of land, situate, lying, and being in Northwest Township, Brunswick County, State of North Carolina, adjoining the lands of M. W. Murrell, B. T. Trimmer, Z. E. Murrell, the Metts estate, and lying on both sides of the Carolina Central Railroad, known as the L. C. McCoy place, being the same on which Mrs. M. E. McCoy resides at the present time; said tract of land containing 1,500 acres, more or less, and lies on the waters of Mill Creek and near the waters of Hood's Creek, *and is all of the land owned by Mrs. M. E. McCoy, C. L. McCoy and wife, Charles F. McCoy and wife, and F. M. McCoy and wife, in the county of Brunswick, State of North Carolina.*" When the time came for the payment of the purchase money and the delivery of the deed, the defendants tendered a deed which did not include in the description the words set out in italics above.

The plaintiff admits that the words in the option are restricted by the description, "situate in Brunswick County," and if there are any lands within the above boundaries which lie outside of Brunswick County he makes no claim thereto. But he contends that there are 66 acres lying within said county, and which may not be within the above boundaries, for which he is entitled to a conveyance because they were a part of the land "lying within Brunswick County and owned by the defendants" at the time the option was given.

An examination of the option will show that the words in italics, as above set out, are merely words of description, and that there is no obligation in the option to convey such land if outside of the boundaries of that which the defendants contracted to convey under the option. We are of opinion that the Court erred in excluding parol testimony to show what lands were embraced within the description in the option
(327) of the "L. C. McCoy place on which Mrs. M. E. McCoy resides at the present time." *Harper v. Anderson,* 130 N. C., 538; *Cox v. McGowan,* 116 N. C., 131; *Carter v. White,* 101 N. C., 30. The last-named case is almost identical as to the facts with this case. If the bounds of the tract described in the option embrace the said 66 acres, the conveyance tendered to the plaintiff should also include them. If said boundaries did not include said 66 acres, there is no obligation on the defendants to convey the same.

This renders it unnecessary to discuss the other exceptions taken.

Error.

Cited: *S. c.,* 161 N. C., 685; *Ward v. Albertson,* 165 N. C., 221.

R. B. SOUTHERLAND v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 March, 1912.)

1. Railroads—Live Stock—Unreasonable Delay—Negligence—Evidence.

In action for damages to cattle shipped under a live-stock bill of lading, alleged to have been caused by defendant railroad while in course of transportation, evidence is competent which tends to show that another shipment was made over the same road to the same destination and over practically the same route and distance, in a shorter period of time, with delivery of cattle in good condition, and is sufficient to be submitted to the jury under the issue as to defendant's negligence.

2. Railroads—Live-stock Bill of Lading—Notice of Damages—Substantial Compliance.

The acceptance of a car-load of cattle, damaged in transportation, under protest made to one who customarily acted for the defendant railroad in delivering them at destination, is a sufficient compliance with a stipulation in a live-stock bill of lading that written notice of the damage must be given before removal of the cattle in order to recover.

3. Same—Principal and Agent—Evidence.

Evidence tending to show that a certain person customarily acting for a railroad company in delivering car-load shipments of cattle at a stock yard is sufficient upon the agency of that person to receive notice there of a damaged car-load shipment and to permit recovery under a live-stock bill of lading requiring that notice of the damages be given before the removal of the cattle.

4. Railroads—Live-stock—Transportation—Negligence—Evidence.

In this case, a charge *Held* correct, that the time a certain car of cattle was loaded and the time delivered at destination was some evidence of negligence, under the surrounding circumstances, damages to cattle in transportation being the subject of the action.

5. Instructions—Special Requests—Given in Substance—Appeal and Error.

In this case, a correct prayer for instructions having been substantially given, no error is found therein.

APPEAL from *Ward, J.*, at October Term, 1911, of SAMPSON. (328)

Action for damages caused by the delay in transporting cattle.

These issues were submitted to the jury:

1st. Were the cattle of the plaintiff injured by the negligence of the defendant, by defendant failing to carry said cattle in a reasonable time, as alleged? Answer: Yes.

2d. What damages, if any, is the plaintiff entitled to recover? Answer: $150, with interest at 6 per cent from 27 April, 1905, till paid.

From the judgment rendered the defendant appealed.

Fowler & Crumpler and C. M. Faircloth for plaintiff.

H. L. Stevens and Murray Allen for defendant.

BROWN, J. There are fifteen assignments of error in the record, which have received our consideration, and we think that none of them can justly be sustained. We will not undertake to comment on all of them, but only such as we think necessary.

1. The motion to nonsuit was properly overruled. We think there was sufficient evidence to justify his Honor in submitting the issue, as

to the negligent delay in the shipment of the cattle, to the jury, and the consequent injury to the animals therefrom. The evidence tended to prove that on 25 April, 1905, the plaintiff shipped a car-load of cattle from Magnolia, N. C., to one Brauer, Richmond, Va., over the
(329) road of the defendant under a live-stock contract. The car was loaded and delivered to the defendant at 9:20 a. m. 25 April, and reached its destination at 11 o'clock 27 April, in a much damaged condition. There was evidence tending to prove that on the same day, 25 April, 1905, the plaintiff shipped another car of cattle from Clinton, N. C., to Richmond, Va., over the defendant's road, which was delivered in Richmond in good order and condition on the morning of the 26th. This evidence was objected to by the defendant, but we think it perfectly competent upon the question as to what would constitute a reasonable time for transportation between Magnolia and Richmond, both points being on the defendant's road, and Clinton being on a branch line and a few miles further from Richmond than Magnolia. Upon this evidence, we think the motion to nonsuit was properly overruled.

2. It is contended by the defendant that the consignee of the cattle failed to give written notice to any agent of the defendant of the damaged condition of the cattle before they were removed from the jurisdiction of the railroad, as required by the terms of the bill of lading. This Court has recognized such a stipulation in a bill of lading as valid. *Selby v. R. R.*, 113 N. C., 588; *Austin v. R. R.*, 151 N. C., 137. But we think the terms of the bill of lading in this respect were substantially complied with. The evidence shows that it was the custom of the railroad company to send loaded cattle cars to the Union Stock Yards in Richmond to be unloaded. The evidence shows that the consignee Brauer received the cattle under protest on account of the damage due to unnecessary delay while en route. It is true, this notice was given to one Lambert, who was in charge of the stock yards, but there is testimony tending to prove that he superintended the unloading of cattle for the railroads, that he was always present at such unloadings, and worked for the railroad company in that way, and looked after all the cattle for the railroad when they came in. From the evidence, we think the jury was fully warranted in inferring that Lambert was the agent of the railroad company in receiving and unloading the cattle, and that being so, notice to him would be in all respects a compliance with the terms of the contract. It would be unreasonable to require the consignee to search for some other agent of the defendant than the one who was present, superintending the receipt and delivery of the cattle.
(330) Lambert was to all intents and purposes the agent of the railroad company, and notice to him was notice to it.

3. The defendant's eighth exception, directed to the charge of the court upon the question of what constitutes reasonable time, cannot be sustained. His Honor instructed the jury that the evidence tends to show the time when the cattle were loaded at Magnolia, and when they were delivered at Richmond, but he did not undertake to declare that to be *per se* negligence; but he instructed the jury that such facts, if found to be true, were evidence of negligence, to be weighed and considered by the jury upon the first issue.

4. The plaintiff requested instructions relative to a delay of the car of cattle at Rocky Mount, and contended that his Honor failed to give the instructions. An examination of the record shows that the instructions were substantially given by the court, certainly to the full extent to which the defendant was entitled.

Upon examination of the entire record, we are of opinion that no substantial error was committed.

No error.

Cited: *Duvall v. R. R.*, 167 N. C., 25; *Lewis v. Fountain*, 168 N. C., 279.

KATE M. WELLS v. JULIA E. WELLS ET ALS.

(Filed 20 March, 1912.)

Descent and Distribution—Next of Kin—Mother—Interpretation of Statutes.

When an intestate leaves no children, but a mother and sisters, his mother is his next of kin and entitled to share equally in his personalty with his widow. Revisal, sec. 133 (3).

HOKE, J., dissenting.

PETITION to rehear.

D. L. Ward for plaintiff.

Aycock & Winston, Stevens, Beasley & Weeks for defendants.

CLARK, C. J. This is a petition to rehear this case, decided (331) 156 N. C., 246. W. D. Wells, deceased, left surviving a widow, who, it is admitted, is entitled to one-half the personal estate, and his mother, who claims to be entitled to the other half. Revisal, 132 (3), provides: "If there be no child nor legal representatives of a deceased child, then half 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."

The intestate left no children, and besides his mother he left two sisters and a brother, who claim to share equally with the mother in the half of the estate not conceded to the widow.

The next of kin of the intestate 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. This language of the statute is so explicit that it can leave no room for doubt. This is what we held on the former hearing, and we see no reasoning that would permit us to change it. Exactly in point on a similar statute is *Trapp v. Billings,* 6 S. C., 569.

The petitioner contends that there are previous decisions to the contrary. If this were so, they would be clearly erroneous. No decision of any court can change the physical fact that the mother is the next of kin, and that the brothers and sisters are one degree further removed. But in fact the former decisions relied on by the petitioner are not contrary to this. Indeed, on the former hearing, in their brief, the petitioners admitted that there was "no North Carolina authority to fit the case," and conceded that the mother was next of kin to her son in preference to the brother and sisters. But they relied upon Revisal, 132 (6), to take this case out of the rule prescribed in 132 (3). Said subsection 6 does not apply to this case, because that applies only when the husband dies without leaving a widow.

On this rehearing the petitioners rely upon *Anon.,* 3 N. C., 63, which decides that the mother shares equally with the brothers and sisters when her child dies intestate *without wife,* father, or children, which is the case provided for by subsection 6 above referred to. *Gillespie v. Foy,* 40 N. C., 280, was a decision upon an entirely different state of facts,

(332) where the contest was between the brothers and sisters on one side and the grandfather and grandmother on the other, each claiming to be the next of kin to the deceased. In *Ferrand v. Howard,* 38 N. C., 384, it was held that where the intestate died "without leaving father, wife, or issue in the lifetime of his mother, she is to be considered as one of the next of kin and shall take a share of his personal estate with his brothers and sisters." This again is the state of facts provided for in subsection 6 of the present statute. But no case can be found in North Carolina which holds that the mother is not entitled to one-half of the estate when her son dies intestate, leaving a widow but no children. Indeed, there could be none under the present statute.

Revisal, 132 (6), provides that if the intestate dies without wife or children, "his brothers and sisters shall have an equal share with the

mother of the deceased child." This of itself is a recognition that the mother is the next of kin and would have taken the entire estate otherwise. In 132 (3) there is no such provision, but it is merely provided that if there are no children the widow takes half and the next of kin, which in this case is the mother, takes the other half.

At common law the king took all the personalty, which in that rude age was usually of very little value. Afterwards the crown passed this prerogative to the Church, which took all the personalty except the reasonable parts for the widow and the children, and the Church officials claimed to dispose of it *in pius usus*. But they were accountable to no one, and were not even required to pay the debts of the decedent. By statute 13 Ed. III (A. D. 1358) the churchmen were required to appoint an administrator who should be next of blood kin, and this relationship was computed by the civil law and not by the canon law, which was used in computing relationship in the descent of land. But by statute 21 Henry VIII (A. D. 1530) the administrator was appointed by the Ordinary, and was required to be the widow or next of kin, or both, who after paying the intestate's debts and the reasonable parts for the widow and children retained the surplus in their own right until the statutes of 22-23 and 29 Charles II, which required the surplus to be distributed among the next of kin in the manner provided by those (333) statutes which became known as the Statute of Distribution.

These statutes, however, did not apply to executors, who retained the surplus for themselves till the statute in North Carolina of 1715, chapter 15. Under the English statutes, 22-23 and 29 Charles II, the mother as well as the father succeeded to all the personal effects of their children who died intestate and without wife or issue, to the exclusion of brothers and sisters of the deceased. After the death of the father there is no one in equal degree with the mother, when there are no children, and therefore if there is no widow she as the next of kin is entitled to the personal estate of her son under Revisal, 132 (5); *Davis v. R. R.*, 136 N. C., 115.

The following terse analysis we find in the brief of the learned counsel of the defendants and place it on record for the convenience of the profession:

ANALYSIS OF NORTH CAROLINA STATUTE OF DISTRIBUTION, REVISAL, 132.

Widow's Share.

Section 1. One-third part to the widow of the intestate.
Section 2. A child's part to the widow.
Section 3. One-half of the estate to the widow.
Section 7. All the personal estate to the widow.

Child's Share in Father's Estate.

Section 1. If not more than two children, equal portions to and among the children and such persons as legally represent such children as may then be dead.

Section 2. If more than two children, an equal share, including the widow as a child.

Section 4. Equal portions among all the children and such persons as legally represent such children as may be dead.

Share of Next of Kin.

Section 1. If no child nor legal representative of a deceased child, the residue to be distributed equally to every of the next of kin
(334) of the intestate who are in equal degree and to those who legally represent them.

Section 5. If neither widow nor child nor any legal representative of the child, the estate shall be distributed equally to every of the next of kin of the intestate who are in equal degree and to those who legally represent them.

Brothers and Sisters of the Intestate.

Section 6. After the death of the father and in the lifetime of the mother, if any of his children shall die intestate without wife or child, every brother and sister and the representative of them shall have an equal share with the mother of the deceased child.

The English statutes of distribution are to be found in 8 Pickering's Statutes at Large, 348, and are somewhat confused and contradictory. So much so that *Lord Hardwick* in *Stanley v. Stanley,* 1 Atkyn, 455, said that the statutes were "utterly unintelligible and have no meaning," and the Court was therefore "compelled to search out the meaning and intent of the Legislature." The English decisions, therefore, can have no bearing in construing our statute, which is clear and unambiguous.

Petition dismissed.

Cited: Floyd v. R. R., 167 N. C., 59.

MERCHANTS NATIONAL BANK v. S. T. FLIPPEN AND O. E. SNOW.

(Filed 20 March, 1912.)

Debtor and Creditor—Insolvent Corporations—Receivers—Collaterals—Application of Dividends—Credits—Bills and Notes.

A creditor of an insolvent corporation holding its notes with collaterals is entitled to a dividend, which the court has ordered the receivers to pay to its creditors, on the amount the debtor is due on the note, without deduction for credits received from the collaterals; and should there be any collaterals or proceeds thereof after the note has been paid in full, they should be turned over to the receivers.

APPEAL from *Webb, J.*, at February Term, 1912, of WAKE.

Motion in the above cause. His Honor rendered judgment as set out in the record, and the defendant Snow, receiver, appealed. The facts are stated in the opinion of the Court. (335)

Aycock & Winston for plaintiff.
T. W. Folger and Walter Clark, Jr., for defendant Flippen.
Watson, Buxton & Watson for defendant Snow.

BROWN, J. The Pilot Bank and Trust Company failed in business, and defendant Snow was appointed receiver to settle up its affairs. At date of receivership the insolvent corporation owed the Merchants National Bank of Raleigh, N. C., $4,227.51. That bank held certain notes as collateral, among others, that of the defendant Flippen. From this collateral the said bank had received certain sums since the date of the receivership.

The sole question presented is: Whether in cases of this nature distribution by the receiver should be on the basis of the entire indebtedness originally, *i. e.*, $4,227.51, or on the basis of the amount remaining unpaid at the time distribution is ordered. In other words, whether the receiver, being ordered to pay 50 per cent of the indebtedness, should pay on the basis of the entire amount which originally was due, or only 50 per cent of the amount still remaining due.

It is useless to discuss the many cases in which this matter has been passed on by the courts of this country. Suffice it to say that the overwhelming weight of authority favors the position that dividends are declared upon the basis of the original indebtedness existing at the time of the receivership.

When such dividends, added to any sums collected by the creditor from collateral, shall have paid the debt in full, then dividends of course must cease, and the uncollected collateral delivered to the receiver.

By following this rule no injustice is done to the other creditors of the insolvent, and a certain and unchanging sum is given upon which dividends are to be declared.

This is the view taken by this Court heretofore, and directly decided in the cases of *Winston v. Biggs,* 117 N. C., 206; *Brown v. Bank,* 79 N. C., 244.

In *Merrill v. Bank,* 173 U. S., 131, the Supreme Court of the United States holds that "A secured creditor of an insolvent bank may
(336) prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom, after such declaration, subject always to the proviso that dividends must cease when, from them and from collaterals realized, the claim has been paid in full."

The above, we think, is a succinct and correct synopsis of the great weight of authority.

The following courts hold similar views:

England: *Palmer v. Culverwell,* 85 L. T., N. S., 758.

Colorado: *Hendrie v. Graham,* 14 Col. App., 13.

Illinois: *In re Bates,* 118 Ill., 524; *Furness v. Bank,* 147 Ill., 570.

Kentucky: *Hibler v. Davis,* 76 Ky., 20.

Massachusetts: *Cobat v. Bodman,* 77 Mass., 134.

Michigan: *Bank v. Byles,* 67 Mich., 296; *Bank v. Haug,* 82 Mich., 607.

Minnesota: *Mead v. Randall,* 68 Minn., 233.

New Hampshire: *Bank v. Trust Co.,* 70 N. H., 542.

New York: *In re Bicknell,* 31 Misc., 302; *People v. Remington,* 121 N. Y., 328.

Pennsylvania: *Morris v. Olwine,* 22 Pa. St., 441; *Miller's Appeal,* 35 Pa. St., 481.

Rhode Island: *Greene v. Bank,* 18 R. I., 779.

South Carolina: *Atlantic Phos. Co. v. Law,* 45 S. C., 606.

Texas: *Kauffman v. Hudson,* 65 Tex., 716.

West Virginia: *Williams v. Overholt,* 46 W. Va., 339.

Vermont: *West v. Bank,* 19 Vt., 403.

We find nothing in the case of *Chemical Co. v. Edwards,* 136 N. C., 74, which contravenes our decision.

The judgment is

Affirmed.

Cited: *Milling Co. v. Stevenson,* 161 N. C., 513.

(337)

GEORGE ACKER AND WIFE ET AL. v. ELIZABETH L. PRIDGEN.

(Filed 20 March, 1912.)

Deeds and Conveyances—Interpretation—Intent.

A deed will be construed so as to effectuate the intent as gathered from the entire instrument when it can be done by any reasonable interpretation.

2. Same—Habendum—Remainders.

A conveyance of land, in the premises, being "unto the party of the second part and to his heirs and assigns," and in the habendum, unto the second party "during the term of his natural life, and after his death" to certain named children of his: *Held*, the failure to mention the children as formal parties does not avoid the limitation to them by way of remainder.

3. Same—Rule in Shelley's Case—Heirs of the Body.

The premises of a deed to lands being to the "party of the second part and his bodily heirs and assigns," and in the habendum "during the term of his natural life, and after his death" to certain named children: *Held*, the words bodily heirs construed with the words of the habendum to mean children.

4. Deeds and Conveyances—Interpretation—Habendum—Strangers—Limitations.

While a stranger to a deed cannot be introduced in the habendum clause to take in fee, he can take in remainder, when by construction of the entire instrument it appears that the intention of the parties is thus given effect.

5. Deeds and Conveyances—Interpretation—Stare Decisis—Limitation—Rule in Shelley's Case.

The doctrine of *stare decisis* invoked by the defendant cannot be given effect in this case, as she acquired the property by deed from her husband for a nominal consideration, and not being a purchaser for value, could stand in no better attitude than her grantor.

APPEAL from *O. H. Allen, J.*, at January Term, 1912, of NEW HANOVER, on case agreed.

Action to recover possession of a certain lot of land described in the pleadings. From a judgment for plaintiffs the defendant appeals.

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

E. K. Bryan, Bellamy & Bellamy for plaintiffs. (338)
H. McClammy, S. M. Empie for defendant.

BROWN, J. On 12 August, 1882, Moses Moore conveyed the land in controversy to John Pridgen and wife, Peggie, the premises being, "unto the parties of the second part and to their heirs and assigns forever"; the habendum being: "To have and to hold the said property unto John Pridgen and wife, Peggie, during the term of their natural lives, and after their death to Marion Pridgen, Ellen Beatty, and any other child or children that may be begotten by him at any time during his marriage with Peggie Pridgen, his wife, to them and their assigns forever."

Peggie Pridgen died and John Pridgen married the defendant in 1889 and on 13 October, 1904, for the nominal consideration of $5 executed a deed in fee to the defendant for the land in controversy.

John Pridgen died 10 August, 1905.

The judge below held that John Pridgen took only a life estate under the Moore deed, and that the remainder over to Marion Pridgen and others was good, and that the plaintiffs, the remaindermen, were entitled to recover.

In their brief the learned counsel for defendant state "that under the decisions as lately enunciated by our Supreme Court, the Court has correctly decided this case, following the authority in the cases of *Triplett v. Williams,* 149 N. C., 394, and supported in principle in the cases of *Condor v. Secrest, ib.,* 201; *Sprinkle v. Spainhour, ib.,* 223."

They argue at length and with much earnestness that those decisions should not be followed, but overruled.

In the *Triplett case,* which has been repeatedly cited and approved in subsequent opinions of this Court, we admitted the technical effect of the ancient rule of the common law as applied to the construction of deeds, but we also recognized the more enlightened rules of construing deeds which have obtained in all the courts of the country, and as well in the English courts, in a more enlightened age.

(339) It is said in that case: "But this doctrine, which regarded the granting clause and the habendum and tenendum as separate and independent portions of the same instrument, each with its especial function, is becoming obsolete in this country, and a more liberal and enlightened rule of construction obtains, which looks at the whole instrument without reference to formal divisions, in order to ascertain the intention of the parties, and does not permit antiquated technicalities to override the plainly expressed intention of the grantor."

In that opinion there are cited an array of cases and text-writers in support of the views there expressed.

This more enlightened rule of construction has been previously recognized and stated by *Mr. Justice Walker* in *Gudger v. White,* 141 N. C., 513, in these words: "It is not difficult by reading the deed to reach a

satisfactory conclusion as to what the parties meant, and we are required by the settled canon of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed, and to construe it consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice, and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results."

Those writers and courts who recognize the generally preponderating influence of the premises of a deed in determining the estate conveyed admit that there are instruments in which the intention of the grantor is so plainly manifested in the habendum that it will control the premises.

Mr. Devlin in his work on deeds says: "It may be formulated as a rule, that where it is impossible to determine from the deed and surrounding circumstances that the grantor intended the habendum to control, the granting words will govern, but if it clearly appears that it was the intention of the grantor to enlarge or restrict the granting clause by the habendum, the latter must control." 1 Devlin on Deeds, sec. 215; *Dodine v. Arthur,* 91 Ky., 53; *Fogarty v. Stack,* 8 S. W. Rep., 846; *Barnett v. Barnett,* 104 Cal., 298; *Moore v.* (340) *Waco,* 85 Tex., 206; *Dorem v. Gillum,* 136 Ind., 134.

Even the common-law judges did not always confine themselves to the strict letter of the law in construing deeds, and applying the rule in *Shelley's case,* we find it not uncommon to construe "bodily heirs" or even the word "heirs" itself to mean children, or issue, when the context of the instrument plainly indicated the manifest intention. *Puckett v. Morgan, post,* 344.

That the grantor, Moore, used the word "heirs" in the premises in the sense of children is plainly manifest from the context of the entire deed. The words of the habendum qualify and explain what is stated in the premises, and in the habendum the children are specified who are to take in remainder, viz., the two plaintiffs, Marion Pridgen, Ellen Beatty, children by former marriages, and any other child of John Pridgen and his wife, Peggie.

The fact that their names are not mentioned as among the formal parties to the deed does not avoid the limitation by way of remainder.

While a stranger to a deed cannot be introduced in the habendum clause to take as grantee, he can take in remainder by way of limitation, when by construction of the entire instrument it appears that the intention of the parties is given effect. *Condor v. Secrest,* 149 N. C., 201.

The defendant invokes the doctrine of *stare decisis,* and claims that a rule of property had been established by the older decisions which should protect her title.

We do not think the principle laid down in *Hill v. Brown,* 144 N. C., 117; *Hill v. R. R.,* 143 N. C., 539, can be properly applied here.

In the first place, the defendant acquired the property by deed from her husband, John Pridgen, the life tenant, in 1904, for a nominal consideration only. She is not a purchaser for value, and stands in no better attitude than her grantor.

In the second place, such a remainder as is created in favor of these plaintiffs in the Moore deed could have been created in the earliest
(341) stages of the common law. *Blair v. Osborne,* 84 N. C., 420; Shepherd's Touchstone, 151; 2 Roll. Ab., 68.

The judgment of the Superior Court is

Affirmed.

Cited: Williamson v. Bitting, 159 N. C., 324; *Eason v. Eason, ib.,* 540; *Baggett v. Jackson,* 160 N. C., 30; *Midgett v. Meekins, ib.,* 44; *Beacom v. Amos,* 161 N. C., 366; *Ipock v. Gaskins, ib.,* 681; *Harrington v. Grimes,* 163 N. C., 77; *Holloway v. Green,* 167 N. C. 94.

ALBERT DIXON v. JOHN HAAR.

(Filed 13 March, 1912.)

1. Register of Deeds—Marriage License—Venue.

An action for the penalty against a register of deeds for unlawfully issuing a marriage license under Revisal, 2090, should be tried in the county wherein the cause of action arises. Revisal, 420 (2).

2. Same—Removal of Cause—Practice—Jurisdiction.

When an action for the penalty sought against a register of deeds for unlawfully issuing a marriage license is brought in the wrong county, Revisal, 420 (2), it should be removed and not dismissed; and when after the refusal of a justice of the peace to remove the cause to the proper county and on appeal the motion is renewed in the Superior Court, the judge should order the cause removed to the proper county, and not remand it to the justice who had wrongfully assumed jurisdiction.

3. Register of Deeds—Marriage License—Defect of Venue—Jurisdiction.

A justice of the peace has jurisdiction of an action against a register of deeds for unlawfully issuing a marriage license, and when service is made in the wrong county, the defect is one of venue, and not of jurisdiction.

4. Same—Appeal and Error—Premature Appeal.

An appeal from the refusal of the Superior Court judge to remove a case to the proper county (Revisal, sec. 420, 2), wherein a penalty is sought against a register of deeds for unlawfully issuing a marriage license (Revisal, sec. 2090), is not premature.

APPEAL from *G. W. Ward, J.*, at November Term, 1911, of DUPLIN.

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

Kerr & Gavin for plaintiff.
Stevens, Beasley & Weeks for defendant.

CLARK, C. J. This action was begun before a justice of the (342) peace in Duplin County by the plaintiff, who lived in that county, against the defendant, Register of Deeds of New Hanover, to recover the penalty of $200, under Revisal, 2090, for unlawfully issuing a marriage license. The summons was served upon the defendant, who happened to be in Duplin County.

The justice refused the motion to remove the action for trial from Duplin to New Hanover, and rendered judgment against defendant, from which he appealed to the Superior Court. On appeal, the defendant moved in the Superior Court to dismiss the action, and also to remove it to New Hanover. Both motions being refused, the defendant appealed. Revisal, 420 (2), provides that an action against a public officer "for an act done by him by virtue of his office must be tried in the county in which the cause of action arose." Revisal, 425 (1), provides: "When the county designated for that purpose is not the proper county," the action should be removed, not dismissed.

The statute is explicit that such action should be "tried" in New Hanover, and having been wrongly brought in Duplin, it should have been removed to New Hanover. It is true that, as held in *Fisher v. Bullard,* 109 N. C., 574, there is no defect of jurisdiction, since the magistrate had jurisdiction of the subject-matter (being a penalty for not more than $200), and service had been made upon the defendant. The defect was one of *venue.* The justice of the peace having declined to remove it, when the action got into the Superior Court, that court having full jurisdiction to try it, the cause should not have been dismissed, nor remanded to the justice of the peace, but it should have been removed to the county of New Hanover, that being the proper order under Revisal, 425 (1).

In *Fisher v. Bullard, supra,* the action was brought in the county where the defendant resided, and while the act for which the penalty

in suit was incurred was the burning of the woods in another county, it would have been difficult to have enforced the penalty, since the act authorizing the indorsement of the warrant of a justice of the peace by a justice of another county, except under Revisal, 1449, 1450, applies only in criminal cases. The motion in that case that was presented before the justice and on appeal was not a motion to remove, but
(343) a motion to dismiss, and the Court held merely that the latter motion was properly refused. If the motion had been to remove, our conclusion should and, doubtless, would have been different.

In *Austin v. Lewis,* 156 N. C., 461, the action was begun in Union County, before a justice of the peace against a nonresident of that county by warrant issued to another county, when there was no *bona fide* defendant living in the county of the justice. This was in violation of the act of 1876 and 1877, now Revisal, 1447, which was enacted to forbid such practice which had led to serious abuses, and the Court held that in such case there was a defect of jurisdiction and hence dismissed the action. There was no valid warrant or service in that case. Here both were valid, but the action was triable, *i. e.,* the venue, was in New Hanover.

The present case, therefore, differs from both the above. *Wooten v. Maultsby,* 69 N. C., 462, was a case similar to *Austin v. Lewis, supra,* and it was held that the justice of the peace acquired no jurisdiction, the warrant having been served in another county without any law which authorized such service. In *Lilly v. Purcell,* 78 N. C., 82, the Court held differently under the act of 1870, but pointed out that under the act of 1876-7, now Revisal, 1447, which restored the law as it was prior to 1870, the Court would have no jurisdiction. This ruling was followed by us in *Austin v. Lewis, supra.* In this latter class of cases, in which the warrant is attempted to be served by issuing it to another county, the action is forbidden when there is no *bona fide* defendant in the county where the justice resides and a removal would not give the relief against abuse which was sought by the statute. In such cases there is a defect of jurisdiction, and not merely of venue.

The appeal from the refusal of the motion to remove the cause to the proper county was not premature. *Brown v. Cogdell,* 136 N. C., 32, and cases there cited.

Reversed.

(344)

F. A. PUCKETT v. JAMES MORGAN.

(Filed 13 March, 1912.)

1. Wills—Devise—Estates in Remainder—Rule in Shelley's Case—Heirs of the Body—Interpretation.

For a devise of lands to come within the meaning of the rule in *Shelley's case*, the subsequent estate must be limited to the heirs *qua* heirs of the first taker, or to the heirs or heirs of the body as an entire class or denomination of persons, and not merely to individuals embraced within that class.

2. Estates in Remainder—Heirs of the Body—Descriptio Personarum—Interpretation.

The rule in *Shelley's case* applies only when the words "heirs" or "heirs of the body" are used in their technical sense, and not when such terms are used as *descriptio personarum*.

2. Same.

The rule in *Shelley's case* will not apply to a devise of lands when, from the instrument, the intention of the devisor can reasonably and legitimately be construed as giving a life estate to the first taker with remainder over to designated persons of a certain class of heirs, as in this case to the "bodily heirs of" M.

4. Same—Contingent Remainders.

A devise to M. of certain described lands, "during her life, then to her bodily heirs, if any; but if she have none, back to her brothers and sisters": *Held*, M. took only a life estate in the lands, with remainder to her children living at the time of her death, the intention of the testator in the use of the term "bodily heirs," in connection with the other words employed in the devise, being descriptive of a certain class of heirs, upon failure of whom the remainder would go to the brothers and sisters of M.

APPEAL from *Ferguson, J.*, at October Term, 1911, of FRANKLIN.

Action to recover possession of certain land described in the complaint. The defendant demurred to the complaint. The court sustained the demurrer, and the plaintiff appealed.

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

W. H. Yarborough, Jr., for plaintiff.
W. M. Person for defendant.

BROWN, J. In 1890, William Pace, the maternal grandfather (345) of the plaintiff, died, leaving a will containing the following clause: "Item: I leave Martha Morgan, the wife of James Morgan, 48½ acres of land, known as the Rachel tract, on the east side, during

her life, then to her bodily heirs, if any; but if she have none, back to her brothers and sisters."

Martha Morgan died in 1894, leaving two daughters, of whom the plaintiff is one, she having since intermarried with P. H. Puckett. James Morgan, the husband of Martha Morgan, is still living and in possession of the land aforesaid, to recover which this suit is brought, claiming that he is entitled to a life estate in it as tenant by the curtesy.

The judge below was of opinion that under the rule in *Shelley's case* Mrs. Morgan took an estate in fee, and consequently her husband, the defendant, would be entitled as tenant by the curtesy to the possession of the land during his life.

It is needless to quote this ancient rule of law, so familiar to every student. The original case was tried in the reign of Queen Elizabeth, and is reported in 1 Coke Rep., 104 A, and the statement of the rule there given is the one most generally adopted by text-writers.

While this dogma of the common law has been expounded and applied in hundreds of cases and by as many judges and text-writers, it seems to be generally agreed that in order to bring the rule into operation the subsequent estate must be limited to the heirs *qua* heirs of the first taker. It must be given to the heirs or heirs of the body as an entire class or denomination of persons, and not merely to individuals embraced within such class.

The rule applies only when the word "heirs" or "heirs or the body" are used in their technical sense. Where such terms are used as mere *descriptio personarum,* the rule has no application.

It is conceded that the rule in *Shelley's case* is a rule of law, and not of construction; yet whether the subsequent limitation is to the "technical heirs" of the person taking the prior freehold, or to a particular class of heirs, is necessarily a preliminary question of construction of the particular instrument under consideration. *Parkhurst v. Harrower,* 142 Pa. St., 432.

(346) As said by the Supreme Court of Pennsylvania, "To bring a devise within the rule in *Shelley's case,* the limitation must be to the heirs in fee or tail as *nomen collectivum* for the whole line of inheritable blood." *McCann v. McCann,* 197 Pa. St., 452.

While this rule seems to be applied with greater strictness in England than in this country, even there, when it appears from the context of the instrument that the words are used not in the technical sense, but as mere *descriptio personæ,* they are taken as words of purchase, and not of inheritance, and the rule does not apply. Theobald on Wills, 340-342, and cases there cited.

This principle is commented upon by *Judge Gaston* in these expres-

sive words: "On the other hand, as the law will not entrap men by words incautiously used, if in the limitation of a remainder by any instrument or conveyance the phrase 'heirs' or 'heirs of the body' be expressed, but it is unequivocally seen that the limitation is not made to them in that character, but simply as a number or class of individuals thus attempted to be described, then the whole force of the phrase is restricted to this designation or description—it shall have the same operation as the words would have of which it is the representative; there is not in fact a limitation to 'heirs,' and of course there is no room for the application of the rule." *Allen v. Pass,* 20 N. C., 212.

This principle is recognized by *Chief Justice Shepherd,* in his often cited and learned opinion in *Starnes v. Hill,* 112 N. C., 18, when he says: "As the courts are astute in discovering the intention from the context of the conveyance, and *readily* give effect to every word from which such intention can reasonably and legitimately be inferred, it does not often occur that the application of the rule has the effect of subverting the real intention of the grantor or testator."

This exception to the application of the rule is also clearly stated by *Mr. Justice Hoke* in *Smith v. Procter,* 139 N. C., 322, and it has been recognized and given effect to in a number of cases in this Court in which it was held the rule in *Shelley's case* did not apply.

The citation of a few will suffice. In *Rollins v. Keel,* 115 (347) N. C., 68, the language was: "I give said lands to him, the said Joseph E. Rollins, him, his heirs and assigns, forever: *Provided, however,* that if the said Joseph E. Rollins shall die without leaving any lawful heir, then the same, after the expiration of the widowhood of my wife, shall enure to my brother, Reuben A. Rollins, his heirs and assigns, forever."

In *Francks v. Whitaker,* 116 N. C., 518, the language is: "I give and devise (real estate) to my beloved son, E. S. Francks, during his natural life, and after his death to his lawful heir or heirs, should he have any surviving him; but should he not have any lawful heir or heirs surviving him, then I give and devise the same to the children of my beloved son, W. W. Francks." In the last case the Court says that the words "lawful heir or heirs, should he have any surviving him," should be construed to mean "issue," and in all cases where the word "issue" is used, or it is clear that the words "heir or heirs of the body" were used in the sense of "issue," it has been held that the rule did not apply.

In *Bird v. Gilliam,* 121 N. C., 326, the language is: "I loan the land whereon I now live to my daughter, Mary, during her natural life, and give the same to the heirs of her body; but if she should have no lawful heirs of her body, the said land at her death shall go back to my son,

William." This is another case in which "lawful heirs of the body" were construed to mean "issue."

In *May v. Lewis,* 132 N. C., 115, the language is: "I loan unto my son my entire interest in the tract of land, . . . to be his during his natural life, and at his death I give said land to his heirs, if any, to be theirs in fee simple forever; and if he should die without heirs, said land to revert back to his next of kin." (Almost identical with the language in this case).

In *Howell v. Knight,* 100 N. C., 254, the language is: "I lend to A, and if he hath a lawful heir begotten of his body, at his death, I give it to said heir or heirs; and if he dies without an heir, as aforesaid, I lend it to B."

Walker v. Taylor, 144 N. C., 176, is not in conflict with these views, for in that case the remainder over was to "the heirs at law of the testator's three daughters," and the context shows that the words

(348) were used in their technical sense, and not as *descriptio personæ.*

In the will now under consideration, we think the testator Pace has so explained and qualified the use of the words "her bodily heirs" as to plainly indicate that he meant the children or issue of his daughter Martha, and that the words are not employed in their legal or technical sense as representing heirs in general, but only as descriptive of a certain class of heirs.

The words "if any" would be quite appropriate to indicate the possibility of no issue, but not to indicate the contingency of no lawful heirs, for it is rarely possible for one to die without heirs, and not uncommon to die without children. Then again the reversion over is to a class of heirs at law who would certainly inherit in the event of a failure of issue.

It is also manifest that the testator did not intend that his daughter should take an estate in fee, for in express words he devised her an estate for life only, and the context shows that he intended that her children should take at her death, and in the event of her death without children, then that her brothers and sisters should receive the property.

We are of opinion that his Honor erred in sustaining the demurrer.

The cause is remanded with direction that the demurrer be overruled and the defendant answer over.

Reversed.

Cited: Acker v. Pridgen, ante, 340; *Harrington v. Grimes,* 163 N. C., 77; *Jones v. Whichard, ib.,* 244; *Brown v. Brown,* 168 N. C., 11; *Gold Mining Co. v. Lumber Co.,* 170 N. C., 276; *Ford v. McBrayer,* 171 N. C., 423.

W. S. BARBER ET AL. v. L. H. GRIFFIN ET AL.

(Filed 13 March, 1912.)

1. Public Highways—Cartways—Petition—Sufficiency—Demurrer Ore Tenus —Interpretation of Statutes.

A petition for a cartway over the lands of the respondents alleged that it was necessary in order to get a convenient pathway and outlet to the public road to cross the respondents' land, and that the respondents closed up an old pathway which had run through their lands for over forty years, greatly to the detriment and inconvenience of the petitioners: *Held*, the petition stated facts sufficient to constitute a cause of action, and it should not be dismissed upon a demurrer *ore tenus*. Revisal, sec. 2686.

2. Public Highways — Prescriptive Rights — Easement — Inconsistent Pleadings.

A claim of a prescriptive right to the use of an old pathway across the respondents' land, or of an easement therein, is inconsistent with the character of proceedings by petition to get a convenient pathway and outlet to a public road across the respondents' lands. Revisal, sec. 2686.

3. Highways—Cartways—Condemnation—Eminent Domain.

Cartways are *quasi*-public roads in which the public have a direct, personal interest, and condemnation of private property for such a use is sustained as a valid exercise of the power of eminent domain.

4. Public Highways—Cartways—Old Cartways—Evidence.

In proceedings under a petition for a cartway over respondents' lands there was evidence tending to show that the respondents had closed up an old pathway across their lands to the petitioners' great inconvenience, etc.: *Held*, evidence as to the use of the old pathway, its convenience and directness, was competent as tending to prove its convenience to the public, permitting the jurors, should they see fit, to lay out the new pathway over the route of the old one.

5. Public Highways—Cartways—Proceedings to Establish—Evidence—Elements for Consideration.

In proceedings under a petition for a cartway over respondents' lands, a request for instructions is properly refused, that if petitioners by acting together can establish a cartway over their own lands to the public road, they are not entitled to the cartway over the respondents' lands, for it ignores the question of distance, convenience, and reasonableness.

APPEAL from *Cooke, J.*, at September Term, 1911, of MARTIN. (349)

Petition for a cartway, under Revisal, sec. 2686. This issue was submitted to the jury: Is the cartway proposed by the plaintiff necessary, reasonable, and just? Answer: Yes. From the verdict and judgment establishing the cartway the defendant appealed.

The facts are sufficiently stated in the opinion of the Court (350) by *Mr. Justice Brown.*

A. R. Dunning for plaintiffs.
Martin & Critcher, S. J. Everett, for defendants.

BROWN, J. The defendants moved to dismiss the petition upon the ground that the same did not state facts sufficient to constitute a cause of action, and to have the same considered as demurrer *ore tenus.*

We think his Honor properly overruled the motion. The petition sets forth the fact that for over forty years there was an old pathway running through the lands of the petitioners, and the defendants, L. H. and Caroline Griffin, which was closed up by the said Griffin, greatly to the detriment and inconvenience of the petitioners. The petitioners further set forth that in order to get a convenient pathway and outlet to the public road, it is necessary to cross the lands of the said L. H. and Caroline Griffin.

The petitioners do not seem to rely upon any prescriptive right to the use of the old pathway, nor do they set up any easement over the Griffin lands. That would be inconsistent with the character of this proceeding. It is patent from a cursory reading of the Revisal, sec. 2686, that the facts set forth in this petition bring this proceeding clearly within the language and spirit of the statute.

Cartways are regarded as *quasi*-public roads, and the condemnation of private property for such a use has been frequently sustained upon that ground as a valid exercise of the power of eminent domain. This question is fully considered by *Mr. Justice Walker* in *Cook v. Vickers,* 141 N. C., 103. These cartways are public institutions in which the public have a direct, personal interest. 1 Lewis Em. Domain, sec. 167.

The next exception is to the ruling of the court admitting evidence of the old pathway upon the ground that laying out the new pathway was a matter entirely within the discretion of the five freeholders. We see no force in the objection. The issue seems to have been submitted to the jury in almost the very language of the statute. In passing on the reasonableness and the necessity, as well as the convenience of the new cartway sought to be laid out, evidence as to the use of the (351) old pathway, its convenience and directness, was competent as tending to prove its utility to the public. It would not be a violation of the statute, if the jurors saw fit to do so, to lay out the new pathway over the route of the old.

The defendants requested his Honor to instruct the jury that if the petitioners by acting together can establish a cartway over their own lands to the public road, then they are not entitled to a cartway

over the lands of the defendants. This instruction seems to ignore entirely the question of distance, convenience, and reasonableness. In that particular we think his Honor gave all that the defendants were entitled to when he instructed the jury that the petitioners are not entitled to have this cartway simply as a convenience, or because it enables them to reach the public road from the lands upon which they may reside by a shorter or more convenient route, as there is no public outlet serving such a purpose. The case was put to the jury upon the necessity, reasonableness, and justice to the petitioners in permitting them to have the cartway as laid out.

Upon examination of all the evidence, together with the lucid charge of the court, we think no error has been committed of which the defendants can justly complain.

No error.

Cited: S. v. Hardy, post, 653.

JOSEPH W. LITTLE, ADMINISTRATOR OF D. T. McCULLOCH,
v. H. W. CALDWELL.

(Filed 13 March, 1912.)

1. Insurance—Fraternal Order—"Legal Dependents"—Interpretation.

Brothers and sisters of the deceased, who died a bachelor, without having children, are not his legal "dependents," nothing else appearing, so as to make them the beneficiaries under his membership certificate of a fraternal order, providing that any benefits thereunder accrue to his "legal dependents."

2. Insurance—Fraternal Orders—"Legal Dependents"—Executors and Administrators—Creditors.

When there are no "legal dependents" of the deceased, within the terms of his certificate of membership in a fraternal insurance order, the administrator is entitled to the proceeds of the policy for distribution among creditors of the deceased.

APPEAL by plaintiff from *Cline, J.,* at July Term, 1911, of (352) NEW HANOVER.

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

Rountree & Carr for plaintiff.
No counsel for defendant.

BROWN, J. The only assignment of error relates to the correctness of the following ruling of the judge:

"Second. That the funds received from the Junior Order United American Mechanics are hereby declared to be assets in the hands of the administrator for the payment of debts of D. T. McCulloch, and the court finds as a fact on the admission of all parties that the deceased was a bachelor and died without leaving children, or any relative living with him, but did have brothers, sisters, and nephews and nieces, whom the court holds not 'legal dependents' under the terms of the certificate offered in evidence."

It appears that the membership certificate in the Junior Order of United American Mechanics provides that any benefit accruing thereunder shall be payable to the legal dependents of the deceased. The benefit for $500 was paid over to the administrator by the Junior Order of United American Mechanics with the understanding that it was to be distributed as provided by law, and the administrator desires to disburse it among creditors, or among the brothers and sisters and nephews and nieces of the deceased, as the court may hold is proper.

Upon the findings of fact, we agree with the court below that the deceased died leaving no "legal dependents" within the meaning of the certificate of membership.

(353) His brothers and sisters did not live with him, and for aught that appears were in no legal sense dependent upon him, any more than he was dependent upon them.

While the meaning of the term "legal dependent" has not been defined in any case before this Court, we have abundant authority from other courts, as well as text-writers, in support of our decision.

Webster's Dictionary defines the word "dependent" primarily to mean "one who depends; one who is sustained by another, or who relies on another for support or favor."

In *Keener v. Grand Lodge,* 36 Mo. App., 543, the "legal dependents" of a person were restricted to those whom he was legally bound to support.

Upon this theory a mistress is held not to be a legal dependent, and the same as to servants and retainers. *Keener v. Grand Lodge, supra; West v. Lodge,* 14 Tex. Civ. App., 471.

In a Wisconsin case the Supreme Court defined the word "dependent" as follows: "We think the true meaning of the word 'dependent in this connection means some person, or persons, dependent for support in some way upon the deceased." *Ballou v. Giles,* 50 Wis., 614.

Mr. Bacon, in his work on Benefit Societies, after reviewing the cases, says: "We are forced to the conclusion that they limit the term 'depend-

ents' to those who reasonably rely upon another for subsistence, nourishment, and support."

In Massachusetts it is held a mother not living with her son, and not relying on him for support, is not a legal dependent (*McCarthy v. New England Order,* 153 Mass., 314), and the same ruling as to a brother is made in *Supreme Council v. Smith,* 45 N. J. E., 466.

In *Supreme Council v. Perry,* 140 Mass., 580, it is held that a sister (nothing else appearing) is not a legal dependent.

In 3 Eng. & Am. Ency., 969, it is said: "In passing upon the designation of 'dependents,' the courts have generally construed it strictly, and held it to mean those relying upon the insured for support."

In 2 Words and Phrases, 1991-1992, many cases are cited, and quoted from at length, sustaining this definition of the term.

As there are no "legal dependents," it follows that the administrator is entitled to the fund to be applied to the debts of the (354) deceased, if any, and otherwise distributed in due course of administration.

Affirmed.

THE POCOMOKE GUANO COMPANY v. THE CITY OF NEW BERN.

(Filed 13 March, 1912.)

1. Taxation—Fertilizers—Inspection—Tonnage Tax—Cities and Towns—License Tax—Interpretation of Statutes.

The tonnage tax for purposes of inspection levied by the State under our statute does not forbid a county, city, or town from levying a license tax upon fertilizer stored therein for purposes of distribution by a manufacturer or dealer, the language of the statute forbidding "any other tax to be levied," etc., referring to any other tonnage tax.

2. Same—Ordinance.

A city ordinance requiring the payment of a license tax from fertilizer agents or dealers, etc., carrying on their business within the city, is authorized by Revisal, sec. 2934.

3. Same—Storage for Distribution.

A manufacturer of fertilizer maintaining its sales department in another State from which sales are exclusively made for fertilizer stored for distribution only, in a city in this State, is liable under an ordinance of the city levying a tax upon callings and professions, naming among others "fertilizer manufacturers' agents or dealers," the tax being for the protection afforded by the city in the exercise of such occupation, and the profits derived therefrom.

BROWN, J., dissenting; ALLEN, J., concuring in dissent.

APPEAL by plaintiff from *Carter, J.*, at October Term, 1911, of CRAVEN.

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

Moore & Dunn for plaintiff.
R. A. Nunn for defendant.

(355) CLARK, C. J. This is an action submitted without controversy to determine whether the plaintiff guano company is liable for the license tax of $50 prescribed by the Board of Aldermen of the city of New Bern for carrying on business as fertilizer agents or dealers, for twelve months succeeding the date of the levy. Revisal, 2924, authorizes any municipal corporation to "annually lay a tax on all trades, professions, and franchises carried on or enjoyed within the city, unless otherwise provided by law."

Such license tax upon a trade or profession is not forbidden because a tonnage tax for purposes of inspection has been levied by the State under a statute which forbids "any other tax to be levied by county, city, or town." That provision simply forbids any other tonnage tax. It does not forbid an *ad valorem* tax upon the goods stored in town, nor a license tax upon the calling or occupation of manufacturing or dealing in fertilizers. *Guano Co. v. Tarboro,* 126 N. C., 68; *Guano Co. v. Biddle, ante,* 212.

The power of the Legislature to authorize the levy of license taxes upon trades, professions, and franchises has been discussed and sustained also in *Wilmington v. Macks,* 86 N. C., 88; *S. v. Worth,* 116 N. C., 1007; *S. v. Irvin,* 126 N. C., 989; *S. v. Hunt,* 129 N. C., 686. The only question that arises, therefore, is whether the occupation or calling exercised by the plaintiff comes within the terms of the ordinance which levies a tax of $50 upon callings and professions, naming among others "fertilizer manufacturers' agents or dealers."

The facts agreed on are that the plaintiff is a company engaged in manufacturing and selling fertilizer and fertilizer material, that it has no factory in New Bern, and that the orders for the goods are received solely at Norfolk, Va., and from thence are sent to its agents who maintain a warehouse in the city of New Bern, where its fertilizers and fertilizing material are stored, and thence are shipped out upon the orders thus sent to them from the general office in Norfolk, Va., no sales being made in New Bern.

Upon these facts, it is clear that the plaintiff is a manufacturing company maintaining an agency in the city of New Bern, through which it

deals in fertilizers and fertilizing material, storing the same and (356) shipping out and distributing the fertilizers and fertilizing materials upon receipt of orders which are taken and accepted at Norfolk, Va. It is not material that no fertilizers are manufactured in New Bern and that no sales are made there. The dealing consists in storing and keeping the goods on hand and shipping them out from time to time to the parties who have bought the same. The tax is upon the occupation or calling or business, whatever it may be termed, from which it is reaping a profit. Like other businesses, professions, and callings that are taxed because carried on there, this plaintiff being protected in the exercise of such occupation or calling by the city, subject to this license tax as the pro rata which the city is authorized to levy upon it in return for such protection. *Holland v. Isler,* 77 N. C., 1.

We concur in the judgment below.

Affirmed.

BROWN, J., dissenting: I am unable to agree with the conclusions of the Court that the tax levied by the city of New Bern upon the plaintiff is valid. The facts, as I gather them from the record, are that the plaintiff, a corporation doing business in the city of Norfolk, leases a warehouse in the city of New Bern for the storage of its own goods only, consisting of fertilizers and fertilizing material.

None of these goods are sold in the city of New Bern, but the sales offices of the plaintiff are outside of the State of North Carolina, at which offices it receives orders from the purchasers of fertilizer through traveling salesmen, and in some instances by mail.

The plaintiff is not engaged in the selling of fertilizer in New Bern, or in the business of a warehouseman. A warehouseman is one whose storage facilities are open to the public. Whereas, the warehouse of the plaintiff is used exclusively for the storage of its own property.

I do not gainsay the right of the General Assembly to tax trades, professions, and franchises; but according to the facts of this case, the plaintiff is not engaged in the exercise of either within the city of New Bern.

The case came before the Superior Court in form of a con- (357) troversy submitted without action, in which it appears affirmatively that the plaintiff is not engaged in the sale of fertilizer in North Carolina, but that the warehouse in question is used exclusively for the private storage of its own material, and that deliveries are made from that upon orders received from the company's offices in Norfolk.

We have at this term held that this company is liable for the *ad valorem* tax upon the value of its fertilizers stored in the city of New

Bern, which tax the company will be compelled to pay; but upon the facts agreed, I find no warrant whatever to tax it either as trader or as warehouseman.

In addition to the heavy *ad valorem* tax adjudged against this plaintiff at this term, it is well to remember that it also pays a tonnage tax of 20 cents per ton upon this very fertilizer.

To permit the city to tax this plaintiff as dealer, or warehouseman, when in fact it is not engaged in either capacity in this State, is piling Pelion on Ossa in the matter of taxation.

ALLEN, J., concurs in dissent.

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(358)

LENOIR COUNTY v. C. W. CRABTREE.

(Filed 20 March, 1912.)

1. Counties—Navigable Streams—Drawbridge—Discretionary Powers.

It is the duty of county commissioners to provide drawbridges where they may be necessary for the convenient passage of vessels (Revisal, sec. 1318, 8), and they have authority to erect bridges and provide for draws in them (Revisal, sec. 2698), and it is within the discretion of the commissioners as to whether the draws in the bridges should turn both ways.

2. Courts—Navigable Streams—Drawbridge—Judicial Notice.

The courts will take judicial notice of the fact that the draws in a bridge over a navigable stream should turn both up and down the stream for the safety and convenience of passing vessels.

3. Courts—Navigable Streams—Drawbridges—Federal Government—Approval—Presumptions—County Commissioners—Supervision.

A bridge with a draw operating up and down a navigable stream built in 1884 will be presumed to have been with the consent of the War Department of the United States Government, and its usefulness cannot be impaired by obstructing its operation without the consent of the board of county commissioners.

4. Counties—Navigable Streams—Drawbridges — Obstructions — Easement—User—Limitation of Actions.

A right to maintain a building on a navigable stream which obstructs the operation of a draw in a county bridge cannot be acquired by adverse user, and the operation of the statute of limitations in this regard is expressly forbidden by statute. Revisal, 389.

5. Counties—Navigable Streams — Drawbridges — Obstructions — Location—High and Low Water—Easements—Public Rights.

The erection of a bridge with a draw, across a navigable stream, of the most modern construction, the draw opening both ways, is an incident to navigation, which cannot be defeated by the erection of a building or other obstruction on a strip of land between high and low water mark, so near as to interfere with the operation of the draw; and the occupant can acquire no easement in lands of this character superior to the rights of the public.

6. Injunctions—Counties—Drawbridges—Obstructions—Discretionary Powers—Evidence.

In proceedings for a mandatory injunction by a county to remove an obstruction to the operation of a drawbridge, any consideration or influence brought to bear upon the commissioners by an opposite shore owner cannot be entertained, when the commissioners in erecting the bridge were in the exercise of their valid discretionary powers.

7. Counties—Quasi-corporations—Injunctions—Parties.

A county is a "body politic and corporate" (Revisal, 1309), and may "sue and be sued in the name of the county" (Revisal, 1310), and it is not required, in an action for a mandatory injunction to have an obstruction removed to the operation of a draw in a bridge over a navigable stream, that the suit should be in the name of the county commissioners.

8. Counties—Navigable Streams—Obstructions—Injunctions—Procedure.

In this action for a mandatory injunction for the removal of an obstruction to a draw in a bridge over a navigable stream, it is *Held*, that an order of the Superior Court dismissing the action be set aside, and judgment there to be entered requiring the defendant to remove the obstruction within a reasonable time, and to such reasonable distance as may be found just, upon investigation of the conditions by the court.

APPEAL by plaintiff from *Peebles, J.*, at June Term, 1911, of (359) LENOIR.

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

G. V. Cowper for plaintiff.
E. R. Wooten for defendant.

CLARK, C. J. This is a proceeding for a mandatory injunction to prohibit the defendant from further maintaining or adding to a building which is built so near to a public bridge over the Neuse River as to prevent the draw therein from being operated except in one direction. For something over one hundred years the county of Lenoir maintained a bridge across Neuse River, a navigable stream at that point. In 1884

the present bridge was built by the county, about 15 feet from where the old bridge stood, and it was furnished with a modern draw-bridge which was constructed for the purpose of turning up or down stream as necessity might arise. There was a draw in the former bridge, but it does not appear whether or not it could be operated in both directions, nor is it material. Revisal, 1318 (8), among other duties, imposes upon the county commissioners that of "providing draws in bridges where same may be necessary for the convenient passage of vessels," etc., and Revisal, 2698, provides that the counties may erect bridges and "shall by their boards of commissioners provide and keep draws in all such bridges."

It is a matter which rests in the discretion of the county commissioners, should they establish draws that turn both ways, certainly unless it were a clear abuse of their powers. *Brodnax v. Groom,* 64 N. C., 244. On the contrary, it is common knowledge that a draw should open both up and down stream, as on high water an emergency may require such to be done in safety to navigation. The bridge or vessels might at times be endangered, or navigation seriously interfered with, if the draw could not be freely turned in either direction, (360) especially in high water.

Though it is not expressly found by the judge, it appears from the admission in the defendant's brief, and is not denied in the evidence, that the building is partly at least, if not altogether, built on land between high and low water mark. The judge finds that it was put there within fourteen months before this action begun and is so close to the bridge that the draw cannot be opened downstream. Indeed, the evidence shows, without contradiction, that the building extends within 2 feet of the bridge on the down side thereof.

By act of Congress the State can authorize bridges to be built over navigable streams wholly within the State, provided the plans are submitted to and approved by the War Department. As the plan of this bridge built in 1884 provided a draw which opened both ways, it must have been so approved, and an obstruction making it less convenient for navigation without the approval of the War Department is doubtless indictable in the Federal court. Nor can its usefulness be impaired by obstructing its operation in any way without the consent also of the board of county commissioners. It might be inferred from his Honor's judgment that he was of opinion that the fact that the building has stood at that point for fourteen months without objection from the county commissioners was an estoppel upon the county. If so, this view is erroneous. In the recent case of *Shelby v. Power Co.,* 155 N. C., 196, *Brown, J.,* says: "It is well settled that unless by legislative enact-

ment no title can be acquired against the public by user alone, nor loss to the public by nonsuer." *Commonwealth v. Morehead,* 4 Am. St., 601, and cases cited; 22 Am. and Eng., page 1190. Public rights are never destroyed by long-continued encroachments or permissive trespasses."

The county commissioners, in many cases, might not have their attention called to an encroachment of this kind upon the public rights, or they might not be properly advised as to the injurious effect. Certainly the public cannot lose their rights by the want of vigilance in the temporary occupants of their office. There is no statute of limitations against the public from which a right can be pre- (361) sumed to have been granted by the county commissioners to the defendant to interfere with the use of the public property for his own use, which is the basis of a statute of limitations. Indeed, the statute expressly prohibits the application of the statute of limitations against the public by reason of such encroachment. Revisal, 389.

The land between high and low water mark belongs to an individual only *sub modo* and subject to the superior right of the public to use it for all purposes incident to navigation. The erection of a bridge across a navigable stream with a draw, of the most modern construction, opening both ways, is an incident of navigation which cannot be defeated by the erection of a building or other obstruction on such strip of land between high and low water mark, or so near to the bridge as to interfere with the free operation of the draw. Gould on Waters, sec. 151, and cases there cited. Land lying between low and high water mark is not subject to entry. *Ward v. Willis,* 51 N. C., 183; *Land Co. v. Hotel,* 132 N. C., 522; *S. v. Twiford,* 136 N. C., 609. At most, the occupant can have only an easement therein subject to the superior right of the public to the use of the stream for navigation, and, as here, for the incidental purpose of a bridge so constructed as to interfere the least with navigation.

The judge below dismissed the action upon the ground, as we understand it, that he knew of no law which required that a draw over a navigable stream should open both ways; that the building had been there for fourteen months without objection by the county commissioners, and because he was "firmly of the opinion that the owner of an opposition store inspired this action." The first two propositions we have discussed. As to the last, the action is brought in behalf of the county by its county commissioners, and it is immaterial whether an opposition storekeeper influenced the commissioners or not. They were discharging their duty in objecting to a longer interference with the free use of the bridge which was provided with a double draw by their author-

ity when the bridge was erected and which had been approved, and was probably required by the War Department. Nor is it a matter
(362) for consideration that to require the defendant to remove his house so as to allow the draw to be operated freely would be an expense to him. He placed his building there without authority of law and in derogation of the public right, and must suffer the consequences of an order to remove it.

This action is brought by "Lenoir County, which sues through the commissioners for the county of Lenoir." His Honor seems to have been of opinion that this was defective in that the action should have been brought by the "board of commissioners," and expresses a doubt whether the defect was cured because no objection was taken by demurrer. Revisal, 1309, constitutes every county a "body politic and corporate," and Revisal, 1310, authorizes a county "to sue and be sued *in the name of the county.*" We see no reason, therefore, why the action might not be brought simply in the name of "Lenoir County," as other actions have been brought to this Court without objection. It is true that there are decisions that a county should be sued through its commissioners, but Judge Pell in his notes to Revisal, 1310, justly calls attention to the fact that the statute had since been amended. Even if it had not been, the designation of the plaintiff would have been sufficient in the absence of a demurrer raising objection thereto. The action was properly brought on behalf of the county. *Commissioners v. Lumber Co.*, 115 N. C., 590.

The order dismissing the action is set aside and, upon the facts found, judgment should be entered requiring the defendant to remove the building within such reasonable time and to such reasonable distance as may be found just, upon investigation by the court below.

Reversed.

Cited: Bell v. Smith, 171 N. C., 118.

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(363)

JOSEPH TARAULT v. JOHN SEIP AND CAROLINA LAND AND LUMBER COMPANY.

(Filed 13 March, 1912.)

1. Deeds and Conveyances—Covenants—Intention—Interpretation.

Covenants in a deed are construed most strongly against the grantor, and any language evidencing such an intention is sufficient.

2. Deeds and Conveyances—Fraud and Deceit—False Representations—Evidence.

In order to recover damages for fraud in the procurement of a sale of lands, there must be false representations as an inducement of purchase, and shown to have been the reason for making the contract, and relied on.

3. Same.

Actions for fraud and deceit rest in the intention with which the representation is made, and not upon the representations alone.

4. Same—Scienter—Burden of Proof.

When damages are sought in an action by the vendee of lands for fraud and deceit in the procurement of the purchase, claiming that certain lands were represented as being included in the description in the deed, when in point of fact they were not, the burden of proof is on the vendee relying upon the fraud to prove the *scienter* of the vendor; and the principle holding the vendor liable for his statement, when the representation is a part of the warranty, whether it be true or not, has no application.

5. Same—Nonsuit.

In the contemplation of purchase of a large tract of lands the vendee sent its agents for the purpose of examination, who were informed by the agent of the vendor that he had not been over the lands and was unacquainted with its boundaries. The vendor's agent was sick and only showed certain lands in cultivation, and sent another person with the vendee's agents to show them the boundaries, who, at a certain place, said, "This ditch marks the line," whereas the ditch only marked a part of the boundary and excluded the lands in controversy, which belonged to an adjoining owner. The vendee's agents were given full opportunity to examine the lands, and could have ascertained that the lands in controversy were not included in the boundaries subsequently given in the deed: *Held*, no evidence in an action for damages for fraud and deceit, and a motion for nonsuit should be granted.

ALLEN, J., dissenting.

APPEAL from *Cline, J.*, at September Term, 1911, of CURRITUCK. (364)

The plaintiff sued to recover on a note for $10,000, given for the purchase money of certain lands. The defendant pleaded counterclaims which are embodied in these issues:

1. Did the plaintiff covenant to warrant and defend the title to the lands described in the answer? Answer: Yes.

2. Were the defendants ousted from the lands, or any part thereof, as alleged in answer? Answer: Yes; 17-80 of the Cox lands.

3. What damage is defendant entitled to recover for 17-80 of Cox land, named by M. B. Mott and others, for value of land and attorney's fees and cost of witnesses? Answer: $2,055.35 and interest from 1 January, 1908.

4. What damage are defendants entitled to recover because of the time of their employers in defending the Mott suit? Answer: $150.

5. What damages are defendants entitled to recover for the 3-80 of the Major John Cox lands? Answer: $900.

6. Did plaintiff represent to defendants that the line of his lands ran to the ditch which is the southern boundary of the A. M. Willey land? Answer: Yes.

7. Were those representations false and fraudulent? Answer: Yes.

8. Were those representations relied upon by defendant, and were they calculated and did they deceive the defendant Seip? Answer: Yes.

9. What damages are defendants entitled to recover of plaintiff by reason of said representations? Answer: $10,000, with interest from 23 August, 1902, at 6 per cent.

10. What amount is due the plaintiff on the note of $10,000? Answer: $10,250, with interest at 6 per cent from 26 July, 1906, on $10,000.

His Honor allowed the counterclaims embodied in the third (365) issue, $2,055.35, with interest from 1 January, 1908, and in the ninth issue, $10,000, with interest from 23 August, 1902, both aggregating $17,925.56, and rendered judgment, after satisfying and discharging the purchase money note, against the plaintiff for $4,508.89. For some reason not set out, his Honor set aside the fourth and fifth issues and declined to allow the amounts as a counterclaim to the defendants.

From the judgment rendered the plaintiff appealed.

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

BROWN, J. There are only two matters presented for our consideration upon this appeal and they relate to the counterclaims passed upon in the third issue and in the sixth, seventh, eighth, and ninth issues.

1. It is contended that the clause in the deed from plaintiff to Seip is not sufficient to create a covenant of warranty of title to the lands described in the deed, and that therefore defendants cannot recover on the third issue. The language of warranty is as follows:

"And we, Joseph Tarault and Richard E. Norton, the said grantors, do, for ourselves and our heirs, executors, and administrators, covenant with the said grantee, his heirs and assigns, that at and until the ensealing of these presents we were well seized of the above described premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written; that

the same are free and clear of all encumbrances whatsoever, except taxes thereon, and that we will warrant and defend said premises, with the appurtenances thereunto belonging, to the said grantee, his heirs and assigns forever, against all lawful claims and demands whatsoever, except taxes."

The learned counsel for plaintiff evidently place but little reliance upon this contention, for they cite us no authority and give no reason in support of it. They content themselves with simply calling our attention to it in their brief. We presume that the theory upon which the exception was taken is, the words "title to" being (366) omitted from the warranty clauses renders it insufficient as a covenant of warranty of title. The position is untenable. Covenants are construed most strongly against the grantor, and any language evidencing such an intention is sufficient. 11 Cyc., 1076 and 1077; 14 Century Digest, "Covenants," sec. 1.

2. The defendants further contend that they were induced to purchase the land by the willful and false representations of the plaintiff in respect to the boundary, whereby the plaintiff was cheated out of about 1,000 acres of land. This counterclaim is embodied in the sixth, seventh, eighth, and ninth issues. The evidence taken in its most favorable light for defendants tends to prove these facts.

H. C. Hosier, of Ohio, a stockholder of the defendant Carolina Land and Lumber Company, which company the defendant John Seip organized to take over the land purchased by him of the plaintiff Tarault, together with A. B. Lukens and E. S. Skilder of Norfolk, and O. D. Jackson, the real estate broker negotiating the sale, went to look over the land before the purchase. The plaintiff Tarault was at home sick, suffering from asthma, and showed the parties only the cultivated land, but was unable to show them the boundaries of all the land. He also stated to the purchasers that he did not know the boundaries of the land and had never been around it, which testimony is uncontradicted. He got a colored man to go with the party to show the lines. When they came to a ditch 6 feet wide Jackson and the colored man both said, "We are now on the Tarault property," and that "this ditch marks the line." The party remained in the vicinity for several days, investigating the land, and later Mr. Seip came from Ohio and closed the transaction. The lands sold to Seip covered some 9,192 acres in all and the purchase price was $70,000. Four or five years afterwards it was found that this ditch did not mark the boundary of the property, and that there was between the ditch and the true Tarault line something like 1,000 acres, which belonged to one Willey, and was later recovered by Willey in a suit. In surveying this boundary it was found that

the ditch was right at the boundary in one place, and it was fur-
(367) ther established that the line between Willey and Tarault was well defined and marked, Willey having cut it out every few years. This testimony is corroborated by A. B. Lukens and O. D. Jackson. Jackson was not sure whether he and the colored man stated the line was at the ditch or near it, but said that they all took it for granted that the ditch was the line. It is further in evidence that this Willey land was well timbered. Upon this testimony of defendants the plaintiff moved for a nonsuit on the defendants' counterclaim as to fraud, which motion was refused. The plaintiff then introduced one Sears, who testified that he was present when Tarault told Jackson, Hosier, and Lukens that he had been only half a mile in the swamp and did not know where the lines were. Deposition of Tarault was introduced, further stating that he had told the defendants that he had not been over the property and did not know where the lines were, and did not know anybody who did, and that he told them to take their time and look at the lines and the records and if they did not want it, it was all right; he had just as lieve keep it. Witness Lukens was recalled and stated that he did not remember Tarault's saying that he did not know where the lines were. Upon the close of the testimony the plaintiff renewed his motion as to nonsuit, which motion was refused. The plaintiff then asked the court to charge that upon all the evidence they should answer the sixth, seventh, and eighth issues "No" and the ninth issue "Nothing."

It is admitted that the boundaries of the deed do not cover the Willey land, and therefore the defendants cannot recover upon the warranty as to that. The cause of action the defendants seek to establish is based upon the allegation that the plaintiff represented to defendants that the Willey land was included in his own boundaries, that such representation was knowingly false and was made by plaintiff with the false and fraudulent purpose of inducing defendants to purchase, and that they made the purchase in consequence of such representations, relying upon them.

Accepting the doctrine that the principle that false representations as to material facts knowingly and willfully made as an inducement to a contract applies to contracts and sales of land as well as person-
(368) alty, we are unable to find in the record any evidence of those necessary elements which are essential to constitute actionable fraud.

In order to constitute such, there must be false representations as to material facts, knowingly and willfully made as an inducement to the contract. Such representations must be shown to have been the reason for making the contract and that they were reasonably relied upon by the other party.

May v. Loomis, 140 N. C., 352. In this often cited case *Mr. Justice Hoke* lays down these principles and quotes abundant authority sustaining them. Applying them in this case, we find no evidence at all sufficient to sustain the allegations of the answer or the findings of the jury.

The plaintiff told the purchasers that he did not know the boundaries. He told them that Sam Jones, the negro, was familiar with the lines. There is not a scintilla of evidence that this statement was made to deceive. All the evidence shows that plaintiff was sick, and in sending the negro with the purchasers he acted in good faith. The ditch did constitute a part of the boundary at one point and there is no evidence that the negro Jones acted with any fraudulent purpose when he said, "This ditch marks the line." That he made a mistake is not sufficient. Erroneous statements made by the vendor in the sale of land as to the location of a boundary are not sufficient, standing alone, to impeach the transaction for fraud. We think that *Gatlin v. Harrell,* 108 N. C., 487, lays down the proper rule for cases of this kind. The facts in that case are practically the same as those in the case at bar. There the vendor pointed out the corners and lines on several occasions, and it turned out that these boundaries were not the correct one, and the opinion, after referring to the fact that the court below had granted nonsuit on the facts, said:

"We think the suggestion of the court was well founded. The whole of the evidence, accepted as true, did not in any reasonable view of it prove the alleged fraud and deceit. The proof was that the defendants pointed out to the plaintiff certain corners and line trees of the tract so sold, and that these, or some of them, were not the true ones; but there is nothing to prove that the defendant knew that they (369) were not the true ones, nor that they fraudulently intended to mislead, deceive, and get advantage of the *feme* plaintiff. The proof, further, was that the defendants said the tract had been surveyed and contained 115 acres. There was nothing to prove that it had not been surveyed, or that it did not contain that quantity. The mere fact that the defendants pointed out corners and lines not the true ones could not of itself prove fraud and deceit, especially in the total absence of proof that the tract conveyed did not contain the quantity of land specified in the deed as containing 115 acres, more or less. Indeed, there was no proof, so far as it appears, as to the quantity of land the defendants contracted to sell to the *feme* plaintiff, or what quantity they conveyed, otherwise than as shown by the deed put in evidence.

"There was no proof to sustain the material allegations of the complaint. In the absence of such proof, it is obvious the plaintiffs could

not recover, and the court hence properly intimated that they could not. There must be *probata* as well as *allegata.*"

In our case there was nothing said or done to willfully mislead the purchasers, nor was artifice used to prevent a full inquiry. The purchasers remained at the property several days and satisfied themselves. They were told by the vendor that he did not know the boundaries, and all the vendor did was to give them what means he had at hand to aid them. He sent a colored man to show the boundaries, and, as far as it appears, thought the colored man knew the boundaries. It turns out that the ditch was actually at the true boundary in one place, and it was not a great mistake for the colored man to have assumed that this large ditch, starting at the boundary and running a long distance, was the real boundary. Being swamp land, with the necessity for boats to cruise in it, there was much less opportunity for any one to be familiar with the true lines. Again, the evidence discloses that the lines were well marked and cut, and a little investigation on the part of the purchasers would have acquainted them with the true boundaries. If purchasers make mistakes and suffer loss by reason of such a state of facts as is disclosed here, it must be attributed to their own lack of
(370) proper and diligent inquiry, and they should not be heard to say, years afterwards, that they were fraudulently induced to make the purchase. Moreover, the evidence here does not show sufficiently that the defendants purchased this large tract of land, relying upon the testimony of the agent Jackson and the negro, in regard to this particular boundary.

An essential element of actionable fraud is the *scienter* or knowledge of the wrong on the part of the vendor. Where the representation is made as a part of the warranty, the vendor is held liable for his statement, whether he knew it to be true or not, but where the action is for fraud the burden is upon the party setting it up to prove the *scienter.* This distinction is well made by *Chief Justice Pearson* in *Etheridge v. Palin,* 73 N. C., 216, and is well supported by numerous authorities in this and other States. This Court said in *Tilghman v. West,* 43 N. C., 183: "Nor can fraud exist where the intent to deceive does not exist, for it is emphatically the action of the mind that gives it existence." And in *Hamrick v. Hogg,* 12 N. C., 350, *Judge Henderson* says: "It is not sufficient that the representation be false in point of fact; the defendant must be guilty of a moral falsehood. The party making a representation must know or believe it to be false, or, what is the same thing, have no reason to believe it to be untrue." The action for fraud and deceit rests in the intention with which the representation is made, and not upon the representations alone.

This doctrine is generally held by all courts in this country and in *England. Berry v. Peak,* L. R., 14 App. Cs., 337; *Byard v. Holmes,* 34 N. J. L., 296; 2 Kent Com., 484; *Shrakelt v. Bickford,* 74 N. H., 57. *Shell v. Roseman,* 155 N. C., 90, is a case in point in which the evidence of intentional deceit is clear and full, as pointed out by *Mr. Justice Allen* in the opinion of the Court.

The judgment of the Superior Court is reversed upon the sixth, seventh, eighth, and ninth issues and the motion of plaintiff to nonsuit defendants upon that counterclaim is allowed. Let judgment be entered in the Superior Court for plaintiff in accordance with this opinion, to wit, for $10,250, with 6 per cent interest from 26 July, 1906, on $10,000, subject to a credit of $2,055.35 bearing 6 per cent interest from 1 January, 1908. (371)

Reversed.

ALLEN, J., dissenting: On 23 August, 1902, the plaintiff executed a deed to the defendant Seip, purporting to convey about 9,000 acres of land for $70,000, in which the covenant of warranty warranted "the premises." The defendant paid all of the purchase price in cash, except $38,500, for which he executed four notes, secured by a mortgage on the land, the last note falling due on 25 August, 1905, and being for $10,000.

The defendant paid all of said notes except the last, and this action is for the purpose of enforcing payment of it.

The defendant resists payment because he contends that he was induced to buy the land upon the representation that 1,000 acres, which were pointed out, were embraced in the purchase, when they were in fact owned by another person.

A jury has returned a verdict, under instructions to which there is no exception, finding that the plaintiff made the representation in the sale of the land; that it was false and fraudulent; that it was relied on by the defendant; that it was calculated to deceive him and did so, and that the defendant has been damaged thereby to the amount of $10,000, with interest thereon from 23 August, 1902, and this Court sets the verdict aside upon the ground that there was no evidence to support the verdict.

I cannot concur in the conclusion reached, and think a careful reading of the evidence shows that every element entering into a fraudulent transaction was fully proven.

It must be remembered that the plaintiff instituted this action, and that he is invoking the equitable jurisdiction of the Court to enable him to foreclose a mortgage.

If the verdict of the jury is supported by evidence, the plaintiff has falsely represented 1,000 acres of land, which he did not own, to be within the boundaries of the deed he made to the defendant; the defendant relied on the representation, which was calculated to deceive and did deceive, and the plaintiff is now asking a court of equity to foreclose a mortgage given to secure a note, which is made up of the purchase price of the 1,000 acres. I say it is so made up, because the rest
(372) of the purchase price has been paid, and the jury has, in effect, found that the 1,000 acres is worth $10,000.

If the law will permit the plaintiff to recover under such circumstances, we must reject the statement that "law is the manifestation of the conscience of the Commonwealth."

I think, tested by the rules of the common law, or by equitable principles, the plaintiff must make good his representation.

Suppose we consider the evidence in the strongest light against the defendant, and require him to furnish evidence of fraudulent conduct upon the part of the plaintiff and actual knowledge that the representation was false.

If there is evidence of these facts, the verdict cannot be disturbed under the rules laid down in the opinion of the Court.

(1) The plaintiff was the owner of the land, and was selling it. The fair inference is that he investigated the boundaries before he bought.

(2) The land had been surveyed before he bought, and the line plainly marked. Is it not legitimate to argue that he knew these facts?

(3) The agent of the defendant, who was examining the land, was a nonresident and had never been on the land before. He was, therefore, easily misled as to the boundary.

(4) He asked the plaintiff to furnish some one who could point out the boundaries.

(5) The plaintiff sent for Sam Jones, a negro, who was his employee and lived on the land, and said he was *familiar with the lines,* and would go with them and point them out.

(6) Sam Jones and a Mr. Jackson, who was the agent of the plaintiff in making the sale, went with the agent of the defendant, and when they reached a certain ditch, both said, "We are now on the Tarault land."

(7) They were not on the Tarault land when they reached the ditch, and there were in fact 1,000 acres between the ditch and the line of the Tarault line, belonging to another person.

(8) The defendant's agent relied on the representation.

Mr. Jackson, the agent of the plaintiff to make the sale, testified, among other things:

"I live in Norfolk and am a dealer in timber and mineral (373) lands, and in the sale of the property from Tarault to Seip I acted in the capacity of broker, and sold the same upon a percentage agreement, to be paid by Mr. Tarault. I accompanied Mr. Seip's representatives, Messrs. Hosier and Lukens, from Norfolk, about the 5th or 6th of August, 1902. Mr. Tarault furnished us a colored man as a guide to show us the timber land. In crossing a well-marked ditch, we took it for granted that that was the line, as I so understood it. It was understood by all of us that we were on Mr. Tarault's land after we crossed a well-marked ditch. I do not remember who stated this ditch to be the line, whether the colored man or myself. I had been informed before that the ditch was the line. In discussing the land, we all talked of it as being Tarault's property. I think this was Lukens' and Hosier's first trip to North Carolina, and the first time on that property, and I should say that they had no knowledge of where the line was, and no other information, except such as they got from the colored man sent by Mr. Tarault and myself. The colored man stated that it was Mr. Tarault's land and timber after they got across the bridge and into the timber. I am unable to say whether the colored man or myself made the statement that the ditch was the line, or very near the line, of the Tarault land, but I recall clearly that the property near the ditch or shortly beyond the ditch was represented as Mr. Tarault's land. My recollection is very clear as to this ditch being considered the line, and we all took for granted that it was."

(9) The agent reported to the defendant, and this was the basis of his purchase.

(10) Sam Jones was not produced as a witness by the plaintiff, and his absence was not accounted for.

(11) The plaintiff was examined as a witness and denied sending any one to point out the lines.

(12) He conveyed land inside the boundaries of the deed, which he did not own, and when sued on his warranty, tries to evade liability by saying he warranted the "premises" and not the title.

No statement I have made in this enumeration can be disputed, and I think I have seen men convicted of high crimes, involving guilty knowledge, on less. (374)

And why should a court be astute to find a way to relieve the plaintiff? No one questions the fact that the representation was made and that it was false. The defendants' agents swear they relied on them in making the trade, and when the trade was consummated the plaintiff received pay for 1,000 acres of land he did not own, by reason of the false representation.

In the opinion of the Court it is suggested that the defendant was negligent in not having the land surveyed, and that he ought not to be permitted to say, after the lapse of four or five years, that he was deceived.

The first suggestion is met by what is said in *Walsh v. Hall,* 66 N. C., 241, "The transaction was like hundreds of others in the country, which are entirely fair and honest, and we do not regard the want of a survey as laches on the part of the defendant. A large majority of the sales of land in the State are completed by the delivery of a deed copied from some previous deed, and surveys are not generally made unless there is some dispute about the boundaries. Where the grantor has been in the possession of land for a number of years, exercising acts of ownership, his positive assertion as to location may be reasonably relied upon without a survey"; and the second by the evidence.

H. C. Hosier, an agent of the defendant and in charge of the land, testified: "I never knew Mr. Willey claimed the land until I got the skidder in there and began to cut the timber. Don't remember the date, but it was four or five years after we got the deed, and somewhere about the year 1906."

Mr. Willey was the owner of the 1,000 acres, and this action was commenced in 1906.

Again the Court says the evidence does not show sufficiently that the representation was relied on.

H. C. Hosier testified: "When Mr. Jackson and the colored man pointed out to me the ditch as the Tarault line, I firmly believed it was the line, and did not know anything else until Mr. Willey told us to get off. I had other information about the line, and Mr. Tarault (375) knew that I had no other information, for this was my first trip to North Carolina. The value of the land we purchased, running to the Abbott line, was from $10,000 to $15,000 less than if we had gotten the land shown us."

A. B. Lukens, another agent of defendant, who was on the land when the representation was made, testified: "Mr. Jackson asked Mr. Tarault for some one to show us the southern boundary of the lands. Mr. Tarault sent for the negro, Sam Jones, who lived on his place. Tarault said he was familiar with those lines. We crossed a ditch from 4 to 6 feet in width. Mr. Jackson said, 'We are now on the Tarault property,' and the negro gave us to understand that the ditch was Mr. Tarault's line. We accepted that ditch as the southern boundary of that land. We reported to Mr. Seip our examination of the matter. Mr. Jackson knew that Mr. Seip would be associated with us if we found the proposition to interest us. It was understood that Mr. Seip should come down

and close up the transaction, take deeds, etc. Mr. Seip took a deed on our report, and turned it over to us, and it was recorded. Mr. Tarault went with us on the cultivated land, but not on the timbered land. He was greatly troubled with asthma at the time. We reported to Mr. John Seip the investigation of the land as set out in his evidence, and Mr. Seip bought upon that report, and we made the report for him upon the representation of the lands as made to us."

The evidence of Jackson, agent of the plaintiff, which has been referred to, shows clearly that the agents of the defendant relied on the representation.

I do not question the ruling in *Gatlin v. Harrell,* 108 N. C., 487, which is said in the opinion to lay down the proper rule for cases of this kind, but I respectfully insist that it has no bearing on the question before us. In the *Gatlin case* the representation was that the land had been surveyed, and contained 115 acres, and the action was dismissed because there was no evidence that the land had not been surveyed and did not contain 115 acres; while in our case it is not denied that the representation was false.

If, therefore, the strict rules of the common law are to be applied, and the defendant s required to prove actual knowledge, I think he has come up to the full measure of the law. (376)

The case is not, however, at law, but in equity, where the maxim prevails that, "He who seeks equity must do equity," and "He who comes into equity must come with clean hands," which is illustrative of the principle that nothing can call forth a court of equity into activity but conscience and good faith.

Mr. Pomeroy, in his work on Equity Jurisprudence, after stating that no representation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under such circumstances that the law must necessarily impute such knowledge to the party when he makes it, points out that the rule is different in equity. He says, section 885: "It is fully settled by the ablest courts, English and American, that there may be actual fraud—not merely constructive fraud—in equity, without any feature or incident of moral culpability; that the actual fraud consisting of misrepresentation is not necessarily immoral. A person making an untrue statement, without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in equity"; and again in section 886: "If a person makes an untrue statement, and has at the time no knowledge of its truth, and even has no *belief* in its truth, he is chargeable with fraud in equity as well as in law. Making a statement which the party does not believe to be true is only slightly removed in culpability from the making a statement

which the party knows to be false"; and in section 887: "It is settled in equity by an overwhelming array of authority that where a person makes a statement of fact, which is actually untrue, and he has at the time no knowledge whatever of the matter, he is chargeable with fraud, and his claim to have believed in the truth of his statement cannot be regarded as at all material. The definite assertion of something which is untrue, concerning which the party has no knowledge at all, is tantamount in its effect to the assertion of something which the party knows to be untrue"; and in section 888: "Finally, if a statement of fact, actually untrue, is made by a person who honestly believes it to be true, but under such circumstances that the *duty* of knowing the truth rests upon him, which, if fulfilled, would have prevented (377) him from making the statement, such misrepresentation may be fraudulent in equity, and the person answerable as for fraud; forgetfulness, ignorance, mistake, cannot avail to overcome the pre-existing *duty* of knowing and telling the truth"; and in section 880: "If, therefore, a representation made prior to the transaction, and directly relating to it, is of such a character that it would naturally and reasonably induce or tend to induce any ordinary person to act upon it, and enter into the contract or engage in the transaction, and is in fact followed by such action on the part of the other person, then it will be presumed that it was made for the purpose and with the design of inducing that person to do what he has done—that is, to enter into the agreement or engage in the transaction. The design will be inferred from the natural and necessary consequences."

Justice Hoke, speaking for the Court, recognizes this doctrine in *Modlin v. R. R.,* 145 N. C., 226, as to the effect upon the principle of the false representations of an agent, and says: "It is well established that one who intentionally and positively asserts a fact to be true of his own knowledge, when he does not know whether it is true or false, is as culpable, in case another is thereby misled or injured, as one who makes an assertion which he knows to be untrue"; and again, in *Whitehurst v. Insurance Co.,* 149 N. C., 276: "And it is not always required, for the establishment of actionable fraud, that a false representation should be knowingly made. It is well recognized with us that, under certain conditions and circumstances, if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it is true or false, he may be held responsible for a falsehood; and this doctrine is specially applicable when the parties to a bargain are not upon equal terms with reference to the representation, the one, for instance, being under a duty to investigate, and in a position to know the truth, and the other relying

and having reasonable ground to rely upon the statements as importing verity."

Applying these principles, I think it clear that there was some (378) evidence to be submitted to the jury.

Under the principles announced by Mr. Pomeroy, the representations are presumed to have been made with the purpose of having them acted on, and it is not necessary to show actual knowledge of falsity.

The representations are fraudulent if made recklessly and without knowledge as to whether they are true or false, and in our case 1,000 acres were represented to belong to the plaintiff which he did not own, and the representations were made by the plaintiff, whose duty it was to know, to a stranger.

Fraud in equity has a wider significance than it has at law, and if it cannot be proven by circumstances, the courts will be powerless to trace it or remedy its wrongs.

Mr. Bispham says, section 197: "From the earliest times down to the present day the wrongs inflicted by *covin* (to use the ancient term) have appealed with peculiar force to the conscience of chancellors; and probably no field of remedial law has more extended boundaries, or has yielded more substantial fruits of justice, than that which, in equity jurisprudence, is embraced under the title of fraud. . . . The courts of equity have always avoided circumscribing the area of their jurisdiction in such cases by precise boundaries, lest some new artifice, not thought of before, might enable a wrongdoer to escape from the power of equitable redress. 'The Court,' said *Lord Chancellor Hardwick,* in *Lawley v. Hooper,* decided in 1745, 'very wisely hath never laid down any general rule beyond which it will not go, lest other means for avoiding the equity of the court should be found out.' "

There is another principle, recognized many times in this Court and in other jurisdictions, upon which I think the judgment ought to be affirmed, and that is, "that where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence or by his negligent conduct made it possible for the loss to occur, must bear the loss." *R. R. v. Kitchin,* 91 N. C., 44; *R. R. v. Barnes,* 104 N. C., 27; *Medlin v. Buford,* 115 N. C., 272; *Rollins v. Ebbs,* 138 N. C., 145; *Bank v. Oil Mills,* 150 N. C., 722; *Bowers v. Lumber Co.,* 152 N. C., 607.

In the *Medlin case, Shepherd, C. J.,* says: "It is a general (379) and just rule that when a loss has happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by

him, but more especially if there has been any carelessness on his part which caused or contributed to the misfortune."

In the *Rollins case Justice Hoke* applies the doctrine to the law of agency, and quotes with approval from 2 Cyc., 159, that, " 'This rule is founded not only upon that principle of general jurisprudence which casts the loss, when one of the two equally innocent persons must suffer, upon him who has put it in the power of another to do the injury, but also upon that rule of the law of agencies which makes the principal liable for the acts of his agent, notwithstanding the private instructions of the principal have been disregarded, when he has held that the agent had a position of more enlarged authority.' This principle finds support in well-considered adjudications in this State and elsewhere. *Gwyn v. Patterson,* 72 N. C., 198; *R. R. v. Kitchin,* 91 N. C., 39; *Humphreys v. Finch,* 97 N. C., 303," and in the *Bowers case, Justice Walker,* after saying that whenever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it, quotes *Lord Holt* as follows: "For as somebody must be a loser by this deceit, it is more reasonable that he who employs and puts a trust and confidence in the deceiver should be the loser than a stranger."

Apply this principle to the facts. The plaintiff lived on the land he was selling, and the defendant knew nothing of the boundaries. The defendant's agent asked the plaintiff to furnish some one who could point out the lines. The plaintiff selected Sam Jones and said he was familiar with the lines. Jones went with the defendant's agent and made a false representation as to the boundary, which was relied on, causing damage. Who ought to bear the loss? In my opinion, the law answers, the plaintiff, Tarault, who first reposed confidence in Jones, although he may have intended no wrong.

Cited: Stewart v. Realty Co., 159 N. C., 233; *Pritchard v. Dailey,* 168 N. C., 333.

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(380)

A. E. CHADWICK v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 20 March, 1912.)

1. Motions—Retaxing Costs—Collateral Matters—Parties.

The taxing of costs in an action is a collateral matter in which the witnesses and others claiming the costs, and the party against whom the costs have been taxed, are the real parties, and they may be retaxed at any time within twelve months.

2. Motions—Retaxing Costs—Judgment—"To be Taxed by Clerk"—Res Judicata.

A judgment that a party litigant recover against his adversary the costs of the action "to be taxed by the clerk," by its express terms directs the clerk to tax the costs, and his doing so cannot be held as *res judicata*.

3. Motions—Retaxing Costs—Witnesses—Tender—Nonsuit—Materiality.

When on motion of defendant a nonsuit upon the evidence is ordered after the examination of plaintiff's witnesses, the cost of defendant's witnesses may not be taxed against the plaintiff when defendant has not tendered them; for he should have done so after the nonsuit was ordered, to give the plaintiff an opportunity to examine them upon their materiality, etc.

4. Motions—Costs—Expert Allowance—Interpretation of Statutes—Res Judicata—Legality of Fees.

The court has now the statutory authority to fix the fees of expert witnesses (Revisal, sec. 2803), and its action is *res judicata* as to the amount, leaving open the question of the legality of the taxing of the fee on a motion to retax.

5. Same.

The court having fixed the fees of certain named experts, it was made to appear, on a motion to retax, that the witnesses had not been examined by or tendered to the party against whom the costs were taxed: *Held*, these witness tickets were not properly taxable against the losing party, but should be paid by the party whose witnesses they were.

APPEAL from *Bragaw, J.*, at April Term, 1911, of WAKE.

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

Douglass, Lyon & Douglass for plaintiff.
John W. Hinsdale for defendant.

CLARK, C. J. This is a motion to retax a bill of costs. The (381) action was for a small sum. At the conclusion of plaintiff's testimony the judge nonsuited the plaintiff and the bill of costs as taxed amounts to $262.25, including fees to five expert witnesses and mileage of witnesses from Buncombe, New Hanover, Guilford, Durham, and other counties. The judgment entered by his Honor was "that the defendant recover against the plaintiff and surety on the prosecution bond the cost of this action *to be taxed by the clerk* (including an expert fee of $10 to each of the following witnesses: Drs. W. L. Dunn, W. H. Honeycutt, J. H. Borneman, Charles T. Harper, and A. W. Goodwin)."

The first objection raised by the defendant is that a subsequent judge has no right to review the action of the trial judge, much less can

the clerk of the court do so. An examination of the judgment, however, shows that the taxing of the costs was to be done by the clerk himself and that the judge simply fixed the amount of the expert fees and ordered plaintiff to pay the costs. The same point was raised in *In re Smith,* 105 N. C., 167, and the Court held, after full discussion of the authorities, that it was error in the subsequent judge to hold that the taxation of costs by the former court was *res judicata* and that he had no power to correct the same. In that case the Court pointed out that the motion to retax costs can be made at any time within twelve months; that it is not a reopening of the matter decided upon the issues between the plaintiff and defendant, but that it is a collateral inquiry in which the real parties are the witnesses and others claiming the costs and the party against whom they are taxed. This is cited and approved. *Cureton v. Garrison,* 111 N. C., 272.

At common law, in civil cases neither party recovered costs and each side paid its own witnesses. *Costin v. Baxter,* 29 N. C., 111; *S. v. Massey,* 104 N. C., 878. By statute, the losing party is taxed with the costs of the witnesses of the winning party, but to prevent oppression only two witnesses of the winning side to each material fact can be taxed against the losing side (Revisal, 1300), and then only if subpœnaed and examined or tendered. *Cureton v. Garrison,* 111 N. C., 272; *Loftis v. Baxter,* 66 N. C., 340; *Wooley v. Robinson,* 52 N. C., 30. These cases have been cited and approved, *Sitton v. Lumber Co.,* 135 (382) N. C., 541, in which the Court says that the Court in *Cureton v. Garrison* "sustained the following ruling of the judge (*Hoke*) below: 'If the witnesses were not sworn and examined or tendered, even though attending under subpœna, and though they would have given material evidence, their fees cannot be taxed against the losing party.'" The same cases have also been followed and approved in *Moore v. Guano Co.,* 136 N. C., 251, and in *Hobbs v. R. R.,* 151 N. C., 136, in which last *Walker, J.,* after citing numerous authorities, lays down the rule, "Only those witnesses of the successful party who have been sworn and either examined or tendered to the opposite party can be taxed against the latter." He adds: "The reason for the rule is that if the witness is examined the nature of his testimony will appear and the court can then judge as to its materiality, or, if he is tendered, the party to whom the tender is made has the opportunity not only of using him as a witness, but of ascertaining whether or not his testimony is relevant to the controversy, and consequently whether he shall be made to pay for his attendance, if he should be cast in the suit."

In *Brown v. R. R.,* 140 N. C., 154, *Brown, J.,* quotes this as the well-settled rule, and says: "The object of tendering the witnesses is to give

the adversary party an opportunity to test their materiality and to prevent oppression by summoning a multitude of immaterial witnesses for the purpose of increasing costs."

In *Herring v. R. R.*, 144 N. C., 209, *Hoke, J.*, cites the same rule and the same authorities, but made an exception where after a witness had been subpœnaed and attended, by amendment of the pleadings he was excused from further attendance, and hence was not present at the trial," and could not be tendered. He cites also as an exception, *Henderson v. Williams,* 120 N. C., 339, where by reason of a voluntary nonsuit the defendant "had no opportunity to tender his witnesses."

In the present case the plaintiff had examined her witnesses when on motion of the defendant a nonsuit was ordered. The defendant could and should then and there have tendered its witnesses and have given the plaintiff an opportunity to examine them and strengthen her case or to demonstrate their immateriality, if it was sought to (383) charge plaintiff with them.

Originally, the court could not fix an allowance for expert witnesses, but by an amendment to the statute which is to be found in Revisal, 2803, the court now has such powers. The allowance of $10 to each of the five expert witnesses, four of whom were summoned from distant counties, is *res judicata* as to the amount and is properly taxable at least against the party summoning such witnesses, and to that extent it is not reviewable on a motion to retax. But the question whether the evidence of all five of these experts was material, and whether or not more than two of them were not to testify to the same material point as other witnesses, are matters which were not settled by the order fixing the amount allowed the experts nor by adjudging that the plaintiff pay costs. That means only legal costs, and their legality can be considered on a motion to retax.

In *Porter v. Durham,* 79 N. C., 598, the Court allowed the fees of the surveyors, which might be called expert fees, though they were not examined by the plaintiff who summoned them nor tendered to the defendant, because, said *Reade, J.*, it "was made unnecessary by reason that the defendants examined them as witnesses of their own accord." That was not the case with the doctors who were summoned on this occasion. There was no reason why the defendant company when it moved for nonsuit should not have tendered its witnesses, as much so as if the plaintiff had "rested," or on any other occasion when the party who ultimately gains the case has witnesses in attendance whom it may think it unnecessary to examine. In this case the defendant admits that "none of its witnesses were sworn, examined or tendered." Under the uniform decisions of this Court, many of which have been above cited,

the bill of costs should be retaxed by charging said witnesses to the party which summoned them, and not to the opposite praty, who was afforded no opportunity to protect itself against oppression by showing the immateriality of their evidence by an examination of them. Indeed, the plaintiff avers that certain of the witnesses whose mileage and per diem are taxed were not even in attendance upon the court (384) and that others were the superintendent and other officers of the defendant, who should not have proved attendance.

The bill of costs should be retaxed in accordance with this opinion.

Reversed.

W. P. BURRUS v. H. WITCOVER.

(Filed 13 March, 1912.)

1. Contracts, Wagering—Cotton Futures—Lex Loci Contractus—Interpretation of Statutes.

An action upon a wagering or "future contract" in cotton cannot be maintained in this State, though entered into in another State where it is lawful. Revisal, secs. 1689, 3823, 3824.

2. Contracts—Wagering—Bills and Notes—Drafts — Holder — Consideration Illegal.

The owner of a draft which he knows to have been given in the unlawful purchase of cotton futures, or in maintaining or purchasing margins in contracts of that character, is a party to the prohibited contract, the consideration is illegal and he cannot recover from the payee in his action on the draft. Revisal, secs. 1689, 3823, 3834.

APPEAL from *Whedbee, J.*, at November Term, 1911, of CRAVEN.

This is an action to recover on a draft for $800, drawn 4 June, 1906, at Marion, S. C., by W. A. Godbold, in favor of Burrus & Strakley, and accepted by the defendant Witcover.

The defendant set up as a defense that the consideration for his acceptance was a gambling contract between the said Godbold and the plaintiff for the purchase of cotton.

The plaintiff offered evidence that he was the owner of the draft, and admitted that the firm of Burrus & Strakley had negotiated a number of contracts for Godbold for purchase of cotton on margin, known as "future contracts," and that the draft, which is the basis of this action, was drawn to enable the said Godbold to furnish margins for other contracts, or to pay a debt for margins.

The defendant introduced a certified copy of the law of (385) South Carolina, from which it appears that contracts for the sale of cotton and other things are illegal when it is not the intention of the parties to deliver the property the subject of the contract, and for settlements to be made upon the basis of the difference in market values, and the plaintiff said, on his examination, that he did not commence his action in South Carolina because he knew he could not collect a gambling debt in the courts of that State.

Upon these admissions by the plaintiff, his Honor directed a judgment of nonsuit to be entered, and the plaintiff excepted and appealed.

Guion & Guion for plaintiff.
Abernethy & Davis for defendant.

ALLEN, J. The plaintiff objected to the introduction of the certified copy of the laws of South Carolina, and while we think it was competent, it is not, in our opinion, material to the decision of this case, as our courts would not aid in the enforcement of the contract, if it is a gaming contract, although valid in South Carolina. *Gooch v. Faucett,* 122 N. C., 272; *Cannady v. R. R.,* 143 N. C., 443.

In the latter case, after stating that ordinarily matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made, *Justice Connor* says: "The exceptions to the general rule are thus stated by Mr. Lawson, the editor of the excellent and exhaustive article on 'Contracts' in 9 Cyc., 674: 'The general doctrine that a contract, valid where it is made, is valid also in the courts of any other country or State, where it is sought to be enforced, even though had it been in the latter country or State it would be illegal and hence unenforcible, is subject to several exceptions: (1) When the contract in question is contrary to good morals; (2) when the State of the forum, or its citizens, would be injured by the enforcement by its courts of contracts of the kind in question; (3) when the contract violates the positive legislation of the State of the forum, that is, is contrary to its Constitution or statutes, and (4) when the contract violates the public policy of the State of the forum. These exceptions are grounded on the principle that the rule of comity is not a right of any State or country, but is permitted (386) and accepted by all civilized communities from mutual interest and convenience, and from a sense of the inconvenience which would otherwise result, and from moral necessity to do justice in order that justice may be done in return.'"

That the contract between Godbold and the plaintiff, as described by the plaintiff, is one condemned by the laws of this State cannot be

questioned (Revisal, secs. 1689, 3823, and 3824), and one who is a party to such a contract is not only indictable, but the statute says, in language that cannot be misunderstood, that "No action shall be maintained in any court to enforce any such contract, whether the same was made in or out of the State, or partly in and partly out of this State, and whether made by the parties thereto by themselves or by or through their agents, immediately or mediately; nor shall any party to any such contract, or any agent of any such party, directly or remotely connected with any such contract in any way whatever, have or maintain any action or cause of action on account of any money or other thing of value paid or advanced or hypothecated by him or them in connection with or on account of such contract and agency."

It would seem to follow necessarily that the plaintiff cannot maintain his action in our courts except upon the ground that the defendant was not a party to the illegal contract, and that he is bound by his acceptance. The difficulty with this position is that both the plaintiff and the defendant were parties to the contract, and the only consideration for the acceptance of the draft by the defendant was to enable Godbold to continue his illegal transactions.

The exact question seems to have been decided in England in 1794, in *Steers v. Lashley,* 6 T. R., 61, which was approved on this point in *Embrey v. Jemison,* 131 U. S., 347, and this last case was cited with approval by our Court in *Garseed v. Sternberger,* 135 N. C., 502.

The case of *Steers v. Lashley, supra,* "was an action on a bill of exchange drawn by Wilson on the defendant, and indorsed over by the former to the plaintiff after it had been accepted by the defend-
(387) ant. At the trial at the sittings at Westminister before *Lord Kenyon* it appeared that the defendant had engaged in several stock-jobbing transactions with different persons, in which Wilson was employed as his broker and had paid the differences for the defendant. That a dispute arising between Wilson and the defendant respecting the amount of those differences, the matter was referred to the plaintiff and three others, who awarded £306, 12s. 6d. to be due from the defendant to Wilson; for £100 part of which Wilson drew the bill, on which the action was brought." *Lord Kenyon* nonsuited the plaintiff, being of opinion that as the bill grew out of a stock-jobbing transaction, which was known to the plaintiff, he could not recover upon it, and in delivering his opinion, he said: "If the plaintiff had lent this money to the defendant to pay the differences, and had afterwards received the bill in question for that sum, then according to the principle established in *Petrie v. Hannay* he might have recovered. But here the bill on which the action is brought was given for these very differences; and

therefore Wilson himself could not have enforced payment of it. Then the security was indorsed over to the plaintiff, he knowing of the illegality of the contract between Wilson and the defendant, for he was the arbitrator to settle their accounts; and under such circumstances he cannot be permitted to recover on the bill in a court of law."

This language was quoted in *Embrey v. Jemison, supra,* and the Court further says in that case: "While there are authorities that seem to support the position taken by the defendant in error, we are of opinion that, upon principle, the original payee cannot maintain an action on a note, the consideration of which is money advanced by him or in execution of a contract of wager, he being a party to that contract, or having directly participated in the making of it in the name or on behalf of one of the parties."

Williams v. Carr, 80 N. C., 299, and *Ballard v. Green,* 118 N. C., 392, are not in conflict with these views, as they are interpreted in the latter case, where the Court says, after referring to parts of the charge of the judge of the Superior Court: "This means if the jury believed that Duke loaned the money and had no connection with the speculations, that it was a valid contract, and plaintiff would be (388) entitled to recover. *Williams v. Carr,* 80 N. C., 294."

We are, therefore, of opinion that the consideration for the acceptance by the defendant was illegal, and that there is no error.

Affirmed.

Cited: *Cobb v. Guthrie,* 160 N. C., 315.

IN RE ADMINISTRATION ON THE ESTATE OF FRANK P. BATTLE, DECEASED.

(Filed 13 March, 1912.)

1. Superior Courts—Clerks—Probate—Executors and Administrators—Removal—Legal Discretion—Appeal and Error—Practice.

In the exercise of their probate powers, and the legal discretion conferred upon them, clerks of the Superior Court may remove for good cause shown, upon petition filed and notice duly shown, an executor or administrator, subject to review by the Superior Court, and by the Supreme Court on appeal.

2. Superior Courts—Clerks—Executors and Administrators—Issues of Fact—Practice.

On issues raised in proceedings before the clerk of the Superior Court for the removal of an executor or administrator for good cause shown, it

is not required that the clerk transfer the cause to the Superior Court for the trial of the issue, as applications of this character are not regarded in the nature of adversary proceedings, but as a power conferred on the clerk with a view of protecting estates, often presenting the necessity for his prompt action. Revisal, sec. 35.

3. Superior Courts—Clerks—Executors and Administrators—Compensation—Contracts—Removal of Administrator—Appeal and Error.

It appearing by admission of record in the Supreme Court on appeal from an order removing an administrator for cause, that he had procured from the wife of the deceased, an illiterate woman, and her minor children, the next of kin, a contract by which he and another, who had aided him, were to receive 25 per cent more than the legal charges allowed to administrators: *Held*, the order removing him was properly made.

(389) APPEAL from *Ferguson, J.*, from NASH.

Case on removal of W. R. Mann, administrator of Frank P. Battle, deceased, heard on appeal from Clerk of Superior Court of Nash, before *Ferguson, J.*, on 20 December, 1911. There was judgment of removal, affirming a like judgment by the clerk, and said W. R. Mann excepted and appealed.

T. T. Thorne for Mann, appellant.
Brooks & Taylor for appellee.

HOKE, J. It appears of record that Frank Battle died domiciled in Nash County on 29 September, 1911, and that within two or three weeks thereafter W. R. Mann was duly qualified as his administrator; that the proceedings were had before T. A. Sills, Esq., Clerk Superior Court of Nash County, and on presentation of a paper-writing purporting to be a renunciation of Cora Battle, widow of deceased, in favor of W. R. Mann. This paper, bearing date 13 October, 1911, appeared to be signed by Cora Battle having made her mark thereto, and same was witnessed by one R. L. Powell. Thereafter, to wit, on 20 November, 1911, on petition filed and notice duly given, affidavits were submitted on part of Cora Battle tending to show that she had not signed the renunciation nor authorized any one to sign it for her. At same time affidavit was made on the part of Robert L. Powell, to the effect that Cora Battle made her mark to said paper-writing in the presence of affiant as subscribing witness and that the contents were fully explained and understood by her. It was admitted on the hearing by W. R. Mann, that of the same date that the renunciation purported to be signed, and in contemplation of his administering on the estate, he had procured from the widow a contract by which he was to be allowed 25 per cent of the entire estate, in addition to the fees allowed by law. It was also

admitted by Robert Powell, the subscribing witness, that he, the witness, had one-half interest in the contract obtained by Mann, to wit, 25 per cent in addition to lawful fees, and that the contract and the renunciation were carried by him to Cora Battle and executed at one and the same time. The clerk found as facts that the renunciation had not been made or authorized by the widow, and found the facts also in accord with the admissions, and gave judgment of removal.

On appeal, the judge affirmed the judgment of the clerk, on (390) the ground that under the circumstances of the parties the obtaining of the contract in question from the widow and six of the nine children of Frank Battle, deceased, showed W. R. Mann to be an unfit person to administer on the estate; whereupon said Mann excepted and appealed, assigning for error, chiefly, that the pleadings and affidavits before the clerk having raised an issue of fact, the proceeding should have been transferred to the civil-issue docket for trial by jury. (2) That his Honor held the obtaining of the contract showed W. R. Mann to be an unfit person, when said Mann had offered, in the Superior Court, to surrender his contract, and offered affidavits, further, of a number of citizens to the effect that he was a man of good character and good business standing in the community where he lived.

It is well understood that our clerks of the Superior Court, on petition filed and notice duly served, in the exercise of powers conferred upon them in matters of probate, may remove an executor or administrator for good cause shown. They make such orders in the exercise of a legal discretion, which may be reviewed upon appeal. An application of this character is not regarded as being in the nature of an adversary proceeding, but a power conferred with a view of protecting the estate, and because prompt action may often be necessary to this end, a clerk is not required, on issues raised, to transfer the cause to Superior Court for a jury trial, but may and ordinarily should take definite action in the premises. The practice in such cases is very well stated in *Edwards v. Cobb*, 95 N. C., pp. 4-9, in which *Merrimon, J.*, delivering the opinion, said: "This proceeding is neither a civil action nor a special proceeding under the Code of Civil Procedure. Its purpose is not to litigate the alleged rights and liabilities of adverse parties, settle the same, and give judgment against one party in favor of another, but it is to require one who is charged by the law with special duties and trusts, for whosoever may be interested, to show cause why, in some cases, he shall not give such bond as may be required of him, conditioned for the faithful discharge of his duties, and in others, why he shall not be removed from his place of office because of some disqualification, malfeasance, misfeasance, or nonfeasance, (391)

that disqualifies or unfits him in that respect, and renders it necessary that he shall be promptly removed from it. While, ordinarily, some person or persons rightfully interested should make the application for such removal, suggest the grounds for it, and produce the appropriate and necessary proofs in that behalf, and become parties to a proceeding for the purpose, and responsible for costs, the clerk, in the exercise of his jurisdictional powers, requires the executor or administrator, as the case may be, to answer before him and show cause, or be removed from his office, to the end that the interests of the estate may be subserved and the rights of parties interested protected by his removal, and the appointment of a suitable person in his stead. The clerk has power, as we have seen, for proper cause, to make such removal, and, pending any litigation in that respect, to make all necessary interlocutory orders for the protection and better securing of the estate. The Code, sec. 1521; *Taylor v. Biddle,* 71 N. C., 1; *In re Brinson,* 73 N. C., 278.

"Ordinarily, in such matters, issues of fact do not arise—only questions of fact are presented, and the clerk hears the matter before him summarily; he finds the facts from affidavits and competent documentary evidence, and founds his orders and judgments on same. He may, in his discretion, in some cases direct issues of fact to be tried by a jury, and transfer them to the Superior Court to be tried, as directed by The Code, sec. 116, but regularly he will not. No doubt, in some cases, he ought to do so. And also, by virtue of this section, the executor or administrator, or any person interested, may appeal from the finding of fact and the judgment of the clerk, to the judge having jurisdiction, in term-time or in vacation, and the judge may review the findings of fact, if need be, and decide such questions of law as may be raised, affirm, reverse, or modify the order or judgment of the clerk, and remand the matter to him for such further action as ought to be taken. From the judgment of the judge an appeal would lie to this Court, and errors of law only should be assigned. The judge in reviewing the findings of fact might, in his discretion, direct proper
(392) issues of fact to be tried by a jury, for his better information, and in some cases it may be he ought to do so. The statute conferring power on the clerk to remove executors and administrators does not prescribe in terms how the facts in such matters shall be ascertained, but it plainly implies that he shall act promptly and summarily."

Authority with us is in general approval of the position as stated. *Murrill v. Sandlin,* 86 N. C., 54; *In re Brinson,* 73 N. C., 278; *Taylor v. Biddle* 71 N. C., 1; *Lovinier v. Pearce,* 70 N. C., 168; *Hunt v. Sneed,* 64 N. C., 180, and Rev. sec. 35, which directs that, in all cases of revoca-

tion, etc., "the clerk shall immediately appoint a successor, etc., and make such orders as may tend to the better ordering of the estate," is in express recognition of the principle. The clerk, therefore, was not required to transfer the cause to the civil-issue docket and delay action till trial had.

We concur also in the view taken by his Honor, that it sufficiently appeared from the admissions of record that the appellant was not a fit or suitable person to act as administrator of this estate, and that a determination of other questions presented was not necessarily required. It may be that the taking of a contract of this character might not always and as a matter of law justify the removal, but under the circumstances presented here, showing that within two weeks of intestate's death the appellant, a well-informed and capable business man, by his own admission and through the agency of one R. L. Powell, the subscribing witness, went to the house of the widow, who could neither read nor write, and obtained from her and from six of her children a contract for 25 per cent of the estate over and above lawful fees, the administrator and the witness to share equally in the amount, evinces such an erroneous concept of official duty as to demonstrate his unfitness and justify his removal. While the clerk, in such cases, is in the exercise of a legal discretion which may, as stated, be reviewed on appeal, he is necessarily allowed a large latitude in such matters, and, in the present case, on authority and the facts admitted of record, we are of opinion, and so hold, that the order of removal (393) was properly made. *Simpson v. Jones,* 82 N. C., 323; *R. R. v. Wilson,* 81 N. C., 223; *Estate v. Pike,* 45 Wis., 391; 11 A. & E., 823; 1 Williams Exrs. (9 Am. Ed.), 702.

Affirmed.

Cited: *Mills v. McDaniel,* 161 N. C., 115.

R. M. HICKS v. SEABOARD AIR LINE RAILWAY AND BOARD OF ROAD TRUSTEES OF FRANKLINTON TOWNSHIP.

(Filed 13 March, 1912.)

Railroads—Rights of Way—Highways—Pleadings—Demurrer.

The complaint in an action alleging that a railroad company had laid out and used a public road over the plaintiff's lands under the care and

in the charge of certain township road commissioners causing the latter to go upon his lands to the side of the railroad right of way, to plaintiff's damage, without allegation that the railroad company had entered upon his lands or committed any act causing him injury, or any relationship which would cause liability to the railroad for the acts of the commissioners, does not state facts sufficient to constitute a cause of action as against the railroad company, and is demurrable.

APPEAL from *Carter, J.*, at January Term, 1912, of FRANKLIN.

Appeal by Seaboard Air Line Railway Company, from a judgment overruling a demurrer.

The complaint alleges that the plaintiff is a resident of Franklin County and the owner of land adjoining the right of way of the defendant company; that the Board of Trustees of Franklinton Township is a corporation created by chapter 245, Laws 1909, and has complete control of the public roads in Franklinton Township, and is empowered to construct, maintain, and improve the same; that prior to the construction of said railroad the public county road ran along the lands now owned by plaintiff, and had so run for many years—beyond the memory of this plaintiff—and the said railroad company, about the year 1885, in the construction of its road at this point, laid its track along
(394) the side of and parallel to said public road, but within less than forty feet thereof. The said public road, running within forty feet of said railroad track and on its right of way, has been recognized and used as a public road ever since—up to the time complained of was continuously so used; and the said railroad company has never obtained any grant or conveyance thereof from any authorized source, nor made any consideration therefor; that said public road was one of the most important public roads in said Franklinton Township, and under said act of the General Assembly of 1909 it was under the control of said road trustees and full power was vested in said trustees to improve same as might be desired for the best use of the public; that in June, 1910, the defendant road trustees began the work of improving said public road, but along the plaintiff's land, where said road was within forty feet of said railroad track, as plaintiff is informed and believes, and so avers, said road trustees were forbidden by the said defendant railroad company to do any work in the way of drainage or grading said public roadbed or otherwise improving same at any place within forty feet of the center of the railroad track; that, after being forbidden, and in consequence thereof, said road trustees proceeded to construct a public road adjoining the lands of said railroad outside of its right of way and upon the lands of the plaintiff; that in the construction of the said public road there was taken from the plaintiff's land a strip thirty

feet wide and.....long, including a part of the yard in front of plaintiff's residence, to his great damage; that to his request to have his damages assessed under the provisions of the said Franklinton Township Roads Act fixed, the road trustees reply that the said defendant railroad, having taken the public road in its right of way, should pay all the damages caused in securing a location for the road as now laid off on plaintiff's land. The defendant railroad denies liability therefor, and plaintiff, by both defendants, is denied recompense for the injuries sustained by him. And the plaintiff is unable, therefore, to determine in what jurisdiction and in what manner to move for the remedy for the injury done to him.

The defendant railroad demurs to the complaint, upon the (395) ground that it does not state a cause of action against it, and further because it discloses that the remedy of the plaintiff is by mandamus against said board of trustees.

Judgment was entered overruling the demurrer, and the defendant excepted and appealed.

William H. Ruffin for plaintiff.
Murray Allen and F. S. Spruill for S. A. L. Railroad.
Bickett, White & Malone for defendant Road Trustees.

ALLEN, J. We are unable to see that any cause of action is stated against the defendant railroad.

The plaintiff does not allege that said defendant has entered upon his land, or has committed any act causing him injury, nor is any relationship shown which would make the defendant liable for the acts of the board of trustees.

It would seem that the board of trustees had the right to enter upon the lands of the plaintiff for the purpose of locating, relocating, or changing a public road, and the act of the General Assembly (chapter 245 Laws 1909) which confers this power furnishes a remedy to the owner of the land thus taken for a public use.

The question debated here, as to the right of the trustees to proceed against the railroad, is not before us, and we refrain from expressing any opinion upon it.

There is error in overruling the demurrer, and the judgment is Reversed.

O. D. BATCHELOR, EXECUTOR OF V. B. BATCHELOR, v. J. D. OVERTON AND TOM TAYLOR.

(Filed 13 March, 1912.)

1. Clerks of Court—Probate Powers—Executors and Administrators—Orders—Collateral Attack—Practice.

When the clerk of the Superior Court, in the exercise of his probate powers conferred by statute, has general jurisdiction of the subject-matter of the inquiry, as indicated in Revisal, sec. 16, and, on application made, has entered a decree appointing an executor or administrator, and letters are accordingly issued, such decree is controlling and may not be successfully attacked or in any way questioned except by direct proceedings instituted for the purpose.

2. Same—Nonresidents—Bonds—Irregularities.

When a foreign executor has been in all other respects regularly appointed and qualified by the clerk, his failure to give bond specified in Revisal, secs. 5 (5), 28, and 319, is only an irregularity, and cannot be collaterally attacked in an action brought by him to recover upon a note due the estate and to foreclose a mortgage securing it.

3. Clerks of Courts—Executors and Administrators—Nonresidents—Qualifications—Presumptions.

When it appears that an executor was regularly qualified by the clerk of the court having jurisdiction, it is a fair inference that at that time he was a resident of this State, though it is made to appear that he was nonresident at the time of the commencement of his action to collect a debt alleged to be due the estate; and *semble*, the prohibitive terms of Revisal, secs. 28 and 319, respecting the giving of a bond by nonresident executors, does not apply to the facts of this case.

4. Clerks of Courts—Executors and Administrators—Nonresidents—Bills and Notes—Mortgages—Defenses.

The defendant having bought certain property from the plaintiff, as executor, gave his note for a part of the purchase price, and secured it by a mortgage on the property. In an action by the executor upon the note and mortgage, *Held*, the defense is not open that the executor, though duly qualified, was a nonresident, or that, not having given the bond as required by the statute, he could not maintain an action in our courts, neither the title nor possession of the purchaser having been disturbed or in any way questioned.

(396) APPEAL from *Ferguson, J.*, at November Term, 1911, of NASH.

Claim and delivery. On reading the pleadings and it being admitted that plaintiff, at the time of trial, was not a resident of this State and had not given a bond in the State as executor, his Honor, on motion, entered judgment of nonsuit, and plaintiff excepted and appealed.

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

E. B. Grantham and Austin & Davenport for plaintiff.
Brooks & Taylor for defendants.

HOKE, J. It was alleged in the complaint and admitted in the (397) answer that in December, 1902, plaintiff, O. D. Batchelor, was duly qualified as executor of V. B. Batchelor, deceased. The letters of administration to O. D. Batchelor of said date, in proper form, were received in evidence, showing that said V. B. Batchelor had died resident in Nash County, leaving a last will and testament and appointing plaintiff his said executor, and it was further admitted that the will provided that no bond should be required. It was further alleged in the complaint and admitted in the answer that in December, 1908, plaintiff, as executor, had sold and delivered to defendants the sawmill, engine, boiler and other property, the subject of the controversy, for $600; had received $150 on the purchase price and took a mortgage on said property to secure the amount remaining due, to wit, $450, and the mortgage was made part of the complaint. It was further alleged in the complaint and denied in the answer that no other and further payment had been made on the purchase price, and that plaintiff was the owner of the property, under and by virtue of said mortgage, and had instituted present suit after the defendants had failed to make the payments required by said mortgage and after each and every of the payments therein mentioned had become due and payable.

On these facts and admissions, we are of opinion, and so hold, that plaintiff is entitled to proceed with his action, and that the order of nonsuit should be set aside, and this, although it was admitted further that, at the time of trial, the plaintiff was a nonresident and had given no bond. On this subject our statute, Revisal ch. 1, sec. 5, subsec. 2, enacts that a nonresident may qualify as executor; section 28, that such executor shall give bond, etc.; and in chapter 9, sec. 319, it is provided that every executor, etc., from whom a bond is required by law, before letters issued, must give a bond, etc.

Notwithstanding these requirements of the statute, it is very generally held that when a clerk of our Superior Court, in the exercise of the probate powers conferred by statute, has general jurisdiction of the subject-matter of inquiry, as indicated in chapter 1, sec. 16, Revisal, and on application made has entered a decree appointing an (398) executor or administrator, and letters are accordingly issued, such decree is controlling and may not be successfully attacked or in any

way questioned but by direct proceedings instituted for the purpose. *Fann v R. R.*, 155 N. C., 136; *Jordan v. R. R.*, 125 Wis., 581, 4 Anno. Cases, 1113; Croswell on Executors, pp. 19-127. In *Fann's* case speaking to the general question, the Court said: "In this day and time and under our present system, it seems to be generally conceded that the decrees of probate courts, when acting within the scope of their powers, should be considered and dealt with as orders and decrees of courts of general jurisdiction, and, where jurisdiction over the subject-matter of inquiry has been properly acquired, that these orders and decrees are not as a rule subject to collateral attack. The facts very generally recognized as jurisdictional are stated, in section 16 of our Revisal, to be that there must be a decedent; that he died domiciled in the county of the clerk where application is made, or that, having his domicile out of this State, he died out of the State, leaving assets in such county or assets have thereafter come into such county; having his domicile out of the State, he died in the county of such clerk, leaving assets anywhere in the State or assets have thereafter come into the State; and where, on application for letters of administration, these facts appear of record, the question of the qualifications of the court's appointee cannot be collaterally assailed. That is one of the very questions referred to him for decision. But if a person has been selected contrary to the prevailing rules of law, the error must be corrected by proceedings instituted directly for the purpose," citing *Hall v. R. R.*, 146 N. C., 345; *Springer v. Shavender*, 118 N. C., 33; *Lyle v. Siler*, 103 N. C., 261; *Moore v. Eure*, 101 N. C., 11; *London v. R. R.*, 88 N. C., 585, and, generally, on the subject see *Dobler v. Strobler*, 9 N. Dakota, 104, with notes by the editor in 81 Amer. St., pp. 530-535; Croswell on Executors and Administrators, p. 19, *et seq.*

Applying the principle, authority here and elsewhere is to the effect that when a decree has been entered under circumstances stated, the failure to give a bond or the giving of an insufficient bond is only (399) an irregularity, in no way affecting the validity of the appointment, and that such appointment may not be questioned collaterally. *Howerton v. Sexton*, 104 N. C., 75; *Garrison v. Cox*, 95 N. C., 353; *Hughes v. Hodges*, 94 N. C., 56; *Granberry v. Mhoon*, 12 N. C., 456; *Dobler v. Strobler, supra; Leatherwood v. Sullivan*, 81 Ala., 458; *Ex Parte Maxwell*, 37 Ala., 362; *Harris v. Chipman*, 9 Utah, 101; *In re Craig's Estate*, 24 Montana, 37; Croswell on Executors, p. 187. It would seem that the prohibitive terms of chapter 1, sec. 28, and chapter 9, sec. 319, do not apply to the present case, for while it is admitted for defendant that plaintiff is not at present a resident of this State, the admission also appears of record that plaintiff's qualifications in 1902

were regular and proper, and we think it a fair inference that when he originally qualified he was a resident of the State. *Moore v. Eure,* 101 N. C., 11. In such case, and in any event, the appointment should stand unless set aside and letters recalled by direct proceedings.

Apart from this, it is admitted that defendants bought the property from plaintiff and executed the mortgage sued on to him as executor, and in the absence of any proof or suggestion that defendants' possession had been disturbed or the title passed to him in any way rightfully questioned, it is not open to defendants to resist payment or the surrender of the property, as required by his contract. *Webster v. Laws,* 89 N. C., 225; 35 Cyc., 541.

There is error, and this will be certified, that the trial may proceed and the rights of the parties finally determined.

Reversed.

J. W. WILLIAMS v. C. F. DUNN ET AL.

(Filed 20 March, 1912.)

1. Executions—Irregularities—Motion to Quash—Practice.

Usually, the proper method of obtaining redress for irregularities affecting the validity of an execution is to recall it upon notice and motion in the court from which it was issued.

2. Same—Parties—Purchasers.

An execution and sale thereunder may be quashed on motion properly made, as against a party of record or purchaser with full notice, for irregularities affecting its validity, but not as against an innocent purchaser who was not a party.

3. Executions — Irregularities — Motions to Quash — Courts — Jurisdiction—Clerks of Court.

Before sale under execution, proceedings may be instituted before the clerk to recall the execution upon grounds affecting its validity, but after return made, and especially when there may be certain equitable claims for adjustment, *semble,* the practice is that the motion should be made before the judge in term.

4. Same—Interpretation of Statutes.

The clerk is but a part of our Superior Court, and when a motion to quash an execution and sale under judgment for irregularities affecting the validity of the sale is made before the clerk, and regularly brought before the judge in term, all parties having been duly notified, the judge should retain jurisdiction, and not dismiss the proceedings for want of authority in the clerk to set aside the execution theretofore issued. *Semble,* Revisal, sec. 614, would apply.

(400) APPEAL from *Ferguson, J.*, at January Term, 1912, of LENOIR.

This was a motion to quash an execution and sale had thereunder, heard on appeal from Superior Court Clerk. On the hearing, the court being of opinion that the clerk had no jurisdiction to entertain or act on the motion, entered judgment dismissing the proceedings, and the applicant, John Williams, having duly excepted, appealed.

Rouse & Land for plaintiff.
C. F. Dunn for defendant.

HOKE, J., after stating the case: It appears of record that on 13 February, 1909, one Jessie Williams having obtained a judgment in a justice's court against John Williams, the present appellant, for $35.12 and interest, caused the same to be duly docketed in the Superior Court of Lenoir County, and on 21 October, 1910, the same was assigned and transferred of record to Charles F. Dunn, cashier of Charles F. Dunn & Sons. That on 8 February, 1911, execution was issued returnable to March term of Superior Court, same being within forty days from date of issue. That under said execution, on 14 March, 1911, certain
(401) real estate of appellant, to wit, three lots in the city of Kinston, was sold by sheriff and the same bought by Charles F. Dunn, cashier, at the price of $125, and same was thereafter, on 13 April, 1911, conveyed by the sheriff to said Charles F. Dunn, etc. That on 2 September, pursuant to notice duly issued and served on Jessie Williams and C. F. Dunn, motion was made to quash said execution and sale, and there were affidavits submitted on part of appellant tending to show various irregularities in the proceedings by which appellant's land was sold, among others, that the execution had been issued within forty days of the term to which the same was returnable and contrary to section 624, Revisal; that the sale was made without proper advertisement, and that by the action of Charles F. Dunn, competitive bidding was in a large measure suppressed or prevented and such purchaser was enabled to bid off the entire property for $125, when either of the three lost was worth over $300, etc.; and appellant professed a willingness and desire to pay to Charles F. Dunn the amount of said judgments had against affiant and costs, etc.

There was affidavit on part of C. F. Dunn in denial of appellant's affidavits and containing averment that the sale was in all respects regular and fair.

On the hearing before the clerk, that officer entered judgment setting aside the execution and sale thereunder, declared same of no effect, and ordered that execution issue restoring the original owner to his property,

that an account of rents be taken, etc., and on appeal, as heretofore stated, the judge below reversed the ruling of the clerk and dismissed the proceedings on the ground that the clerk was without jurisdiction to entertain the motion.

The right to recall an execution by notice and motion in the court from which same was issued is usually the proper method of obtaining redress for irregularities affecting its validity. *Aldridge v. Loftin,* 104 N. C., 122; *Beckwith v. Mining Co.,* 87 N. C., 155; *Faison v. McIlwaine,* 72 N. C., 312; *Foard v. Alexander,* 64 N. C., 69. The remedy will not usually be entertained or allowed after a sale had as against an innocent purchaser who was not a party to the proceedings, but against a party of record or a purchaser who buys (402) with full notice, on motion made in apt time and in furtherance of right, both writ and sale may be quashed, *Saunders v. Ruddle,* 17 and 18 Ky., 139; *Van Campen v. Snyder,* 4 Miss., 66, and by weight of authority, even after writ returned, 8 Pl. and Pr., p. 470, citing *Meyer v. Baker,* 13 W. Va., 805, and other cases.

At any time prior to sale the proceedings may be instituted before the clerk, and under certain circumstances it is probable that this course could be pursued at any time prior to the return day of the writ. *Aldridge v. Loftin, supra.*

After return made, however, and especially when there may be certain equitable claims for adjustment, it would seem the better practice that the motion should be made before the judge in term. *Beckwith v. Mining Co., supra.*

Without final decision as to the power of the clerk after sale and return made, we all are of opinion that on the facts presented on this appeal the judge should have proceeded to hear and determine the question presented.

Revisal, 1905, sec. 614, it is provided: "Whenever any civil action or special proceeding begun before the clerk of any Superior Court shall be for any ground whatever sent to the Superior Court before the judge, the judge shall have jurisdiction; and it shall be his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it shall appear to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so." This well-considered statute, which has done so much to facilitate the efficient administration of justice, has always received the liberal interpretation that would best promote its beneficent purpose (*Roseman v. Roseman,* 127 N. C., 494; *Faison v. Williams,* 121 N. C., 152; *Capps v. Capps,* 85 N. C., 408) and whether the present case comes strictly within

its terms or not, it is well understood that the clerk is but a part of our Superior Court, and when a motion of this character is brought before the judge in term, all parties having been duly notified, there is no good reason why the principle expressly established by this law in all civil actions and special proceedings should not prevail here and the court (403) have full jurisdiction. Speaking to this subject in *Roseman's case,* our present *Chief Justice* has well said: "The Superior Court undoubtedly had authority, under its general equity jurisdiction, to appoint a new trustee to prevent the failure of the trust, if the proceeding had begun by writ returnable to the Superior Court, and even if no writ whatever had been served, if the parties in interest appeared generally; and that is the case, in effect, here, since no appeal was taken. Even if an appeal had been taken from such judgments, it would be an anomaly if a party sued before the clerk, who is a part of the Superior Court, could, on appeal to the judge, have the action dismissed, and thus require the plaintiffs to come right back into the identical court from which they have been dismissed and in which the cause was originally brought, before the clerk of the court."

There was error in dismissing the proceeding for want of jurisdiction, and this will be certified, that the rights involved shall be determined.

Error.

Cited: Baggett v. Jackson, 160 N. C., 29; *Mills v. McDaniel,* 161 N. C., 115; *Williams v. Dunn,* 163 N. C., 206.

A. C. PELLETIER ET AL. v. THE INTERSTATE COOPERAGE COMPANY ET ALS.

(Filed 20 March, 1912.)

1. Equity—Mistake of Law—Contracts—Intent of Parties.

Equity will correct a mistake in law in the drawing of a written contract, when it is made to appear that the contract as therein expressed does not carry out the actual agreement which both of the parties had made, and which it was their mutual intent to express by the writing.

2. Equity—Deeds and Conveyances—Draftsman—Legal Effect of Words—Mutual Mistake.

A mistake made by draftsman in describing the lands conveyed by the deed, so that the language used did not have the legal effect intended, of excepting certain lands from the description, and which was not intended by either the grantor or grantee to be conveyed, is a mistake of fact which a court of equity will relieve against.

3. Same.

The parties to a deed having agreed upon the sale and purchase of certain lands, exclusive of a certain tract allotted as a widow's dower, the draftsman, after describing the lands in the deed, attempted to exclude the dower in the following terms: "saving and excepting the widow A.'s dower": *Held*, the mistake by the draftsman in the efficacy of the words employed to exclude the dower land was one of fact against which equity will relieve.

4. Same—Successive Conveyances—Purchasers with Notice.

A draftsman failed in drawing a conveyance of lands, to carry out the mutual intention of the parties in excluding from the description certain dower interests, by use of the terms, "saving and excepting the widow A.'s dower." This same mistake in the words employed was made in subsequent deeds by the use of the same words, but with the knowledge of the parties that the widow's dower was intended to have been excluded: *Held*, equity will relieve against the mistake in the subsequent conveyances.

5. Equity—Mutual Mistake—Knowledge—Limitation of Actions.

The statute of limitations begins to run from the discovery of a mistake of the draftsman in the wording of his deed from the time the mistake is discovered, or should have been discovered in the exercise of ordinary care. Revisal, sec. 395 (9).

6. Same—Evidence.

By mistake of the draftsman a deed to lands failed to carry out the mutual intent of the parties in excluding certain dower lands from the description. After the widow had dowered upon the lands, the plaintiffs entered into possession and remained therein up to a few months before action brought, without anything especial to put them on guard that defendants claimed the land by reason of failure of the draftsman to use proper words to exclude the dower lands. The plaintiffs introduced evidence tending to show they had no notice of defendant's claim until the commencement of their action, and there was evidence *contra*: *Held*, the question as to the time the plaintiffs had knowledge of the mistake they seek to relieve against is not one of law, but of fact, to be determined upon by the jury.

APPEAL from *Carter, J.*, at October Term, 1911, of CARTERET.

The action was to remove a cloud from plaintiff's title to a tract of land, known as the old Pelletier homestead, and to correct a mistake of description in a line of deeds, by which same was created, all of the grantees being parties defendant. There was verdict for plaintiff; judgment, and defendant, the Interstate Cooperage (405) Company, excepted and appealed.

The facts are sufficiently stated in the opinion of the court by *Mr. Justice Hoke*.

T. D. Warren and A. D. Ward for plaintiff.
Small, MacLean & McMullan and Abernethy & Davis for defendants.

HOKE, J. There was allegation, with evidence, on the part of plaintiffs, tending to show that in 1894 plaintiffs sold and conveyed to C. S. Riley Co. a tract of land in said county, known as the woodland tract, for a recited consideration of $900; that the Pelletier home tract lay near to this and was at that time included in the widow's dower; that one Lovett Hines, who was acting as agent of C. S. Riley & Co. in the transaction, drew the deed and, in doing so, he included this home tract in the description; that this home tract was not embraced in the trade or intended to be sold or conveyed by the parties, but said Hines, giving the description of a larger boundary in the deed and endeavoring and intending to exclude this home tract, undertook to do so by exception, in terms as follows: "saving and excepting the widow A. A. Pelletier's dower"; that afterwards, in 1904, the woodland tract was conveyed by Riley Bros. to Hines Bros. Lumber Company; in 1905, by Lumber Company to one F. A. Emerick, and in 1907, by said Emerick, to defendant, the Interstate Cooperage Company, the same descriptions appearing in all the deeds. All of the defendants, except Emerick and the Cooperage Company, made formal answers, admitting the mistake, and against them it was established by the verdict and that both of said defendants took and hold the property with full notice and knowledge of all the facts.

It was chiefly urged for error, by the appellants, that the mistake, if any existed, was one of law, and that in such case the courts would not afford relief. The principle relied upon was never, perhaps, as broad as it sounds, and in its practical application has been very much qualified in the later decisons. The position, as it now more generally obtains, is very well stated in 34 Cyc., p. 911, as fol-
(406) lows: "It has been frequently asserted that a mistake of law is not a ground for reformation, but, in late years, the disposition of the courts seems to be to qualify the proposition by many exceptions, so that there is much contrariety of opinion as to the general rule. The most broadly accepted doctrine, however, appears to be that a mere naked mistake of law, unattended by any special circumstances furnishes no ground for relief by reformation, but if the mistake involves fact as well as law or is attended by special circumstances, equity will relieve if the mistake is mutual, so long as the power is not extended to the making of a new contract for the parties." The cases in our own Court, and well-considered decisions elsewhere, are in approval of the general rule as stated. *Condor v. Secrest,* 149 N. C., 201; *Korne-*

gay v. Everett, 99 N. C., 29; *Warehouse Co. v. Ozmont,* 132 N. C., 839; *Sparks v. Pittman,* 57 Miss., 511.

In *Kornegay's case* it was held: "Where it is admitted or proved that an instrument, executed in pursuance of a prior agreement, by which both parties meant to abide, is inconsistent with the purpose for which it was designed, or that by reason of some mistake of both parties it fails to express their intention, a court of equity will correct it, although the mistake be one of law." And in the Mississippi case the same decision was made as follows:

"The rule that equity will not relieve against mistakes of law is not absolute. Relief from the consequences of an agreement formed upon a misapprehension of the law will not for that reason alone be granted. But if a deed, or instrument, is executed, and by reason of misapprehension of its legal effect fails to effectuate or conform to the agreement, a court of equity will relieve."

The principle is not further dwelt upon for the reason that in the present case the mistake is clearly one of fact and not of law. A mistake of law in this connection simply means that made in the absence of equitable circumstances. "A mere naked mistake of law," when the parties have correctly expressed the agreement they intended to make, will not be relieved against because they acted in ignorance of the legal effect of the instrument they have executed. Such a (407) case was presented in *Sandlin v. Wood,* 94 N. C., 490, and others of like import; but here they did not make the deed they intended. They had not sold the home tract and neither of the parties agreed or intended that it should be conveyed, and the mistake made is none the less one of fact because the draftsman mistook the legal effect of the terms used in making the exception. This is very clearly stated in one of the authorities cited, as follows: "There are certain principles of equity, applicable to this question, which, as general principles, we hold to be incontrovertible. The first is, that where an instrument is drawn and executed, which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which by mistake of the draftsman, either as to *fact* or *law,* does not fulfill, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. The reason is obvious. The execution of agreements, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and if the instrument which is intended to execute the agreement be, from any cause, insufficient for that purpose, the agreement remains as much unexecuted as if one of the parties had refused altogether to comply with his engagement; and

a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as in the other, by compelling the delinquent party fully to perform his agreement according to the terms of it and to the manifest intention of the parties" (*Hunt v. Rousmaniere,* 26 U. S., 1-13), and is generally recognized. *Springs v. Harven,* 56 N. C., 96.

It was further contended that plaintiff's cause is barred by the statute of limitations, but this, too, must be held against the appellant. Construing the statute applicable, Revisal, sec. 395, subsec. 9, the Court has decided that the statute of three years begins to run from the time the facts constituting the mistake were discovered or should have been, in the exercise of ordinary care (*Peacock v. Barnes,* 142 N. C., 215), and the same opinion also holds that a party will not be affected with notice of a mistake existent in the deed as a matter of law, but, in the
(408) absence of actual knowledge or negligent inattention, the question as to the date when the action accrued is usually one for the jury, under all the facts and attendant circumstances. Here, according to the testimony, the deed was drawn by the agent of the grantee, and there was nothing to attract the attention of the grantors to the fact that there had been a mistaken description made in the deed. So far as appears, the home place had not been mentioned. It was then in the control and occupation of the grantor's mother, holding the same as her dower, and on her death, in 1905, plaintiffs entered into possession and control as owners, and nothing has ever been done to question their title. There was nothing especial to arouse their attention or put them on their guard as to an adverse claim, and they swear as a fact that they had no notice of it until June, 1909, about seven months before action commenced. Under a clear and comprehensive charge, the jury, as stated, have found all the issues as to the mistake and knowledge on the part of appellants and the statute of limitations in plaintiff's favor, and we find no reason for disturbing their verdict.

No error.

Cited: Wilson v. Scarboro, 163 N. C., 389; *Allen v. R. R.,* 171 N. C., 342.

(409)

JESSIE ARCHBELL v. WILLIAM J. ARCHBELL.

(Filed 20 March, 1912.)

1. Husband and Wife—Contracts—Deed of Separation—Public Policy.

A deed of separation executed by the husband and wife is not against our public policy, when properly made in accordance with our statutes.

2. Same—Time of Separation.

The validity of a deed of separation between husband and wife will not be upheld if it looks to a separation at some future time; and it is effective only when the separation has already taken place or is to immediately follow the execution of the deed.

3. Husband and Wife—Contracts—Deed of Separation—Reasonableness.

A deed of separation between husband and wife, to be valid, must be made for an adequate reason, not for mere mutual volition or caprice, and under circumstances of such character as to render it reasonably necessary to the health or happiness of the parties.

4. Same—Circumstances.

An agreement of separation between husband and wife must be reasonable, just, and fair to the wife, having due regard to the condition and circumstances of the parties at the time it was made.

5. Husband and Wife—Contracts—Deed of Separation—Subsequent Relations.

A deed of separation between husband and wife is rescinded by the acts of the parties in subsequently resuming their conjugal relations.

6. Husband and Wife—Contracts—Deed of Separation—Divorce, Action for.

An agreement of separation between husband and wife does not affect the rights of the parties to sue for a divorce for cause occurring either before or after it has been made.

7. Same—Property Rights—Evidence.

When, after an agreement of separation has been entered into between a husband and wife, a decree of divorce has been obtained, the agreement, if otherwise valid and in so far as it affects the property rights involved, should be upheld by the decree.

8. Husband and Wife—Marriage and Divorce—Property Rights—Maintenance.

The right of a married woman to support and maintenance is primarily a property right, and it may be, and very usually is, made largely dependent on the amount of property owned by the husband.

9. Husband and Wife—Contracts—Deed of Separation—Requirements.

While it is not held to be against our public policy for a husband and wife to enter into a valid contract of separation, the identity of person

between husband and wife in reference to their right to contract with each other is not further relaxed or affected than is specified and required by our Constitution and statutes.

10. Same—Interpretation of Statutes.

Contracts between husband and wife upon consideration of their separation and living apart which purport to release or quitclaim dower, curtesy, and "all other rights which they might respectively acquire or may have acquired in the property of each other," are, by Revisal, sec. 2108, subjected to the requirements of Revisal, sec. 2107, that in addition to the ordinary form the probate officer shall certify that the contract is not unreasonable or injurious to the wife, which certificate shall be conclusive until successfully impeached for fraud; and where, as in this case, the requirements of the statute have not been met, the contract of separation is inoperative.

(410) APPEAL from *Cline, J.*, at December Term, 1911, of BEAUFORT.

Action for divorce from bed and board. In the complaint the plaintiff by proper averment alleged cruelties and ill-treatment, entitling her to divorce *a mesna*, etc.; alleged further, ownership of an amount, real and personal, of property by defendant, and that he was an able-bodied man, capable of earning good wages, etc. Defendant answered, denying all allegations of cruelty and set up counterclaim for divorce by reason of wrongful abandonment by plaintiff, and denied the ownership of any real property whatever, alleging that it had all been disposed of and the proceeds expended in support of plaintiff and the payment of costs and charges imposed upon him at the instance and by the wrong of plaintiff; that his personal property was of insignificant amount and that he was a man sixty years of age, who could only do ordinary manual labor and was incapable of earning any such amount as claimed in the complaint. The answer further set up a deed of separation entered into by plaintiff and defendant of date 14 October, 1909; averred full compliance therewith on part of defendant and relied upon the terms of same in bar of the action and in bar of any other or further allowance to plaintiff by reason of the marital relations between the parties. This contract and agreement was in terms as follows:

NORTH CAROLINA—COLUMBUS COUNTY.

These articles of agreement entered into between W. J. Archbell of Beaufort County and Jessie Archbell of Columbus County, this 14 October, 1909, witnesseth: That whereas the said W. J. Archbell (411) and Jessie Archbell were lawfully married in North Carolina four years ago, and for the past year have been unable to agreeably live together as man and wife; and whereas it is mutually agreeable

that they shall each live separate and apart from the other; now, therefore, for and in consideration of the sum of $100 to the said Jessie Archbell in hand paid, the receipt of which is hereby acknowledged, the said W. J. Archbell and Jessie Archbell do mutually agree to live separate and apart from one another, and in consideration of the sum of $100 to her, the said Jessie Archbell, paid by the said W. J. Archbell, the said Jessie Archbell agrees, and by these presents does agree, to release and relinquish all right of support, all dower right, and all other personal and property rights which she might have acquired against the person or property of the said W. J. Archbell by virtue of the aforesaid marriage, and does hereby receive and accept the aforesaid $100 in full payment and satisfaction of all and of every right that she may hold against the person and estate of the said W. J. Archbell in consequence of the aforesaid marriage, and she does further agree to abandon and relinquish and release the said W. J. Archbell of all and every right of suit that she might have against him by reason of an act of abandonment that he might have committed in the past, and further agrees to release him of any claim she might have against him by reason of the aforesaid marriage. And the said W. J. Archbell agrees to release the said Jessie Archbell of all and every right of curtesy and all rights that he acquired in any property that she might have or might in the future possess and all personal rights that he might have acquired against her by virtue of the aforesaid marriage. And it is mutually agreed that they shall each live separate and apart from the other, independently of the other to the same extent as if they had never been married, and each shall in the future contract and be contracted with independently of the other to the full extent as if they had never been married.

In testimony whereof the said W. J. Archbell and Jessie Archbell have hereunto set their hands and seals this 14 October, 1909.

JESSIE ARCHBELL (SEAL).
W. J. ARCHBELL (SEAL).

And same was acknowledged before a justice of the peace in (412) ordinary form of privy examination; probate adjudged correct by Superior Court Clerk, Beaufort County, and duly registered in said county on 28 October, 1909. On issues submitted the jury rendered the following verdict:

1. Were plaintiff and defendant married, as alleged? Answer: Yes.
2. Has plaintiff been a resident of the State two years before filing the complaint? Answer: Yes.
3. Did defendant in 1908 and up to February, 1909, fail and refuse

to furnish plaintiff and her child proper and sufficient food, clothing, and other provisions, as alleged? Answer: Yes.

4. Did defendant on and shortly after February, 1909, assault the plaintiff with strops and other instruments, as alleged? Answer: Yes.

5. Did the defendant in the year 1906 strike plaintiff with his hand, as alleged by her? Answer: Yes.

6. Did defendant assault and beat plaintiff prior to May, 1906, as alleged? Answer: Yes.

7. Did defendant shortly after February, 1909, assault plaintiff on or near the bridge with her child and whip her, as alleged: Answer: Yes.

8. Did defendant wrongfully take plaintiff's infant from her and carry it out of the State, as alleged? Answer: Yes.

9. Did defendant offer such indignities to the person of plaintiff as to render her condition intolerable and life burdensome? Answer: Yes.

10. Did the defendant by cruel and barbarous treatment endanger the life of plaintiff? Answer: Yes.

11. Has the defendant been a resident of North Carolina two years preceding the filing of his answer, as alleged? Answer: Yes.

12. Did the plaintiff abandon the defendant as alleged? Answer: No.

13. Was the deed of separation procured through fraud and undue influence? Answer: No.

On the verdict defendant through his counsel tendered judgment for divorce *a mensa* and denying order for alimony by reason of the
(413) contract, etc., above set forth. The court being of opinion that the deed of separation was void as a matter of law, entered judgment for divorce and awarding alimony, $15 per month for support of plaintiff and $75 to be paid into court as fees for Ward & Grimes in conducting present suit, and defendant excepted and appealed.

Ward & Grimes for plaintiff.

E. A. Daniel, Jr., and A. D. MacLean for defendant.

HOKE, J., after stating the case: In *Collins v. Collins,* 62 N. C., 153, the Court made definite decision "that articles of separation between husband and wife, whether entered into before or after separation, were against law and public policy and therefore void." Since that decision was rendered in 1867, our statutes upon "Marriage and Marriage Settlements and Contracts of Married Women." as entitled in The Code of 1883 and contained with amendments in Revisal 1905, ch. 51, have made such distinct recognition of deeds of this character, more especially in

Revisal, secs. 2116, 2108, 2107, etc., that we are constrained to hold that public policy with us is no longer peremptory on this question, and that under certain conditions these deeds are not void as a matter of law. This change in our public policy, which has been not inaptly termed and held synonymous with the "manifested will of the State," *Jacoway v. Benton,* 25 Arkansas, 634, has been already recognized in several of our decisions, as in *Ellett v. Ellett,* 157 N. C., 161; *Smith v. King,* 107 N. C., 273; *Sparks v. Sparks,* 94 N. C., 527. And while there are some differences in the matter of form and in the conditions requisite to their validity and their effect when executed, the general proposition as to the validity of these deeds, in so far certainly as they concern property rights, is in accord with that long established in England, *Hill v. Hill,* 1 H. L. Cases, 1847 and 48, 553, and notes to *Stapleton v. Stapleton,* 2 White and Tudor's Leading Cases in Equity, II, 1675, 1697, 1698, and which has generally prevailed with the courts in this country, *Walker v. Walker,* 76 U. S., 743; *Commonwealth v. Thomas Richards,* 131 Pa. St., 209; *Cary v. Mackey,* 82 Me., 516; *Aspinwall v. Aspinwall,* 49 N. J. Eq., all of them, so far as examined, except in New Hampshire. *Hill v. Hill,* 74 N. H., 288; *Foote v. Nickerson,* 70 N. H., 496. (414)

While our statute, as stated, recognizes these deeds as valid, it makes no definite regulation as to their contents or their effect when made, except in 2116, which provides in general terms that when a woman is living separate from a husband, either under a judgment of divorce or a deed of separation executed by the husband and wife and registered in the county where she resides, she shall be deemed and held a free trader with power to dispose of her personal and real estate without her husband's assent, and the question being to a great extent without authoritative decision in this State, we must recur for guidance to the general principles applicable and to well-considered precedents elsewhere as to the nature of these instruments and the conditions and circumstances under which they may be properly upheld. From a consideration, then, of the authorities, we take it as established that articles or deeds of separation are permissible where the separation has already taken place or immediately follows; but that agreements looking to a future separation of husband and wife will not be sustained, and from the apparent weight of opinion it seems in making such agreements, under the circumstances indicated, the parties must be moved to it by adequate reasons, and not from mere "mutual volition or caprice," under circumstances of such character as to "render it reasonably necessary to the health or happiness of the one or the other," a position well stated in a case from Montana as follows: "An agreement between husband

and wife providing for a separation, an adjustment of their respective interests in property and for the future support and maintenance of the wife, is valid only when it is to take effect at once and is immediately complied with, and when the marital relations are of such a character as to render a separation necessary for the health or happiness of one or the other. Mere willingness to live apart is not enough, neither will the agreement be enforced when it is the result of mutual caprice or reckless disregard of marital obligations; neither will such an agreement be enforced when it is to be used as a means to facilitate a divorce."

(415) *"Held,* accordingly, a demurrer to the complaint was properly sustained, where the complaint alleges the agreement to live apart, the mutual obligations thereunder, and the breach of the contract by the husband, but neither the agreement nor the complaint contains any statement of facts showing the necessity or cause for such separation." 19 Montana, 115. This case and the principle it sustains is referred to with approval in a full and learned note to *Baum v. Baum,* 109 Wis., 47, *S. c.,* 83 American St., 854-866. The note in question, however, refers to an opinion by *Sanborn, J.,* in *Daniels v. Benedict,* 97 Fed., 367 and 369, as a "well-considered case," and in which a contrary view is taken, the case holding, among other things, that the relations existing between husband and wife as justifying a deed of this kind must be left to the determination of the parties interested, and that the "courts cannot inquire into the sufficiency of the reasons as affecting the validity of the agreement."

It may be that our statutes, 2107, 2108, hereinafter more particularly referred to, resolve this question in favor of the Federal decision, and the difference appearing in these cases is not perhaps of the first importance, as it will be a very rare occurrence when a deed of the kind is made without adequate reason moving the parties—a condition assuredly present in the case before us.

It is further established that if the parties resume the conjugal relations the agreement will be rescinded. This has been directly held with us in *Smith v. King,* 107 N. C., 273, and is in accord with the weight of authority. *Zerminer v. Settle,* 124 N. Y., 37; Tiffany on Domestic Relations, 168. Again it is held, "That such an agreement must be reasonable, just and fair to the wife, having due regard to the conditions and circumstances of the parties at the time when made." *Garver v. Miller,* 16 Ohio State, 528; *Hutton v. Hutton,* 3 Pa. St., 100.

The authorities also hold that these agreements, even when valid, do not affect the right of the parties to sue for a divorce for causes occurring either before or after they are entered. *Bailey v. Bailey,* 127 N. C., 474; notes to *Baum v. Baum,* 83 Am. St., 873. And while the American

courts hold that deeds of separation are so far imperfect obligations that they will not be specifically enforced in that feature which contemplates or provides for the separation of the parties (*Aspinwall v. Aspinwall,* 49 N. J. Eq., *supra*), when a suit for divorce is (416) entered and the same is obtained, the agreement, if otherwise valid and in so far as it affects the property rights involved, should be respected by the decree. *Galusha v. Galusha,* 116 N. Y., 635. On the record, therefore, we could not, as formerly, declare the deed void in law as against the present public policy of the State, and if the matter were presented only in that aspect, we would feel constrained to uphold the deed, or in any event remand the case for a fuller finding as to whether the instrument in question was a fair and just arrangement. We are of opinion, however, that the judgment of the lower court should be sustained for the reason on which his Honor, no doubt, acted, that the deed in question is not executed in the form and manner required by our law to make it a binding agreement. On the matter of form, a large number of the States upholding these deeds have heretofore maintained that the interposition of a trustee was necessary, as in *Stevenson v. Stevenson,* 41 Miss., 119. This was based partly on the principle of the absolute identity of person in the case of husband and wife, which prevented their making contracts directly between them, a principle approved and acted on in the English courts and which prevailed to a great extent in North Carolina prior to the Constitution of 1868. *Barbee v. Armstead,* 32 N. C., 530. A number of courts, however, have always maintained a contrary view, as in *Jones v. Clifton,* 101 U. S., 225; *Randall v. Randall,* 37 Mich., 573; *Commonwealth v. Richards,* 131 Pa., *supra,* etc.; and in this respect also a change has been wrought in our law and public policy, not only as manifested by the general provisions of the Constitution of 1868 and subsequent statutes, but more directly by express legislative enactment. Revisal 1905, secs. 2107, 2108, 2116. Section 2107 provides that no contract between husband and wife made during coverture shall be valid to affect or charge any part of the wife's real estate or the accruing income thereof for a longer time than three years, etc., or to impair or change the body or capital of her present estate unless in writing, etc., the wife's privy examination taken, with an additional certificate of the examining (417) officer that the "same is not unreasonable or injurious to her," etc.

Section 2108 provides that contracts between husband and wife not forbidden by the preceding section and not inconsistent with public policy are valid and subject to preceding section. Any married person may release or quitclaim dower, tenancy by the curtesy, and all other rights which they may respectively acquire or have acquired by mar-

riage in the property of the other, and such releases may be pleaded in bar of any action or proceeding for the recovery of the right so released. While the presence of a trustee is clearly dispensed with by these enactments, it will be noted that by section 2107, in order to bind the wife by contract with the husband which may affect or charge her real estate, etc., for a longer period than three years or to impair or charge the body or capital of her personal estate, the contract must be in writing, her privy examination taken and, in addition to the ordinary form, there must be the additional certificate that the same is not unreasonable or injurious to her, the section concluding as follows: "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." Section 2108 in express terms subjects to requirements of 2107 contracts between husband and wife which purport to release or quitclaim dower, curtesy, and "all other rights which they might respectively acquire or may have acquired in the property of each other." While we have held that an allowance by way of alimony may be predicated in some instances on the capacity of the husband to labor, *Muse v. Muse,* 84 N. C., 35, this right of a married woman to support and maintenance is primarily a property right, or may be and very usually is made very largely dependent on amount of property owned by the husband. *Taylor v. Taylor,* 93 N. C., 418; Nelson on Divorce, secs. 908-909. Our decisions are to the effect that the identity of person between husband and wife in reference to their right to contract with each other is not further relaxed or affected than is specified and required by the Constitution and statutes (*Armstrong v.* (418) *Best,* 112 N. C., 59; *Sims v. Ray,* 96 N. C., 87), and this section 2108 by correct interpretation clearly contemplates that a deed of the kind presented here, "surrendering dower and all personal and property rights which she may have acquired against the person and property of her husband," shall only be upheld when it complies with the forms established and required by section 2107. On this ground, therefore, the ruling of the lower court holding that the instrument is void and of no effect on the rights of these parties is affirmed.

No error.

Cited: Pierce v. Cobb, 161 N. C., 303.

L. G. DANIELS ET AL. v. ROANOKE RAILROAD AND LUMBER COMPANY.

(Filed 20 March, 1912.)

1. Trespass—Possession—Pleadings—Damages—Freehold.

In an action for damages for trespass on lands possession must be alleged and shown; but when the damages claimed are to the freehold, the land itself, the plaintiff must show his title at the time of the injury complained of.

2. Same—Deeds and Conveyances.

Damages for cutting timber under the size, and not of the kind conveyed to the defendant in a timber deed, and those caused by his negligently setting fire thereto, are not recoverable by the plaintiff if they accrue subsequently to his conveying the freehold, or the land itself; but it is otherwise as to any he may have sustained prior to that time, for such damages are personal to the owner of the property and do not pass to his grantee of the land.

3. Corporations—Pleadings—Corporate Existence—Evidence.

While ordinarily the right to question the exercise of corporate powers is with the State, and cannot be raised collaterally, a denial in the answer of plaintiff's corporate existence requires proof on plaintiff's part that it is a corporation.

4. Same—Estoppel.

When plaintiff's corporate existence is denied by the answer sufficient affirmative proof may be furnished by the introduction of the character and evidence of its acceptance, by the exercise of corporate powers for a long time without objection, by estoppel, etc.

5. Same.

When denied by the answer, the corporate existence of a plaintiff corporation may be established by the recognition thereof by one of the defendants in having conveyed the lands the subject of the controversy, to the plaintiff as a corporation, and, by the other defendant claiming title under the plaintiff's deed, as a corporation, by way of estoppel.

6. Same—Partnership.

When the plaintiff, purporting to be a corporation, takes title to lands from one defendant as a corporation and as a corporation conveys it to another defendant, the estoppel which would bind the defendants in the action concerning the lands conveyed would also bind the partnership, plaintiffs, if in point of fact a partnership and not a corporation, as it purported to be.

7. Same—Deeds and Conveyances.

It is no defense to an action to recover damages to the freehold that the plaintiff's corporate existence was denied and not sufficiently established, and therefore a conveyance of the *locus in quo* to it as a cor-

poration did not pass title, for, in the absence of objection by defendant that the individuals composing the partnership were not parties, the plaintiff may maintain its action in the partnership name.

8. Damages—Several Plaintiffs—Apportionment—Right of Defendant.

It being established in this case that one of the parties plaintiff may recover damages to the freehold of the defendant for trespass before the execution of his deed to the other plaintiff, it is *Held*, the defendant had no voice in the apportionment of the damages between the plaintiffs.

9. Deeds and Conveyances—Timber Deeds—Interpretation—Exclusion of Certain Timber.

The expression in a deed to timber, that the grantee "shall have the further right to take and use such of the dead down timber, etc., including small gum, etc., as may be necessary for the purpose of constructing and maintaining and operating the said roads and railroads, etc.," is *Held* in this case to exclude the use of cedar, which was growing upon the lands, by the use of the words "including small gum."

10. Damages by Fire—Evidence—Harmless Error.

In this action for damages alleged to have been caused by the negligent burning off of plaintiff's lands, the testimony objected to was competent as tending to show that the fire was caused by defendant's act; and while the answer of a witness to a question asked by plaintiff, that the smokestack to defendant's engine was "in bad condition," was objectionable, it is not held for reversible error, as elsewhere he was required to state what he meant by his use of the words "bad condition."

(420) APPEAL from *Ferguson, J.*, at August Special Term, 1911, of PAMLICO.

This action is brought by L. G. Daniels and the Atlantic Coast Forest Preserve and Improvement Company to recover damages alleged to have been caused by the negligence of the defendant in setting out fire, damages for cutting timber under the size permitted by a deed under which the defendant claims, and for cutting cedar which the plaintiffs claim is not conveyed by said deed.

The summons was issued on 18 August, 1909.

On 22 May, 1906, the plaintiff Daniels executed a deed to the defendant lumber company conveying "all of the timber trees of every description on the land described (except cedar and gum) now standing or growing or which may be standing or growing during the ensuing term of six years from and after 1 January, 1907, and which when cut will measure as much as or more than 10 inches in diameter at the base, that is to say, 18 inches above the ground," on the land described therein; and this deed further conveyed to the defendant "all the rights, privileges, and easements which ordinarily are incident to and necessary for the removing of the timber conveyed, or to the cutting, rafting,

and removing of same," and also conveyed to defendant the right to use such dead trees and down timber, earth, underbrush, and timber under the size mentioned therein conveyed, including small gum upon said land, as may be necessary for the purpose of constructing, maintaining, and operating said roads and railroads, and for operating any locomotive or other machinery, and for all other purposes necessary and incident to the cutting, rafting, and removal of said timber.

On 17 December, 1908, the said L. G. Daniels conveyed the (421 land described in the complaint, subject to the timber rights of said lumber company, to Albin Daniels, and on the next day, 18 December, 1908, the said Albin Daniels executed a deed, conveying said land, subject to said timber rights, to the plaintiff the Atlantic Coast Forest Preserve and Improvement Company, and on 1 April, 1910, said company undertook to execute a deed reconveying said land, subject to said timber rights, to the plaintiff L. G. Daniels.

In the deed executed by Albin Daniels, the plaintiff improvement company is described as a corporation under the laws of Massachusetts, and in the deed of 1 April, 1910, the said company is also described as a corporation of Boston, Mass.

Objection was made to the introduction of the last-named deed, upon the ground of defective probate, and the attestation clause, the execution, and probate are as follows:

In testimony whereof the said party of the first part hath caused these presents to be executed in its name by its president and attested by its secretary and its corporate seal to be hereunto affixed the day and year first above written.

ATLANTIC COAST FOREST PRESERVE AND IMPROVEMENT COMPANY,
By ALVAH G. SLEEPER, *President.*
CLAUDE H. DANIELS, *Clerk.*

Witness to signature:
MOSES H. LIBBY.
NELLIE ORTON.
(Notarial Seal.)

COMMONWEALTH OF MASSACHUSETTS.
(Notarial Seal.)

SUFFOLK—ss. BOSTON, 1 April, 1910.

There personally appeared the above-named Alvah G. Sleeper and acknowledged the foregoing instrument to be his free act and deed, before me.

WALTER E. BROWNELL,
Notary Public.

STATE OF MINNESOTA—County of St. Louis—ss.

This is to certify that on 30 April, 1910, before me personally came C. H. Daniels, clerk, with whom I am personally acquainted, who, being by me duly sworn, says: That Alvah G. Sleeper is the president of the Atlantic Coast Forest Preserve and Improvement Company, the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president, and that said president and clerk subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation.

Witness my hand and seal the day and year above written.

NELLIE ORTON, [SEAL]
Notary Public.

Notary Public, St. Louis County, Minn.

NORTH CAROLINA—Pamlico County.

The foregoing certificate of Walter E. Brownell, notary public of the State of Massachusetts, and the certificates of Nellie Orton, notary public of St. Louis County, State of Minnesota, are adjudged to be correct. Let the instrument with the certificates be registered.

Witness my hand, this 5 August, 1910.

GEO. T. FARNELL, C. S. C.

There was evidence on the trial that, at the time of the execution to the defendant lumber company of the deed of 22 May, 1906, from 125 to 150 acres of the land had cedar on it; that soon thereafter said defendant took possession of said land and began cutting and removing timber, which it continued for several years, and that at the conclusion of its operations very little cedar was on the land.

There was also evidence of two fires, one in September, 1909, (423) and the other in October of the same year, which injured the property of the plaintiff, and also that the defendant had cut timber under the size allowed by its deed.

The defendant offered evidence to the contrary, but it is not necessary to state the evidence of either party more fully, as the motion of the defendant to nonsuit is not upon the ground that there is no evidence to support the findings of the jury, except as to the first issue, and the evidence on that issue has been stated.

At the conclusion of the evidence the defendant moved for judgment of nonsuit, upon the following grounds, as shown by the brief of the defendant:

"That the plaintiffs have offered evidence showing the conveyance of title to the timber to the defendant by plaintiff L. G. Daniels, and have further offered in evidence a deed from L. G. Daniels to Albin Daniels, prior to the date of the alleged trespass, and that there is no right of L. G. Daniels to recover for any trespass that may have been committed (if any) in any view of the case between the date of the deed to Albin Daniels and date of the deed from Atlantic Coast Forest Preserve and Improvement Company to L. G. Daniels, to wit, between 17 December, 1908, and 1 April, 1910. That the conveyance having been made prior to the alleged trespass, divested him of all right of action during the time the title rested in Albin Daniels and the other date. The trespass having been committed between December, 1908, and April, 1910, upon all the evidence, then there was no right of action in the Atlantic Coast Forest Preserve and Improvement Company, they having made a conveyance to L. G. Daniels of the land without reserving any rights of action, and there being no evidence as to their corporate existence (the corporate existence being alleged in the complaint and denied in the answer), then there is no right of recovery in the Atlantic Coast Forest Preserve and Improvement Company. If there were evidence of trespass prior to December, 1908, then L. G. Daniels, having conveyed fee-simple title, without reserving to himself the rights of action for alleged trespass, he would not be entitled to maintain his action for recovery of damages thereafter," and that no actual possession of the land had been shown in either of there plaintiffs. The motion was denied, and defendant (424) excepted.

The defendant requested that the following instructions be given to the jury:

1. If the jury shall find from the evidence that any cedar was cut or used by defendants, the court charges you that under the provisions of said deed they had the right to use such cedar under the size of 10 inches in diameter at the stump, 18 inches above the ground, and such dead and down cedar, along with other undersized timber as was necessary in the construction of its roads, engines, and machinery on said land.

2. That the defendants had the right to cut out such cedar trees as were in its roadways, and plaintiffs are not entitled to recover anything for cedar so cut and moved out of the rights of way in the construction and operation of its road upon said land.

The first was refused, and the defendant excepted, and the second was substantially given.

There are three exceptions to evidence, which will be referred to.

The issues and the answers thereto are as follows:

1. Is plaintiff Atlantic Coast Forest Preserve and Improvement Company a corporation? Answer: Yes.

2. Did defendants wrongfully and negligently set fire to and burn plaintiff's land, timber, and trees, as alleged in the complaint? Answer: Yes.

3. If so, what damages are plaintiffs entitled to recover therefor? Answer: $1,500.

4. Did defendants wrongfully and negligently cut and destroy plaintiffs' cedar trees and cedar timber, as alleged? Answer: Yes.

5. If so, what damages are plaintiffs entitled to recover by reason thereof? Answer: $500.

6. Did defendants wrongfully and negligently cut and destroy plaintiffs' timber and trees other than cedar, not conveyed in said deed, as alleged? Answer: No.

7. If so, what damages are plaintiffs entitled to recover by (425) reason thereof? Answer.

Judgment for the plaintiffs, and defendants excepted and appealed.

Simmons & Ward, H. L. Gibbs, and T. D. Warren for plaintiffs.
Moore & Dunn and Small, MacLean & McMullan for defendants.

ALLEN, J. No objection is made by answer or demurrer that there is a misjoinder of parties or causes of action, and no exception presents the question of the right of the plaintiffs to recover for trespasses committed after the commencement of the action. We do not intimate that such objections would have been sustained, and refer to them only for the purpose of excluding the idea that they were relied on, and are embraced in the motion for judgment of nonsuit.

The defendants say, upon the facts admitted, that neither of the plaintiffs is entitled to maintain this action; that the plaintiff L. G. Daniels cannot do so as to trespasses committed prior to 17 December, 1908, because on that day he conveyed the land to Albin Daniels, without reserving the right of action, nor as to trespasses after that date, because he had parted with his title to the land; and that the plaintiff improvement company has no right to sue, because its corporate existence is denied in the answer, and no evidence has been introduced to establish its incorporation, and further, if a corporation, having exe-

cuted a deed of date 1 April, 1910, conveying the land without reserving its right of action, it now has no right to sue.

We will consider these questions in their order, and first as to the right of the plaintiff Daniels, and this depends on the effect of his deed to Albin Daniels.

The plaintiffs do not allege as a cause of action an injury to their possession, which would be sufficient to maintain an action for trespass, *Frisbee v. Marshall,* 122 N. C., 760, but they seek to recover damages for injury to the freehold—the land itself—and it therefore was necessary to show title at the time of the injury complained of. If so, the plaintiff Daniels could not recover damages accruing after the execution of his deed of 17 December, 1908; but we do not think this deed, which purports only to convey the land, has the effect of (426) transferring to the grantee his right of action for damages accruing prior to its execution. *Liverman v. R. R.,* 114 N. C., 696; *Drake v. Howell,* 133 N. C., 168.

In the last case cited the plaintiff sought to recover damages for cutting timber on certain land, and the Court, among other things, said: "There is an allegation in the pleadings that the plaintiffs have acquired the title to the Britt tract since this action was commenced; but this, if true, cannot help them, as a conveyance of title to the land after the defendants had committed the alleged trespass would not pass the right to the damages claimed by the plaintiffs. Such damages are personal to the owner of the property and do not pass to his grantees. *Liverman v. R. R.,* 114 N. C., 692."

The right of the improvement company to sue depends upon the solution of other questions.

The defendant denies that this plaintiff is a corporation, and it says if there is no evidence of its corporate existence, that the deed of Albin Daniels to the improvement company has no effect, and that therefore the title remained in Albin Daniels, and that there can be no recovery of damages for acts committed after 17 December, 1908, the date of the deed, as Albin Daniels is not a party plaintiff; and it contends further that the failure to prove that the company is a corporation incapacitates it to sue.

We must then inquire:

1. Is there evidence that the improvement company is a corporation?

2. If not, how does this affect the title to the land and the right to sue?

Ordinarily, the right to question the exercise of corporate powers is with the State and cannot be raised collaterally, but it has been held

in this State that a denial of corporate existence in an answer requires some proof on the part of the plaintiff.

This may be furnished by the introduction of a charter and (427) evidence of its acceptance; by evidence of the exercise of the powers of a corporation for a long time without objection; by estoppel, and in other ways, and we are inclined to the opinion that the fact that all of the parties claim under L. G. Daniels; that Albin Daniels, in his deed of 18 December, 1908, described the improvement company as a corporation; that the improvement company executed the deed of 1 April, 1910, as a corporation, and that during the whole of this period the defendant was in the use and occupation of the land, is evidence of the fact; but if this is not so, the defendant is in no way prejudiced by the failure of strict proof. Albin Daniels held the title to the land one day, and there is no evidence of a trespass on that day. He conveyed to the improvement company as a corporation, and the improvement company as a corporation conveyed to the plaintiff L. G. Daniels. It follows that Albin Daniels and L. G. Daniels are estopped to deny the corporate existence of the company, and if it is in fact a partnership, the estoppel would extend to its members, who have permitted it to be held out as a corporation, and to receive and execute deeds, and to institute actions as such. If so, all the parties who could make any claim against the defendant, covering the time when the trespasses are alleged to have been committed, are bound by the estoppel, and neither can deny that the improvement company is a corporation; and it is not, therefore important to the defendant whether, as matter of fact, it is a corporation.

If, however, material to the decision of this case, and it appeared that the improvement company was a partnership and not a corporation, it would not necessarily follow that the action could not be maintained by it.

A deed to a partnership by the partnership name is not void, *Murray v. Blackledge,* 71 N. C., 492; *Simmons v. Allison,* 118 N. C., 776; *Grabbs v. Insurance Co.,* 125 N. C., 394, and a judgment in favor of a partnership, without giving the names of the partners, is valid. *Wall v. Jarrett,* 25 N. C., 42; *Lash v. Arnold,* 53 N. C., 206.

These last cases were cited with approval in *Heath v. Morgan,* 117 N. C., 507, in which it was held that the action could not be maintained in the partnership name, because objection to the absence of the (428) individuals as parties was taken by demurrer. *Kochs Co. v. Jackson,* 156 N. C., 326.

In this case the defendant does no more than deny that the improvement company is a corporation, and if this is true, it may maintain the

action in its partnership name, in the absence of objection by the defendant that the individuals composing the partnership are not parties.

We are, therefore, of opinion that the plaintiff L. G. Daniels may recover damages for trespass committed prior to 17 December, 1908, the date of his deed, and that the improvement company may recover for trespasses after that time, and also, as his Honor held, that the defendant has no voice in the apportionment of the damages between them. *Hocutt v. R. R.*, 124 N. C., 217.

We think his Honor construed the deed correctly as to the right to cut cedar, and that he properly refused to give the instruction requested.

The deed of the plaintiff Daniels to the defendant expressly excepts cedar and gum from the conveyance, and in the clause allowing the use of timber under the size conveyed provides: "And it is also stipulated and agreed that the party of the second part shall have the futher right to take and use such of the dead and down timber, earth, and underbrush and timber under the size herein conveyed, *including small gum,* upon said lands, as may be necessary for the purpose of constructing and maintaining and operating the said roads and railroads, and for operating any locomotives or other machinery, and for all other purposes necessary or incident to the cutting, rafting, or removal of said timber."

The mention of small gum in this clause, and the failure to refer to the cedar, excludes the idea that it was intended to extend the rights of the defendant as to the cedar.

His Honor instructed the jury that the defendant had the right to cut cedar when necessary to construct its roads or to move its machinery.

There are three exceptions to evidence:

1. To the evidence of a witness for the plaintiffs, Edmond (429) Jones: Q. Along about the time those fires took place, what was the condition of the engine as to emitting sparks? A. It was in bad condition.

2. To the evidence of a witness for the plaintiffs, William Potter: Q. Tell what you saw before this time and afterwards as to the engine emitting sparks. A. If we stopped near the engine it would catch our clothes and we would have to move out of the way.

3. To the introduction of the deed of 1 April, 1910, from the improvement company to L. G. Daniels.

The form of the answer of the witness Jones may be objectionable, but it is but another way of saying that the engine emitted a considerable quantity of sparks, and would not justify a reversal of the judgment,

and his entire examination shows that he was required to state what he meant by "bad condition."

The evidence of both witnesses was material to the claim that the defendant set out fire on the land, and competent.

It is not necessary to consid r the objection to the introduction of the deed from the improvement company to L. G. Daniels, as both are parties plaintiff.

The record is voluminous, but we have examined it and the briefs with care, and find

No error.

Cited: *Bowen v. Lumber Co.*, 162 N. C., 519.

J. H. HUDSON ET AL., SURETIES, v. A. W. AMAN ET AL.

(Filed 20 March, 1912.)

Principal and Surety—Joint Action—Severance—Practice—Appeal and Error.

When sureties on a sheriff's bond have been compelled to pay in unequal amounts for the defalcation of the sheriff, and a demurrer to the cause of action against the county has been sustained, leaving the defaulting sheriff the only party defendant: *Semble*, the cause might well have proceeded in joint action, that the ultimate right of the parties should be finally determined, and *Held*, in this case, that as no claim for adjustment among the sureties is made and the plaintiffs have not appealed, the order of severance made in the trial court is upheld, and the plaintiffs allowed to proceed in separate actions for the amount each may have paid.

(430) APPEAL from *G. W. Ward, J.*, at Fall Term, 1911, of SAMPSON.

There was demurrer by A. W. Aman, the present defendant, for misjoinder both as to parties plaintiff and causes of action. The court in its discretion ordered a severance, and defendant Aman excepted and appealed, assigning for error the failure and refusal to dismiss the action for misjoinder.

Faison & Wright for plaintiff.
H. A. Grady for defendant.

HOKE, J. The action was originally instituted by plaintiffs, sureties on the official bond of A. W. Aman, as Sheriff and Tax Collector of

Sampson County, against the defendants, county commissioners of said county. Pending the action said A. W. Aman was duly made party defendant. The complaint in effect alleged that plaintiffs, with others, were sureties on the bond of A. W. Aman as Tax Collector of Sampson County in the sum of $38,500, and that said Aman had failed to comply with the conditions of said bond, had misappropriated and squandered the taxes, and by reason of his said default the plaintiffs, his sureties, had been compelled to pay to the county the sum of $418.50 each, and one of them, J. H. Turlington, had so paid an additional $94. That the commissioners of the county had turned over the current tax lists to said Aman, before requiring proper settlement of him on former lists and when they well knew or had every reason to believe he was already in default, and by reason of this breach of statutory duty had caused increased loss and damage to plaintiffs, his sureties.

To this complaint the county commissioners demurred. Their demurrer having been overruled in the court below, on appeal to this Court it was held that no cause of action had been stated against them in plaintiffs' favor. See *Hudson v. McArthur,* 152 N. C., 445. This opinion having been certified down, the action was dismissed as to said commissioners, and thereupon defendant Aman demurred (431) to the complaint, as stated, for misjoinder of parties plaintiff and causes of action.

At common law, sureties who paid the debt of their principal could sustain an action in exoneration of the loss. The action lay in assumpsit, and was ordinarily several and not joint. *Boggs v. Cureton,* 10 Pa., 211; *Peabody v. Chapman,* 20 N. H., 418. Even at law, however, when the payment was joint or was made out of a joint fund, that sureties were permitted to join in a suit for reimbursements, and this very generally obtained when a judgment had been recovered and was paid by the sureties jointly. *Weeks v. Parsons,* 176 Mass., 570; *Clapp v. Rice,* 15 Gray, 557; *Rizer v. Callen,* 27 Kansas, 339; *Day v. Swann,* 13 Me., 165; *Prescott v. Newell,* 39 Vt., 82. And in courts of equity, when an adjustment of conflicting claims became necessary and a surety brought suit for contributions against cosureties, it was usually required to make the principal and all solvent sureties, resident within the State, parties plaintiff or defendant, that a full determination of interests involved could be had in one and the same suit. *Raney v. Yarborough,* 37 N. C., 249; *Adams v. Hayes,* 120 N. C., 383.

The cause having been dismissed against the county commissioners, the action as it now stands presents a claim by sureties who have paid the debt of their principal and by fair inference have been compelled to pay it by suit, and it further appearing that these payments have

been in unequal amounts, it would seem that the cause might well have proceeded in a joint action, that the ultimate rights of the parties should be finally determined. Inasmuch, however, as no claim for adjustment is demanded and parties plaintiff have not appealed, we see no good reason why the order of severance should not stand and the parties allowed to proceed in separate actions for the amount each has paid, and in no event could the action have been properly dismissed. *Street v. Tuck,* 84 N. C., 605; *Hodges v. R. R.,* 105 N. C., 170. We find no reversible error, and the judgment of the Superior Court ordering a severance of the actions is

Affirmed.

V. SEDBURY v. R. N. DUFFY, A. C. BURNETT, D. H. GREEN, AND H. T. PRATT.

(Filed 27 March, 1912.)

1. Bills and Notes—Guarantors of Payment—Loan—Usury—Interpretation of Statutes.

When the transaction is free from fraud and unlawful imposition, a purchaser may buy a note at any price they may agree upon; but if the purchaser requires the indorsement of the seller, the transaction, as between the immediate parties thereto, is in effect a loan, and will be so considered within the meaning and purport of our usury laws.

2. Same.

The purchaser at $4,200 of a promisory note given for $5,000, upon which $1,000 had been paid, required an indorsement by the payee and another guaranteeing payment. In an action upon the note our statute as to usury was pleaded by the guarantors of payment: *Held,* as between the purchaser and guarantors of payment, the transaction is regarded as a loan, upon which a usurious charge of $200 was made in addition to the legal rate of interest.

3. Bills and Notes—Unqualified Indorsers—Usury—Interpretation of Statutes.

The provisions made as to warranties which prevail in case of unqualified indorsements by Revisal, sec. 2215, refer to lawful transactions, and do not relate to transactions coming within the meaning of our usury laws.

BROWN, J., concurring.

(432) APPEAL from *Whedbee, J.,* at November Term, 1911, of CRAVEN.

Civil action to recover the balance due on a note.

SEDBURY *v.* DUFFY.

It appeared that on 3 March, 1909, defendants R. N. Duffy and A. C. Burnett executed their note to D. H. Green for $5,000; that there had been a payment thereon of $1,000 and the remainder, or $4,000, was due at the time of suit brought; that some time prior to institution of action D. H. Green sold the note to plaintiff for $3,200 and the purchaser required the indorsement of the payee, Green, and H. T. Pratt as guarantee of payment. The indorsers having pleaded that as to them this was an usurious transaction, issues were submitted. The court charged the jury if they believed the evidence to answer the issue as to usury "No." There was judgment for full amount (433) due on note and interest, against all of the parties served with process, and the indorsers, Green and Pratt, excepted and appealed.

D. E. Henderson and K. C. Sedbury for plaintiff.
Simmons & Ward for defendants Green and Pratt.

HOKE, J., after stating the case: It has been repeatedly held, in this State, that while one may buy a note from another, at any price that may be agreed upon, the bargain being free from fraud or unlawful imposition, if the purchaser requires the indorsement of the seller as a guaranty of payment, the transaction, as between the immediate parties thereto, is in effect a loan, and will be so considered, within the meaning and purport of our laws against usury. *Bynum v. Rogers,* 49 N. C., 399; *Ballinger v. Edwards,* 39 N. C., 449; *McElwee v. Collins,* 20 N. C., 209. In the *McElwee case* it was held: "Where an indorsee takes a bill or note with the indorsement or guaranty of the indorser, and advances therefor less than the real value of the bill or note, the transaction is, in effect, a loan between the indorsee and indorser, and is usurious as between those parties." In *Ballenger's case, Chief Justice Ruffin,* delivering the opinion, said: "Now, that is a case of plain usury, and the contracts of Edwards touching it are void by the statute. The bill, indeed, does not enter into the particulars of the contract, but the plaintiff is content to state, in general, that Lane 'purchased' Boykin's bond, and it is laid down that a purchase of a negotiable security for less than the real value is valid. But that is subject to this qualification, that it must be merely a purchase of the security and at the risk of the purchaser, and therefore if the person who claims to be such purchaser holds the person to whom the money is advanced responsible for the payment of the debt, it is not in law and fact a purchase of the security, but a loan of money upon the security; and if the sum advanced be less than the amount of it, deducting the legal interest for the time until maturity, the loan is usurious. *Collier v. Nevill,* 14 N. C., 30; *Mc-*

Elwee v. Collins, 20 N. C., 209. The latter case expressly and correctly lays down the rule that the ordinary case of discounting a note, with an indorsement or guaranty of the receiver of the usury, is a (434) lending within the statute."

The principle is established by statute in reference to the discounting of notes by National banks. Page on Contracts, sec. 477, citing *Gloverville Bank v. Johnston,* 104 U. S., 271, and is enforced in other jurisdictions by courts of recognized authority. *Whitworth v. Yancy,* 26 Va., 383; *Cowles v. McVickar,* 3 Wis., 725.

In the Wisconsin case cited the Court said: "The indorsement or guaranty of a bill or note, by which the party renders himself liable for its payment, is incompatible with a simple sale. It is a contract essentially different from that of bargain and sale. And herein is the distinction clearly perceptible and well established. The simple sale of a note or bill for less than its face is not in itself usurious. But if the vendor indorses, or guarantees, or otherwise becomes liable for the payment of the bill or note, the transaction is usurious. The bill or note may be of doubtful character, and its value a fair subject of calculation; but when the vendor indorses it, or guarantees its payment, and thereby makes himself liable, he then fixes its value (as between him and the vendee) at its face, and there is no room for difference of opinion, or the exercise of skill and judgment. If the transaction between the plaintiffs and defendant was a mere sale of the notes, for their market or estimated value, why seek to hold the defendant liable on his contract of indorsement? The only purpose which the indorsement could serve in such a transaction would be to pass the legal title to the plaintiffs. If the contract was merely one of bargain and sale, the passing of title was all that was requisite. If it was not one of mere bargain and sale, but a contract of indorsement, its legal effect was to create a different relation between the parties than that of vendor and vendee, viz., that of drawer and payee of a bill of exchange, and hence the amount of consideration received, and the amount stipulated to be paid or secured, are such that mere computation brings the transaction within the usury act of 1851."

A proper consideration of these and other authorities sustaining the position will show that a discount of the kind in question does not render the note usurious nor affect the rights and obligations otherwise arising on the instrument. It is only as between the immediate parties (435) that the transaction is regarded as a loan of money and to be so considered and dealt with. *Cowles v. McVickar, supra.* The principle is not changed nor affected by our statute on negotiable instruments, section 2215, making provision as to the warranties which

prevail in case of an unqualified indorsement of commercial paper. By correct interpretation these warranties refer to lawful transactions and the statute in no wise intended to withdraw contracts of that nature from the effect and operation of our laws against usury. Eaton and Gilbert Commer. Paper, sec. 85. Under our authorities, therefore, the court below was in error in holding that as to indorsers the transaction was free from usury, and we would remand the case for further hearing but for an agreement between the parties that if the Court should hold the transaction usurious, judgment should be entered against the indorsers for the amount received by them, with interest. This will be certified, that judgment shall be entered against the principal of the note who was served with process for amount due on the face of the note, with interest, and against the indorsers for $3,200, with interest thereon at 6 per cent from the time this amount was received by them.

Error.

BROWN, J., concurring: I concur in the disposition made of this appeal. But I think as between the indorser of the note and the purchaser, the transaction is not technical usury.

A owns a note for $1,000, signed by B, due twelve months after date. C purchases it for $800, and A indorses it. C is entitled to collect the face of the note from B, but as between A and C the transaction is held to be a loan of $800, which legitimately bears interest from the date of the indorsement.

I think it a misnomer to call the transaction usurious, unless it can be shown that A agreed specifically to pay the $1,000 at the time he indorsed it in order to obtain the $800 from C.

The law fixes A's liability at $800 and interest, and in the absence of proof of an agreement upon his part to pay more, there is no evidence of intent to charge, or pay usurious interest.

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(436)

MARTIN & GARRETT, AGENTS, v. GEORGE M. MASK.

(Filed 27 March, 1912.)

1. Principal and Agent—Parties—"Real Party in Interest"—Bills and Notes—Rentals.

An agent for the collection of rents is not the "real party in interest," within the meaning of Revisal, sec. 400, so as to maintain an action in his name for the benefit of his principal; but when he has taken a rental

note with the consent of his principal, made payable to himself as agent, he may, under Revisal, sec. 404, maintain an action for its collection in his own name.

2. Same—Interpretation of Statutes.

Revisal, sec. 404, permitting "a trustee of an express trust" to maintain an action in his own name, by its explanation of such a trustee, that he "shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another," extends the meaning of the statute so as to include an agent who sues upon a note to him, as an agent, with the consent and for the benefit of his principal.

3. Same—Authority Given.

An agent has no right to require that a debtor to his principal make a note payable to himself, as agent, for the principal's benefit, without authority therefor; but he may do so and maintain an action thereon, in his own name, as agent, if the note is taken with authority from the principal. Revisal, sec. 404. That this does not extend to assignments of claims for collection, pointed out and discussed by ALLEN, J.

4. Same—Motion to Dismiss—Evidence.

A motion to dismiss an action on a note made to an agent, on the ground that the agent was not the real party in interest, made before the introduction of evidence, is properly overruled, as the plaintiff would be entitled to show that he had the authority from his principal to have had the note payable to himself as such, for the benefit of the principal; though in this case it should have been allowed if it had been made after the close of the evidence, as there was nothing to prove the required authority. Revisal, sec. 404.

5. Principal and Agent—Bills and Notes—Production of Note—Evidence, Prima Facie—Issues—Interpretation of Statutes.

In an action by an agent upon a note made payable to himself as such for the benefit of his principal, the doctrine that the production of the paper is *prima facie* evidence of ownership has no application, the question being whether he has shown title sufficient to enable him to sue as agent. Revisal, sec. 404.

6. Bills and Notes—Contracts — Parol Evidence — Consideration — Credits—Rentals.

In an action to recover upon a note given for rent, the defendant offered evidence tending to show by parol a separate and distinct contract made at the signing of the note, whereby he was only obligated to pay it if he continued to reside in the house for the period of time covered by the note, which was uncertain, owing to his occupation or business; and that accordingly he surrendered the possession before the said period, which the plaintiff received and rented to other parties: *Held*, competent, (*a*) as a parol agreement, which was a part of the rental contract; (*b*) if believed, it proved a total want of consideration for the note sued on; (*c*) if it did not avoid the payment of the note, it was competent to show that the defendant was entitled to have the rents subsequently received by the plaintiff credited thereon.

APPEAL from *Peebles, J.*, at November Term, 1911, of WAYNE. (437)

This action was commenced by Martin & Garrett, agents, before a justice of the peace, to recover the sum of $166.65, and interest on $166.65 from 14 December, 1910, due by five notes for $33.33 each, given for rent of house No. 307 Third Street, Augusta, Ga., said notes being due 1 March, 1911; 1 April, 1911; 1 May, 1911, 1 June, 1911, and 1 July, 1911.

The form of the notes was as follows:

$33.33. AUGUSTA, GA., 14 December, 1910.

After date the undersigned promises to pay to the order of Martin & Garrett, agents, thirty-three and 33-100 dollars at any bank in the city of August, Ga., for value received in rent, with interest from maturity at the rate of 8 per cent per annum, with all costs of collection, including 10 per cent attorney's fees. And each of us, whether maker or indorser, hereby severally waives and renounces for himself and family any and all homestead or exemption rights he may have under or by virtue of the Constitution or laws of the State of Georgia or of any State or of the United States, as against this note or any renewal thereof. GEO. M. MASK [L. S.].

Rent of house No. 307 Third Street.

On the left end of the said note were the following words and (438) figures:

MARTIN & GARRETT,

Real Estate and Renting Agents.

137 Eighth Street, Ground Floor. Dyer Building.

The defendant denied any liability to the plaintiffs.

Judgment was rendered by the justice in favor of the defendant, and the plaintiff appealed.

In the Superior Court the defendant moved to dismiss the action on the ground that it appeared upon the face of the summons and also from the notes that the plaintiffs were agents, and that the action should have been brought in the name of their principal, the real party in interest.

The motion was denied, and the defendant excepted.

The defendant offered to prove that he was, at the time of making said contract, the agent of the Metropolitan Life Insurance Company, and he did not know how long he would reside in the city of Augusta, his residence there being entirely dependent upon his employment by

the company at that point; and in consequence thereof there was a separate and distinct contract made with the plaintiffs at the time of the signing of the said notes, by which it was agreed and understood that the defendant would pay said notes which were given for the house in which he was to reside and did reside during his stay in Augusta, but that if he was required to leave the city of Augusta, that he was to pay no other note, and that he would surrender the possession of the house to the plaintiffs. That, in accordance with the contract, the defendant did pay to the plaintiffs the rent on said house during his stay in Augusta. That under instructions from his employer, he left Augusta during the month of January, 1911, and paid the plaintiff the note that was due 1 February, 1911, for the rent of said house for the month of January, 1911, and delivered the possession of said house and lot to the plaintiffs, and that the plaintiffs took possession of and rented said house out to other parties. That by reason of said contract the said notes sued on, all being given for the rent of the house for months subsequent to 1 February, 1911, were not to be paid, and the
(439) defendant was under no obligation on said notes to the plaintiffs or their principal.

This evidence was excluded, and the defendant excepted.

There was judgment in favor of the plaintiffs, and defendant excepted and appealed.

Wentworth W. Peirce for plaintiffs.
George E. Hood for defendant.

ALLEN, J. The record presents two questions:

1. Was it error to refuse to dismiss the action because the plaintiffs are named as agents, and sue on notes payable to them as agents?

2. Was it error to exclude the evidence offered by the defendant?

1. The first question must be solved by adopting a correct interpretation of Revisal 400, providing that "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided," and Revisal, sec. 404: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

It is clear that the plaintiffs, being agents, are not the real parties in interest, under section 400, and in order to maintain their action it must appear that they are trustees of an express trust, under section

404, and within that term are included those in whose name a contract is made for the benefit of another.

The clearest and most comprehensive discussion of the language used in this section we have been able to find is in Pomeroy's Code Remedies, sec. 99 *et seq.*, from which we quote at length:

"The only difficulties of interpretation presented by this section are the determining with exactness what persons are embraced within the three classes described as 'trustees of an express trust,' 'persons with whom or in whose name a contract is made for the benefit of another,' and 'persons expressly authorized by statute to sue.' It (440) is plain that there are substantially three classes. The second and better form of the provision actually separates them, and does not represent one as a subdivision of the other. The first form in terms speaks of 'the person with whom or in whose name a contract is made for the benefit of another,' as an instance or individual of the wider and more inclusive group, 'trustees of an express agent.' It should be carefully noted, however, that these two expressions are not stated to be synonymous; the former is not given as a definition of the latter. The section does not read, 'a trustee of an express trust shall be construed to mean a person with whom or in whose name a contract is made for the benetfi of another'; but simply that the latter shall be regarded as one species of the genus. There is here no limitation, but rather an extension, of the meaning, and the clause, of course, recognizes other kinds of trustees besides the party to the special form of contract, who is not very happily termed a 'trustee.' We must find the true legal definition of 'trustees of an express trust,' and add to this the 'persons with whom or in whose name contracts are made for the benefit of others'; the combined result will be the entire class intended by the Legislature. . . . An *express* trust assumes an intention of the parties to create that relation or position, and a direct act of the parties by which it is created in accordance with such intention, outside of the mere operation of the law. . . . It primarily assumes three parties; the one who by proper language creates, grants, confers, or declares the trust; the second, who is the recipient of the authority thus conferred; and the third, for whose benefit the authority is received and held. It is true that in many instances the first-named parties are actually but one person; that is, the same individual declares, confers, receives, and holds the authority for the benefit of another; but the theory of the transaction is preserved unaltered, for the single person who creates and holds the authority acts in a double capacity and thus takes the place of two persons. . . . In the light of this analysis of the expression as a term of legal import,

it is plain that 'a person with whom or in whose name a contract
(441) is made for the benefit of another' is not necessarily a trustee. He may be; and whether he is or is not must depend entirely upon the nature and subject-matter of the contract itself. The contract may be of such a kind, stipulating concerning property in such a manner that the contracting party will be made a trustee. On the other hand, it may be of such a kind, having no reference perhaps to property, or stipulating for personal acts alone, that the contracting party will not be a trustee in any proper sense of the word, but will be at most an agent of the person beneficially interested. There are numerous instances, therefore, in which an agent, who enters into an agreement for either a known or for an unknown principal, is permitted, in accordance with the particular clause under consideration, to sue in his own name.

"In a case where a contract in the nature of a lease was effected by a person describing himself in the instrument as agent of the owners, but who had no interest whatever in the premises leased, and did not execute the instrument, and to whom no promise was made as the lessor, it was held that he could not maintain an action for the rent or for possession of the land forfeited by nonpayment of the rent. He could not sue as the 'person with whom, or in whose name, a contract is made for the benefit of another,' because no promise at all was made to him, and he was not 'a trustee of an express trust.' 'One who contracts merely as the agent of another, and has no personal interest in the contract, is not the trustee of an express trust within the meaning of the statute, and cannot, under The Code, sue upon such contract in his own name. Of course, this last expression must be taken in connection with the facts of the case, namely, that no promise was made to the plaintiff individually.

"It is fully established by numerous decisions that when a contract is entered into expressly with an agent in his own name, the promise being made directly to him, although it is known that he is acting for a principal, and even although the principal and his beneficial interest in the agreement are fully disclosed and stipulated for in the very instrument itself, the agent in such case is described by the language of the statute, and may maintain an action upon the contract in his
(442) own name, without joining the person thus beneficially interested.

"The rule is the same, and even more emphatically so, if the principal or beneficiary is, at the time of the contract, unknown or undisclosed, or not mentioned in the instrument. When a contract, even in writing, is made with and by an agent, and no mention is made of any principal or beneficiary, but the other contracting party supposes he is dealing

with the former on his own private account, but in fact such person *is* an agent for an undisclosed principal and enters into the agreement in the course of his agency, actually effecting the contract on behalf of that superior behind him, the rule is well settled that the one who was thus a direct party to the agreement—the actual agent—may bring an action upon it in his own name, or the principal may sue in *his* name."

We deduce from this construction of the statute the principle that an agent, as such, has no right to require that promises to pay be made to him, and when contracts are so made, and nothing else appears, he cannot maintain an action as agent to enforce them, and that he may maintain such action if the promise is made to him as agent by the authority of the principal and for his benefit.

Note that we speak of contracts made payable to the agent with the consent of the principal, and that we have no reference to the assignment of a claim for the purpose of collection, in which case the assignee cannot sue in his own name. *Abrams v. Cureton,* 74 N. C., 527; *Boykin v. Bank,* 118 N. C., 568; *Morefield v. Harris,* 126 N. C., 628.

Many illustrations of the principle may be found in our reports.

It has been held that an action cannot be maintained by the administrator of a deceased guardian on a note payable to the guardian; *Alexander v. Wriston,* 81 N. C., 194; by an agent for collection; *Boykin v. Bank,* 118 N. C., 568; by an assignee of a note, assigned for the purpose of collection; *Abrams v. Cureton,* 74 N. C., 527; *Morefield v. Harris,* 126 N. C., 628; by an attorney, who, pending a motion for a receiver, had been ordered to collect certain insurance. *Boyd v. Insurance Co.,* 111 N. C., 374; by a contractor, authorized to collect the amounts due to those who had furnished materials; *Perry v.* (443) *Swanner,* 150 N. C., 141; by an agent, who sold guano on a *del credere* commission, but to whom the claim sued on was not made payable; *Chapman v. McLawhorn,* 150 N. C., 166.

On the other hand, it has been held that an action may be maintained by one to whom a note is handed, with authority to collect and pay a debt due him; *Willey v. Gatling,* 70 N. C., 421; by an attorney to whom a claim was transferred with authority to collect and apply to claims held by him for collection; *Wynne v. Heck,* 92 N. C., 414; by the cashier of a bank to collect collaterals deposited to secure a note payable to him as cashier; *Jenkins v. Wilkinson,* 113 N. C., 533; and it is said in *Winders v. Hill,* 141 N. C., 703, that if the contract is in the name of one, but really for the benefit of another, that the person in whose name it is made is to be regarded as the trustee of an express trust, whether the name of the beneficiary is disclosed or not.

Applying these principles, we are of opinion that one cannot maintain

an action in his own name when nothing appears except that he is agent, and that this designation is not *ex vi termini* included within the meaning of the words of the statute, "trustee of an express trust," or "a person with whom a contract is made for the benefit of another," but that if it is made to appear that the contract was made payable to the agent with the consent of the principal and for his benefit, he may do so, and that the burden is on the agent to prove these facts.

It follows, therefore, that his Honor properly denied the motion to dismiss the action, upon the ground that the plaintiffs were named as agents in the summons, because the motion was made before the introduction of evidence; but if it had been renewed at the conclusion of the evidence, it could have been allowed, as the plaintiff failed to prove that the note was made payable to them by the authority of their principal and for his benefit.

This is the proper course, as indicated in *Perry v. Swanner,* 150 N. C., 142, in which *Justice Brown* says: "It is not a question of parties, as we understand the matter, that is raised by the motion to
(444) nonsuit, but a question as to whether or no the plaintiff has made out a cause of action upon which he personally can recover."

We are not inadvertent to the line of authorities holding that the production of a negotiable paper is *prima facie* evidence of ownership, but they are not applicable here, because the plaintiffs do not claim to be the owners except as agents, and the question involved is whether they have shown a title to sue as agents.

2. The evidence offered by the defendant was, in our opinion, clearly competent, and for several reasons:

(1) It tended to prove a separate parol agreement entered into at the time of the execution of the notes, which was to be a part of the contract, and which is not distinguishable in principle from agreements admitted in evidence under the authority of several cases in our reports.

In *Braswell v. Pope,* 82 N. C., 57, it was held competent to prove that notes given for money were to be surrendered upon the maker signing a judgment and a certain mortgage as security for the money.

In *Pennington v. Alexander,* 111 N. C., 427, that "The maker of a promissory note or other similar instrument, if sued by the payee, may show as between them a collateral agreement, putting the payment upon a contingency."

In *Evans v. Freeman,* 142 N. C., 61, that the maker of a note for the purchase money of a stock-feeder could prove by parol that at the time the note was given it was agreed that it should be paid only out of the sales of the stock-feeder, and in *Kernodle v. Williams,* 153 N. C., 475, that it was competent to prove a parol agreement that the children

should pay only so much of notes given their father as was necessary to pay his debts, and that the balance should be accounted for as an advancement.

(2) The evidence, if believed, proved a total failure of consideration as to the notes sued on. *Carrington v. Waff,* 112 N. C., 119.

(3) If the defendant could not avoid the payment of the notes, it was competent to prove that he surrendered the house for the rent of which the notes were given, and that the plaintiffs accepted it, for the purpose of charging the plaintiffs with the rents. For (445) the error pointed out,

New trial.

Cited: Vaughan v. Davenport, 159 N. C., 371; *Pierce v. Cobb,* 161 N. C., 301.

D. M. IPOCK v. ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY AND NORFOLK SOUTHERN RAILROAD COMPANY ET AL.

(Filed 27 March, 1912.)

1. Contracts—Voidable—Insane Persons—Defenses.

Executed contracts of an insane person, before office found, *i. e.*, when such condition has not been formally ascertained and declared, are not void, but voidable, usually at his election or of the person appointed to act in his behalf, unless it is made to appear that the party contracting with him has acted without knowledge of the insanity or notice of such facts in reference thereto as would put a reasonably prudent man upon inquiry; and that no unfair advantage was taken, and that the consideration passed cannot be restored or adequate compensation made therefor.

2. Same—Burden of Proof.

While one who seeks to avoid a contract on the ground of insanity has the burden of proving his position, when it is established that the contract has been made with a person mentally incapable of making a contract, the burden is so far shifted that the agreement will be set aside unless the sane party brings himself within the requirements necessary to uphold it as a binding one.

3. Same—Release—Damages—Evidence.

When in defense to an action for damages it is shown that the plaintiff has accepted a voucher which by its terms purports to be a full release for a grossly inadequate consideration, that the injury was inflicted by a blow on the head resulting from defendant's negligence from

which partial paralysis followed, and under these conditions, known to a great extent by the defendant, the voucher was obtained, it is sufficient to set aside the voucher as a bar to the plaintiff's recovery.

4. Same—Judgments—Credits.

When a voucher is set up as a defense in bar to plaintiff's recovery in his action for damages for a personal injury negligently inflicted on him, and it appears that it should be disregarded as such, but without reason to conclude that the defendant had any design or purpose to circumvent him, the action, in this regard, is in the nature of an equitable proceeding to set aside the voucher or avoid the effect of the payment received thereon, and in the absence of positive, as distinguished from constructive fraud, is subject to the maxim that he who seeks equity must do equity, and, consequently, the amount received on the voucher will be held as a credit upon a judgment which has ascertained the full amount of the damages suffered.

(446) APPEAL from *Whedbee, J.*, at November Term, 1911, of CRAVEN.

Action to recover damages for personal injuries caused by alleged negligence on the part of defendant companies.

There was evidence on part of plaintiff, tending to show that he was an employee, as section boss of the defendant companies and, on 24 August, 1908, he was seriously and permanently injured by the derailment of a hand-car he was then using in the course of the employment; the derailment being caused by a defective wheel, attributable to negligence of defendants.

The defendants denied the negligence and set up, by way of defense, a voucher, issued in plaintiff's favor, on 24 October, 1908, for $150, purporting to be in "full settlement of all claims against the railroad companies on account of the injuries; indorsed by plaintiff, making his mark, and the proceeds of which were shown to have been received and spent for plaintiff's benefit.

Plaintiff made formal reply, alleging that, at the time the voucher was issued and indorsed and at time of proceeds received and used, owing to his injuries, he was incapable, mentally, of making any binding contract affecting his interests, and was utterly unable to understand or appreciate the character of the transaction or its effect upon his rights, and offered evidence in support of his allegation. On issues submitted, the jury rendered the following verdict:

1. Did the plaintiff indorse the voucher or release introduced in evidence and marked Exhibit A? Answer: Yes, by consent of
(447) plaintiff.

2. Was the plaintiff, by reason of bodily pain, mental anguish, or mental incapacity, unable to comprehend the effect of such release

indorsed by him, and was such release signed and indorsed by him without knowledge that the same was a release for his injury? Answer: Yes.

3. Did the plaintiff draw the money upon said voucher from the bank without knowledge that it was in full payment and release by him for all injuries sustained? Answer: Yes.

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

5. If so, what damages has plaintiff sustained thereby? Answer: $1,500.

Judgment on the verdict for $1,500, and defendants excepted and appealed.

D. L. Ward and Guion & Guion for plaintiff.
L. J. Moore for defendant.

HOKE, J., after stating the case: There was ample evidence to support the verdict on the issues as to defendants' negligence and the amount of damages awarded, the testimony of plaintiff tending to show that, on the derailment he received a blow on the back of the head, from one of the handles of the car, rendering him unconscious at the time, causing partial paralysis of his limbs and seriously affecting his mental capacity for several months after the occurrence; one of the physicians testifying, further, that in some of the effects the injuries were likely to be permanent; and it was chiefly urged, against the validity of the recovery, that plaintiff's demand was barred by reason of the terms and effect of the voucher issued in his favor, and the use of the proceeds by him or for his benefit.

On this question, and in view of the facts in reference to plaintiff's mental condition, established by the verdict on the first and second issues, it is held with us that the executed contracts of an insane person and before office found, before such condition has been formally ascertained and declared, are voidable and not void, and it is also recognized that such contracts are usually voidable at the election of the lunatic or person properly appointed to act in his behalf, unless (448) it is made to appear that the other party to the agreement acted without knowledge of the insanity or notice of such facts in reference thereto as would put a reasonably prudent person upon inquiry; that no unfair advantage was taken and the consideration passed cannot be restored or adequate compensation made therefor. *West v. R. R.*, 154 N. C., 24, and *s. c.*, 151 N. C., 231; *Godwin v. Parker*, 152 N. C., 673; *Sprinkle v. Wellborn*, 140 N. C., 163; *Odom v. Riddick*, 104 N. C., 515;

Riggan v. Green, 80 N. C., 236; *Gribben v. Maxwell,* 34 Kan., 8; *Eaton v. Eaton,* 37 N. J. L., 108; *Flack v. Gottschalk,* 88 Md., 368; *Hostler v. Beard,* 54 Ohio St., 398; Clark on Contracts, pp. 178 and 183.

The general rule which prevails under ordinary conditions in such cases is very well stated in Clark on Contracts as follows: "As a rule, a contract entered into by an insane person or person *non compos mentis* is voidable at his option, but the rule is subject to exceptions as follows:

. . . . . .

"2. In most, but not all, jurisdictions where the sane party acted fairly and in good faith, without actual or constructive knowledge of the other's insanity, and the contract has been so far executed that he cannot be placed in *statu quo.*" . . .

From the form in which this rule is here given, and the authorities applicable, we hold it to be the correct principle that, while one who seeks to avoid a contract on the ground of insanity has the burden of proving his position, when it is established that the contract has been made with a person mentally incapable of making a contract the burden is so far shifted that the agreement will be set aside unless the sane party, by proper proof, brings his case within the rule, as stated, to wit, that he acted in ignorance of conditions that no unfair advantage was taken; that the insane person is not able to restore the consideration or make adequate compensation therefor. *Sprinkle v. Wellborn, supra; Hostler v. Beard, supra;* Bigelow on Fraud, 377; Eaton's Equity, p. 317.

(449) In the Ohio case, just cited, it was held, as appears from the digest of the case in 56 Amer. Decisions: "Plaintiff suing upon a negotiable instrument or other contract made by an insane person must assume the burden of proving that it was given for necessaries or during a lucid interval, or while the insane person was apparently of sound mind and not known to be otherwise, and for property purchased by him under a fair and *bona fide contract,* and which he has received and fully enjoyed, so that the parties can no longer be put in *statu quo.*"

This being the correct principle, on the facts established by the verdict and admission of the parties, that the plaintiff, at the time, was mentally incapable of making the contract or understanding its full effect and meaning, and, under such conditions, a contract was obtained, on consideration of $150, purporting to be in full settlement for an injury amounting to $1,500, the right of plaintiff to recover is undoubted. We are not inadvertent to a verdict very similar, appearing in the *West case,* 151 N. C., 231, and to some expressions in the opinion having a tendency to declare that the facts therein established are insufficient to

support the judgment; but a judge's opinion, as a rule, must be considered in reference to the facts of the case before him, and a careful perusal of the facts and the opinion in that well-sustained case will disclose that recovery was denied because there were no facts in evidence sufficient to show mental incapacity on part of plaintiff, or that defendant had any knowledge or notice of mental weakness which would disable plaintiff from taking proper and intelligent care for his own interest, or that any unfair advantage was taken of plaintiff, under facts and conditions as they reasonably appeared to both parties when the adjustment and payment was made, and this is the rule by which the fairness of the transaction must be tested. See same case, 154 N. C., pp. 29 and 30.

When the $1,511.61 was paid plaintiff in that case he was apparently in perfect possession of his mental faculties and with full prospects of permanent recovery, and under all the circumstances of the case, as they then appeared, the amount given him was a fair and full allowance for the injuries received. It turned out that, unknown to defendant or plaintiff, his injuries were progressive in their ill effects, and that the amount paid him was insufficient as compensation; but (450) this should not be allowed to affect *bona fides* of the settlement, which, as stated, must be determined under conditions as they then were or as they reasonably appeared. The nonsuit was ordered in the *West case,* therefore, not on the ground that the verdict was insufficient, but that the facts in evidence were not sufficient to support the verdict.

But no such conditions are present in the case before us, where it appears that plaintiff was injured by a blow on the back of his head, which rendered him unconscious, at the time; that it was followed by partial paralysis; that he acted throughout with the aid of others, and that the attendant conditions were to a great extent known to defendant's agents who looked after the adjustment. While it is not established, nor is there sufficient reason to conclude that these agents had any design or purpose to circumvent plaintiff, there were sufficient facts observable to notify them that $150 was not a fair compensation for the injuries, and that it was not improbable that plaintiff's mental capacity was affected. We hold, therefore, that plaintiff's right to recover, in the present case, must be sustained, but on the facts established and admitted that the $1,500 awarded as the full value of the plaintiff's injury should be credited with the $150 received by him or used for his benefit.

Although the authorities are to the effect that the contract, under the circumstances of the present case, is voidable at the option of the plaintiff, and it is not regarded as essential that plaintiff should restore

the consideration, when it appears that he is unable to do so, the action in this aspect of the case is in the nature of an equitable proceeding to set aside the voucher or avoid the effect of the payment had, pursuant to an adjustment between the parties, and, in the absence certainly of positive as distinguished from constructive fraud, is in no wise exempt from the wholesome maxim that he who seeks equity must do equity. This principle was fully recognized with us in the well-considered case of *Odom v. Riddick,* 104 N. C., 523, and the ruling is in accord with authoritative decisions here and elsewhere. *Creekmore v. Baxter,* 121 N. C., 31; *Coburn v. Raymond,* 76 Conn., 484; *Rea v. Bishop,* 41 Neb., 202; *Rickets v. Jolief,* 62 Miss., 440.

(451) In the present case it appears that the $150 has been paid plaintiff on account of this injury, and same has been used by him or applied for his benefit, and the amount of the recovery being under the control of the Court, it is in accord with good reason and well-considered precedent that the amount awarded as damages for the injuries received by plaintiff should be reduced by the sum received and used by him.

The judgment will be reduced by crediting the $150 and, so modified, the recovery is affirmed.

Modified and affirmed.

BOLLING WHITFIELD ET AL. v. McD. BOYD ET ALS.

(Filed 27 March, 1912.)

1. Ejectment—Rentals, etc.—Limitation of Actions.

This action to recover possession of lands known as "the Homestead," alleging want of title in the defendant, and for the recovery of rents, is held, in effect, a proceedings in ejectment, wherein the provisions of Revisal, 654, apply, that "the defendant shall not be liable for such annual value for any longer time than three years before the suit, or for damages for any such waste or other injury done before said three years, unless when he claims for improvements as aforesaid."

2. Same—Betterments.

In an action in ejectment, the defendant claiming for improvements put upon the land is entitled to have the betterments placed by him in good faith and without notice, assessed not to exceed the amount actually expended by him, with interest thereon, and not to exceed the increased value of the premises at the time of the assessment which has been caused thereby; and if the betterments exceed in value the rental and

damages for waste, the rents and profits accruing prior to the three years may be assessed so far as to balance the improvements, but no further. Revisal, secs. 653, 654, 655, 657, 658. *Reid v. Exum*, 84 N. C., 430, cited and distinguished.

3. Same—Married Women—Homestead.

When a married woman has brought her action in the nature of ejectment and claims rents and damages for its wrongful detention, and the defendant holding under color of title believed by him to be good has made permanent improvements, the statutes regulating the adjustments to be made under such circumstances apply (Revisal, 653, and other sections); and the plaintiff has no claim of homestead in preference to the defendant's lien. Revisal, sec. 408, permitting a *feme covert* to sue without joining her husband; chapter 78, Laws of 1899, repealing the exemption of married women from the statute of limitations, and the effect of the Constitution of 1868, discussed in its application to this subject by CLARK, C. J.

PETITION to rehear. (452)

Watson, Buxton & Watson for plaintiffs.
Manly, Hendren & Womble for defendants.

CLARK, C. J. This is a petition to rehear this case, which was decided at Spring Term, 1911. The only point sought to be presented is the ruling of the referee, which was approved by the judge below, that the petitioner, McD. Boyd, was liable for rents for more than three years next preceding the commencement of the action.

In the original action the plaintiffs sought, among other things, to recover of McD. Boyd a tract of land known as the "Homestead," alleging want of title in him. The referee found that McD. Boyd had title to all the interests in said land, except that Marietta C. Sheek was entitled to recover one-fifth interest in said land with one-fifth of the rents after the death of Elizabeth C. Sheek in 1879, down to the hearing in 1906, at the rate of $80 per year, making a total of $2,080, besides interest on each installment as it yearly fell due. The defendant Boyd excepted, but the referee was affirmed by the Superior Court, and on appeal here the judgment was affirmed by a *per curiam* order, the Court being evenly divided.

Boyd duly entered of record notice of his claim to have the value of his betterments assessed in this action. We are of opinion that this action, so far as recovery of this tract of land is concerned, was in effect a proceeding in ejectment. Revisal, 654, provides that in such cases "The defendant shall not be liable for such annual value for any longer time than three years before the suit, or for dam- (453)

ages for any such waste or other injury done before said three years, unless when he claims for improvements as aforesaid.

The statutes applicable are:

1. Revisal, 652, provides that when the court is satisfied of the probable truth of an allegation that the defendant while holding the premises under a color of title, believed by him to be good, made permanent improvements thereon, he shall be allowed for the same over and above the value and occupation of the land. The court shall suspend judgment and impanel the jury to assess the damages of the plaintiff and the allowance to the defendant for such improvements.

2. Revisal, 653. The jury in such case shall assess against the defendant the clear annual value of the premises exclusive of the use of the improvements by him, *i. e.,* the rents should be assessed upon the basis of the property without such betterments.

3. Revisal, 654. The defendant shall not be liable for such annual value or for waste and damage for a longer time than three years before suit, with the exception of the provision in the next two sections.

4. Revisal, 655. The jury shall estimate in favor of the defendant the value of the improvements made by him before notice in writing of the title under which the plaintiff claims, not exceeding the amount actually expended in making them, and not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment.

5. Revisal, 656. If the assessment for improvements exceed the damages assessed by the jury against the defendant for said three years, the jury shall then estimate against him the rents and profits and damages for waste and injury so far as may be necessary to balance his claim for improvements. But the defendants shall not be liable for the excess of such rents and profits and damages if any beyond the value of improvements. *Barker v. Owen,* 93 N. C., 202, citing *Merritt v. Scott,* 81 N. C., 385, and *Wharton v. Moore,* 84 N. C., 479, are exactly in point. *Reed v. Exum,* 84 N. C., 430, is not in point, because
(454) there the deed was set aside because procured by duress, and the defendant not being a *bona fide* holder, was not entitled to the equity of reimbursement out of the rents not barred by the statute of limitations before applying to payment for betterments the rents that are thus barred, as is provided for by Revisal, 656.

Sections 657 and 658 provide that the judgment shall be for the difference, if any, found in accordance with the above rules, and that any balance due the defendant shall be a lien upon the land recovered by the plaintiff.

Applying the above rules, the plaintiff was entitled to recover in no

event to exceed the $80 per year for three years preceding action begun, with interest on each installment. The defendant was entitled to have the betterments placed by him upon the land in good faith and without notice assessed, not to exceed the amount actually expended by him, with interest thereon, and not to exceed the increased value of the premises at the time of the assessment which has been caused thereby. If said betterments exceed in value the three years rental, and damages for waste, the rents and profits accruing prior to the three years may be assessed so far as is necessary to balance the improvements, but no further. The defendant McD. Boyd is not liable for rents and profits and damages prior to said three years, should they exceed the value of the improvements, but if the value added to the land by him exceeds the rents and profits and damages, he is entitled to recover the *pro rata* part, one-fifth thereof, due by the plaintiff, Marietta C. Sheek. Revisal, 652.

The statute of betterments is a statutory expression of the equitable principle that when one, under title of color believed by him to be good, makes permanent improvements upon land, he shall be entitled to make use of the value thus added to the land by him, not to exceed the amount actually expended by him, after deducting for rents and profits and damages for injury to such premises for not exceeding three years prior to the action. There is no exception in the statute in favor of married women, and there should have been none. The exception of married women from the statute of limitations was repealed in 1899, chapter 78, and indeed had no logical place in our law after the enactment in 1868, that she could bring suit in her own name without join- (455) ing her husband. Revisal, 408. That exception was to protect a married woman from being barred when she delayed to bring action, but it had no application to a cause like the present where she has brought her action and there is to be an equitable adjustment of benefits accruing to her on account of betterments placed on the property by the defendant and the rents and damages incurred by him. Indeed, the plaintiff could not claim a homestead in priority to the defendant's lien for betterments. *Barker v. Owen,* 93 N. C., 199.

The judgment heretofore entered is modified accordingly. The other defendants did not file a petition to rehear, and though one of them has filed a brief, it cannot be considered.

Petition allowed.

BROWN, J., did not sit.

Cited: McKeel v. Holloman, 163 N. C., 135; *Daniel v. Dixon, ib.,* 139.

VIRGINIA-CAROLINA CHEMICAL COMPANY v. O. I. FLOYD.

(Filed 3 April, 1912.)

1. Contracts — Vendor and Vendee — Retaining Title — Misappropriation of Funds.

By a contract for the sale of fertilizer which generally provides that the fertilizer, with notes, liens, bills of sale, etc., arising from sales, etc., thereof, shall be kept separate for the use and benefit of the vendor, subject to his order, the fertilizer, etc., remain the property of the vendor, converting his vendee into a trustee of the notes, etc., taken for its sale to others, who holds them for the benefit of the owner of the fertilizer, together with money derived from the sales, or collections on the notes given therefor.

2. Same—Corporations—Officers—Principal and Agent—Parties.

When a corporation has entered into a contract for the sale of fertilizers under which the proceeds of sales, moneys collected on notes, etc., are to be the property of the one furnishing the fertilizer, an action against certain of its officers brought by the owner of the fertilizers and notes, alleging in the complaint that the defendants, with knowledge of the facts, misapplied and misappropriated the moneys derived from the sales or collections on notes given therefor, sets forth a good cause of action and is not demurrable; and when alleging a joint wrong, it is not a misjoinder of parties.

3. Same—Bankruptcy—Trustees.

Where a complaint alleges for its cause of action that certain officers of a corporation knowingly misapplied and misappropriated funds belonging to the plaintiff in their management of the corporation, without alleging that the defendants converted the money to their own use, the inference is that the corporation received the benefit of the funds alleged to have been misappropriated, and therefore the corporation is not a necessary party defendant, nor its trustee in bankruptcy, and a demurrer upon these grounds will not be sustained.

4. Same—Independent Liability.

The fact that a debtor corporation is in bankruptcy does not prevent a creditor from suing certain of its officers for misapplication and misappropriation of the plaintiff's money for the benefit of the corporation; as the bankrupt courts have only the administration of the bankrupt's assets in charge, not that of the plaintiff, and the liability of the officers is independent thereof.

5. Pleadings—Parties—Misjoinder—Joint Cause—Debtor and Creditor.

A complaint is not objectionable for a misjoinder of parties which alleges a joint wrong as to two of the defendants in misapplying and misappropriating the moneys of the plaintiff, and seeks to set aside a deed made by one of them to his wife with the intent of delaying and defrauding his creditors, inclusive of the plaintiff's demand.

APPEAL from *Carter, J.*, at Fall Term, 1911, of ROBESON. (456)

The plaintiff is the Virginia-Carolina Chemical Company, and the defendants are O. I. Floyd, A. N. Mitchell and wife, Elizabeth A. Mitchell.

The complaint filed by the plaintiff is as follows:

First. That it is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and having offices in the city of Richmond, in the State of Virginia, and the city of Durham, State of North Carolina.

Second. That Floyd Bros. & Mitchell, Inc., was at the time (457) hereinafter referred to, and is now a corporation existing under and by virtue of the laws of the State of North Carolina, and having its principal place of business in the town of Fairmont, in the county of Robeson and State aforesaid; that the defendant O. I. Floyd was the secretary and treasurer of said corporation, and the defendant A. N. Mitchell was the president of said corporation, and these two defendants were largely in control of the business of Floyd Bros. & Mitchell, Inc.

Third. That on 15 January, 1908, the said Floyd Bros. & Mitchell, Inc., entered into a contract with the plaintiff company, wherein and whereby it undertook to act as selling agent for commercial fertilizers of the plaintiff company under and by virtue of contract, a copy of which is hereto attached; and in pursuance of and according to the terms of said contract the plaintiff shipped to the said Floyd Bros. & Mitchell, Inc., during the year 1908, commercial fertilizers under said contract of the value of $7,252.56, the purchase price, and the said Floyd Bros. & Mitchell, Inc., sold on behalf of the plaintiff, for cash and on credit, a large portion of the said fertilizers, and paid over to the plaintiff on such account the sum of $3,850.30. The sixth paragraph of said contract is as follows: "(6) That until sold or settled for by the customer, the fertilizer contracted for under this agreement shall remain the property of the company, and when sold, all the proceeds of the sale of such fertilizer, including cash, notes, liens, bills of sale, open accounts and collections therefrom, whenever in possession, shall be kept separate and be held by the customer for the use and benefit of the company and subject to its order, and the same, together with any unsold fertilizer taken under this agreement, shall be the property of the company until the entire indebtedness of the customer arising under this agreement has been paid."

Fourth. That on.....March, 1909, upon petition of certain creditors, said Floyd Bros. & Mitchell, Inc., was adjudicated an involuntary bankrupt, and plaintiff is informed, believes, and alleges that the assets

upon distribution will not be sufficient to pay more than a small per cent of claims proven against the said bankrupt company.

(458) Fifth. That plaintiff is informed, believes, and alleges that a certain amount of money, for which the bankrupt sold the goods of the plaintiff, was collected by it, amounting to the sum of $872.61, and that the defendants, O. I. Floyd and A. N. Mitchell, knew that the said sum of money was the property of this plaintiff, and that it was the duty of Floyd Bros. & Mitchell, Inc., its officers, agents, and employees, to pay over to said plaintiff said sum, and that in violation of said duty O. I. Floyd and A. N. Mitchell misappropriated and misapplied said sum of money to other purposes, in violation of the trust imposed upon each of them by said contract and thereby perpetrated a fraud on this plaintiff, wherein they became personally responsible to the plaintiff for said breach of trust, as plaintiff is informed, believes, and alleges.

Sixth. That on ... January, 1909, the defendants, O. I. Floyd and A. N. Mitchell, in breach of the trust imposed by the said contract between Floyd Bros. & Mitchell, Inc., and this plaintiff, misapplied and misappropriated certain notes which had been taken by their company for goods of the plaintiff sold by them as agent under said contract, as they and each of them well knew, to the amount of $760.70, and thereby committed a breach of trust and fraud upon this plaintiff, for which they and each of them are personally responsible, as plaintiff is advised.

Seventh. That the defendant Elizabeth A. Mitchell is the wife of the defendant A. N. Mitchell, and that on ....., 1908, the defendant A. N. Mitchell was the owner of certain real estate in the county of Robeson, State aforesaid, described in the eleven certain deeds hereto attached and made a part of this complaint.

Eighth. Plaintiff is informed, believes, and alleges that the defendant A. N. Mitchell transferred to his wife, the defendant Elizabeth A. Mitchell, all of the property set out in the deeds hereinbefore referred to; and that at the time of said conveyance the defendant A. N. Mitchell was deeply indebted to various and sundry parties, and that said deeds were made voluntarily, and without reserving property sufficient to pay all of his debts; and that said deeds were made for the purpose of hindering, delaying, and defrauding his creditors, including this

(459) plaintiff, as plaintiff is informed, believes, and alleges, and are null and void.

The defendants demurred to the complaint:

(1) For that the Superior Court had no jurisdiction, on account of the pendency of the proceeding in bankruptcy against the corporation.

(2) For that the corporation is not a party.

(3) For that the trustee in bankruptcy is not a party.
(4) For that there is a misjoinder of parties and causes of action.
(5) For that the complaint does not state a cause of action.

The demurrer was sustained, and the plaintiff excepted and appealed.

Rountree & Carr and R. G. Grady for plaintiff.
McIntyre, Lawrence & Proctor and McLean, Varser & McLean for defendant.

ALLEN, J. The demurrer admits the allegations of the complaint, and it is well to see, in the first instance, if a cause of action is stated by the plaintiff.

If not, the action must be dismissed, and it will not be necessary to consider the other grounds of demurrer, and, on the other hand, if the complaint states a cause of action, an examination and analysis of it will aid in passing on the effect of the proceeding in bankruptcy and the necessity for the presence of the corporation or the trustee in bankruptcy as a party.

Contracts almost identical with the one alleged to have been entered into between the corporation, Floyd Bros. & Mitchell, and the plaintiff, have been considered in several decisions of our Court, and it has been held in each that the proceeds of sales of fertilizers made thereunder, whether in money or notes, are the property of the person originally furnishing the fertilizer for sale. *Chemical Co. v. Johnson,* 98 N. C., 123; *Hoffman v. Kramer,* 123 N. C., 566; *Lance v. Butler,* 135 N. C., 422.

And it is also held that such a contract makes the person with whom it is made a trustee of the notes taken from the purchasers of fertilizer, and of the money derived from sales, or collected on notes, for the benefit of the original owner of the fertilizers. *Guano Co. v.* (460) *Bryan,* 118 N. C., 579; *Chemical Co. v. McNair,* 139 N. C., 335.

The complaint alleges that the defendant O. I. Floyd was the secretary and treasurer of the corporation which made the contract with the plaintiff, and that the defendant A. N. Mitchell was its president, and that these two were largely in control of its business; that money was collected and notes taken under said contract, which are the property of the plaintiff, and that said defendants, knowing these facts, misapplied and misappropriated said money and notes.

The demurrer admits these allegations, and it cannot be questioned, assuming them to be true, that the defendants are liable to the plaintiff, if, as officers of the corporation, they, with knowledge, received property belonging to the plaintiff, and which they held in trust for it, and misappropriated it; and as the complaint alleges a joint wrong, it is not a

misjoinder to sue both defendants in the same action. *Howell v. Fuller,* 151 N. C., 317.

Note that the cause of action is for misappropriation of property belonging to the plaintiff, and not of property of the corporation, Floyd Bros. & Mitchell, and in this is the distinction between the cases relied on by the defendants and this.

In *Coble v. Beall,* 130 N. C., 533, a stockholder sued the directors of a bank for fraudulent and wrongful mismanagement *of the property of the bank,* and in *Latta v. Electric Co.,* 146 N. C., 309, the action was for the *fraudulent disposition of property of the corporation* by its officers; and it was held in each that the action should have been brought by a receiver, if one had been appointed, and if not, by the corporation, and the citations from Loveland on Bankruptcy, secs. 23 and 158, are to the same effect.

Thompson on Cor., vol. 3, sec. 4132, marks the line between the two classes of cases: "The grounds on which the directors of corporations may make themselves liable to *strangers* have been already indicated. They stand toward the outside in the same relation in which any other agents stand toward the general public. For a breach of duty to their principal, redress can only be had by that principal, the corpora-
(461) tion, or by the shareholders, if the corporation refuses to sue, as elsewhere pointed out. But for any breach of duty toward a stranger to the company, such stranger may have redress against them, either at law or in equity, according to the nature of the injury; and it will be no defense that their principal is also liable."

It appears, therefore, that the cause of action is against Floyd and Mitchell for misappropriating property which they knew belonged to the plaintiff. The complaint does not allege that the defendants converted the property to their own use, and the only other reasonable inference is that they used it for the benefit of their corporation.

If so, neither the corporation nor the receiver could sue them, as the corporation had received and used the property, and if they converted the property to their own use, their liability to the plaintiff would be primary, and payment by them would exonerate the corporation.

We are, therefore, of opinion that neither the corporation nor the trustee is a necessary party, and that the pendency of the proceeding in bankruptcy does not prevent the prosecution of this action, as in that proceeding the assets of the insolvent corporation are to be administered, and not the property of the plaintiff.

The question remaining to be considered is that of misjoinder of parties and causes of action, which is not free from difficulty, but we think the authorities authorize the prosecution of the action as now constituted.

The cause of action is the recovery of the value of the property misappropriated, and one of the remedies sought to be enforced is the setting aside of certain deeds alleged to have been executed fraudulently by one of the defendants.

It has been held proper to join a cause of action on a note, a cause of action to set aside a deed made by a bank, and one against the stockholders to hold them personally liable, *Glenn v. Bank,* 72 N. C., 626; to join a cause of action against a sheriff, Wyatt, to compel the execution of a deed, with one against Edwards, who was in possession, to recover the land, *McMillan v. Edwards,* 75 N. C., 82; to join a cause of action to have one defendant declared a trustee of land with another against other defendants to recover judgment on a money demand, and with still another for possession of the land, *Young* (462) *v. Young,* 81 N. C., 91; to join a cause of action on a note with a cause of action against three defendants, to each one of whom it was alleged the debtor had executed a fraudulent deed, *Bank v. Harris,* 84 N. C., 206; and these cases are cited and approved in *Outland v. Outland,* 113 N. C., 75; see, also, *Benton v. Collins,* 118 N. C., 196; *Fisher v. Trust Co.,* 138 N. C., 224.

The language used by *Justice Ashe* in *Heggie v. Hill,* 95 N. C., 306, in discussing misjoinder of parties and causes of action is apposite to the facts presented here. He says: "The rule in such a case as existing prior to The Code was thus announced by *Ruffin, C. J.,* in *Bedsole v. Monroe,* 40 N. C., 313: 'If the grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the *same transaction,* or series of transactions, forming one course of dealing, and all tending to one end—if one unconnected story can be told of the whole, the objection cannot apply.' And it has been held not to apply, 'when there has been a general right in the plaintiff, covering the whole case, although the rights of the defendants may have been distinct.' *Whaly v. Dawson,* 2 Sch. and Lef., 370, and *Dimmock v. Nixby,* 20 Pick., 368. Nor will it apply when one general right is claimed by the plaintiff, though the individuals made defendants have separate and distinct rights; and in such a case they may all be charged in the same bill, and a demurrer for that cause will not be sustained. *Parish v. Sloan,* 38 N. C., 607. And to the same effect is *Watson v. Cox,* 36 N. C., 389; and in *Obin v. Platt,* 3 How. (U. S.), 411, it is held that, 'When the interests of different parties are so complicated in different transactions that entire justice could not be conveniently done without uniting the whole, the bill is not multifarious.' And in Alabama it has been held that the objection of multifariousness is confined to cases where the cause of action against each defendant is entirely distinct and

separate in its subject-matter from that of his codefendants. *Kennedy v. Kennedy,* 2 Ala., 571. . . . But in addition to these authorities, we refer to what Mr. Bliss, in his work on Code Pleading, sec. 110, (463) has laid down as the rule of practice in such cases. Speaking of the improper union of defendants under this section of the The Code, he says: 'When several persons, although unconnected with each other, are made defendants, a demurrer will not lie if they have a common interest centering in the point in issue in the cause.' "

The same principle as to multifariousness is thus stated by the Supreme Court of Massachusetts, in *Long v. Prescott,* 144 Mass., 505: "The plaintiff has a demand growing out of an assignment by which every defendant was affected, and their various interests are so blended that it would be impossible to separate the investigation of them with convenience. It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it is sufficient if each party has an interest in some matters in the suit, and that they are connected with the others. Even if one is a necessary party to some portion only of the case, the bill is not therefore necessarily multifarious."

Being, therefore, of opinion that the complaint states a cause of action of which the court has jurisdiction, and that neither the corporation nor the trustee in bankruptcy is a necessary part, and that there is no misjoinder, we must hold that the demurrer ought to have been overruled.

Reversed.

Cited: Cone v. Fruit Growers' Association, 171 N. C., 531.

R. W. PHEENY AND WIFE v. JOHNSON HUGHES.

(Filed 3 April, 1912.)

Deeds and Conveyances—Boundaries—Constructive Possession—Limitation of Actions.

When both parties claim lands from a common source of title, and one of them has shown actual possession on the west side of a certain creek under a deed which includes in its boundaries the *locus in quo* lying on the east side of the creek, also within the description of the deed of the adverse party, but of which neither party has had actual possession, the constructive possession of the former will extend to the eastern boundaries of his deed, and will ripen title to the lands therein embraced after the lapse of the statutory period of time.

PHEENY *v.* HUGHES.

APPEAL by defendant from *Ferguson, J.,* at September Term, (464) 1911, of MOORE.

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

H. F. Seawall for plaintiff.
R. L. Burns and C. M. Muse for defendant.

CLARK, C. J. This is an action by plaintiffs to quiet their title to a 48-acre tract of land. They claim title under a deed by G. C. Graves, mortgagee, 14 December, 1898, which recites the execution of a mortgage to him by Richardson, sale thereunder and purchase by the plaintiffs. The loss of the mortgage was shown. Title out of the State was shown by possession under the Richardsons since 1857. The defendant claims under a deed from G. C. Graves, 9 June, 1908, and a conveyance of 93½ acres, 14 June, 1898. Both parties claim under G. C. Graves and within the Richardson boundaries of a 175-acre tract acquired by the Richarsons in 1857. Neither party showed actual possession of that part of the 48-acre tract which lies east of the creek and which is also within the bounds of the defendant's deed.

The judge properly refused the motion to nonsuit and charged that the plaintiffs having shown color of title and actual possession within the bounds thereof for seven years, were entitled to recover unless the defendant had shown possession by Graves or himself for seven years subsequent to the date of the deed from Graves to the plaintiffs.

This is not the case where there is a lappage under distinct lines of title and no one is in actual possession thereof. In such case, each party having constructive possession under his deed up to the boundaries thereof, the law carries the possession to the party having the oldest title. But here the plaintiffs' entire tract was within the limits of the Richarson boundary, and the plaintiffs having actual possession of said tract west of the creek, their constructive possession extended to the boundary of said tract on the east side of the creek. Having been exposed for more than seven years to action, they have acquired title by possession under their color for the entire tract covered (465) by their deed. *Currie v. Gilchrist,* 147 N. C., 649; *Simmons v. Box Co.,* 153 N. C., 261.

The motion for nonsuit was properly denied. It is unnecessary to consider the other exceptions.

No error.

Cited: Stewart v. McCormick, 161 N. C., 627.

J. H. WISSLER ET AL. V. YADKIN RIVER POWER COMPANY.

(Filed 3 April, 1912.)

1. Eminent Domain—Electric Companies—Condemnation—Public Uses—Interpretation of Statutes.

A corporation engaged in manufacturing or producing electricity for the purpose of distribution and sale to its users, and for the operation of railways and other purposes, may exercise the power of eminent domain and condemn lands for the erection of poles, the establishment of offices, and other appropriate purposes, under authority of the Revisal, secs. 1571-1577, upon making a just compensation therefor; and such is not a taking of private property for a private use.

2. Eminent Domain — Electric Companies — Condemnation — Constitutional Law.

The provisions of sections 1571-1577, empowering electric power or lighting companies, etc., to condemn lands for the erection of poles, establishment of offices, and other appropriate purposes, are constitutional and valid.

APPEAL from order of *Ferguson, J.*, heard at Chambers, 21 September, 1911, from LEE.

Motion for injunction to enjoin the defendant from entering upon the lands of the plaintiff. The injunction was denied, and the plaintiff appealed.

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

A. C. Davis, Aycock & Winston, and A. A. F. Seawell for the plaintiff.

McIver & Williams for the defendants.

(466) BROWN, J. The defendant by proper proceedings has condemned the right of way across the plaintiff's land for the erection of its electric light poles and other appropriate purposes, and has paid into court damages assessed, and is now in the enjoyment of the easement.

The ground upon which the application for the injunction order is based is that the use to which the property condemned is to be put is private use, and not a public one. It is not denied that under the general law of the State under which the defendant has been incorporated it has been invested with the power of eminent domain, but it is contended by the plaintiff that inasmuch as the use is a private one, no such power can be lawfully conferred.

It is admitted that under the provisions of chapter 32, secs. 1571-1577, electric companies, such as telegraph, telephone, electric power, or lighting companies, are invested with the power to condemn property for the erection of poles, the establishment of offices, and other appropriate purposes upon making a just compensation therefor.

We find upon examination of the defendant's charter that it undertakes to manufacture, produce, sell, furnish, and distribute electricity for the operation of street railways, of all kinds and descriptions, and to sell electricity to the public, and to supply electricity in any form and for any purpose whatever.

The phrase "eminent domain" has been so frequently defined that it needs no further definition at our hands. It originated in the writings of an eminent publicist, Grotius, in 1625, who says: "The property of subjects is under the eminent domain of the State, so that the State, or he who acts for it, may use and even alienate and destroy such property, not only in case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way." Grotius De Jure Belli et Pacis, Lib. 3, C. 20.

This power of eminent domain is conferred upon corporations affected with public use, not so much for the benefit of the corporations themselves, but for the use and benefit of the people at large. What are *public utilities* has been pretty well settled by the courts, but with the advance of science and the arts the scope of such utilities (467) must necessarily be constantly increased.

That the power of condemnation could be lawfully conferred upon railroad companies, telephone and telegraph companies, has long since been settled by repeated decisions, as the owner or manager of such industries becomes voluntarily the agent or servant of the public. The vast growth in the knowledge acquired concerning the uses of electricity has made it possible to extend that subtile but powerful agent to many forms of industry, and to divide its efficacy into many desired portions, and to freely transmit it to almost any point for use. To make this agency useful to man requires capital for its extension, as well as the power to extend its operations even against the will of an individual.

In commenting upon the wonderful growth of operations conducted by electrical power, Mr. Lewis says: "All of these considerations tend to show that the use of land for collecting, storing, and distributing electricity, for the purpose of supplying power and heat to all who may desire it, is a public use, similar in character to the use of land for collecting, storing, and distributing water for public needs—a use

that is so manifestly public that it is seldom questioned, and never denied." 1 Lewis on Eminent Domain, sec. 268; *L. and P. Co. v. Hobbs,* 72 N. H., 531; *Jones v. Electric Co.,* 125 Ga., 618; *Goddard v. Railway Co.,* 104 Ill. App., 533; *Palmer v. Electric Co.,* 158 N. Y., 231.

In a recent case in New York it has been held that the furnishing of electricity for the use of the inhabitants, or for illuminating purposes, and for the use of surface railroads, constitute public use within the definition of that term as used with reference to the right of eminent domain. *In re Niagara L. and O. Power Co.,* 97 N. Y. Sup., 853; *Prince v. Crocker,* 166 Mass., 347. Joyce on Electric Law declares that the supplying of electricity to the citizens of a town, or to the public generally, is a public use, citing many cases which, upon examination, sustain the text. 1 Joyce, sec. 276.

In 15 Cyc., 600, it is said: "The exercise of the right of emi-
(468) nent domain for the purpose of erecting and maintaining electric light plants for public and private lighting is not for a private use." And this Court, as late as 154 N. C., 131, in *Turner v. Power Co.,* expressly holds that "Corporations engaged in furnishing electric power and lights to its patrons in the exercise of chartered rights and privileges conferred by the lawmaking power, in part for the public benefit, are *quasi*-public corporations.

Nichols on Eminent Domain, sec. 277, says in substance that the furnishing of any kind of artificial light, as well as power, by gas or electricity, for the use of the public is public purpose, in aid of which the power of eminent domain may be lawfully invoked.

The authorities all seem to be uniform on this subject, and to multiply them is easy, but useless. The judgment of the Superior Court is Affirmed.

Cited: *Power Co. v. Wissler,* 160 N. C., 273.

NEILL BLACK v. CONSOLIDATED RAILWAY AND POWER COMPANY AND W. D. McNEILL, RECEIVER.

(Filed 3 April, 1912.)

Courts—Regularity of Proceedings—Presumptions — Receivers — Permission of Courts to Sue—Interpretation of Statutes.

When it appears from the record that an action has been instituted against a corporation, and after several months a receiver of the defendant has, upon motion, been made a party defendant, without anything to show when the receivership was granted, the judgment of the lower

court in overruling a demurrer to the complaint, upon the grounds that it is not alleged that permission to sue the receiver had been obtained from the court, nor that the claim had been filed, etc., will be sustained, every presumption being in favor of the regularity of the proceedings in the Superior Court, and that its judgment was authorized by law. The statutory powers and duties of receivers of insolvent corporations relative to the courts' discretion for "good cause shown" to allow suits against them, discussed by ALLEN, J.

APPEAL from *Whedbee, J.*, at October Term, 1911, of CUMBER- (469) LAND.

This action was commenced on 22 July, 1909, against the Consolidated Railway and Power Company, successor to Little River Power and Transportation Company, and is to recover judgment for the value of certain material which the plaintiff alleges he furnished the defendants for the purpose of building a power-house and repairing a dam, and to enforce a lien therefor.

The complaint was filed on 10 August, 1909, and no answer was filed by the defendant.

At May Term, 1910, of the Superior Court of Cumberland County, an order was made in said action, giving permission to make W. D. McNeill, receiver of the Consolidated Railway and Power Company, a party defendant, and summons was duly served on him in May, 1910.

On 9 September, 1910, the plaintiff filed an amended complaint, alleging the appointment of McNeill, receiver, the service of the summons on him, and adopting the allegations of the original complaint.

At May Term, 1911, of said court said receiver filed a demurrer to the complaint upon the following grounds:

First. That said complaints do not state a cause of action, for that, as appears on the face thereof, the property which the plaintiff seeks to subject to the payment of his alleged debt is in the hands of a duly appointed and acting receiver.

Second. That said complaints fail to state a cause of action, in that it appears upon the face thereof that said action is an attempt upon the part of the plaintiff to interfere with property in the hands of a duly appointed and acting receiver.

Third. That said complaints do not state a cause of action, for the reason that it does not appear upon the face thereof that plaintiff obtained permission of the court appointing the receiver to make him a party defendant herein.

Fourth. That said complaints do not state a cause of action, because the plaintiff fails to allege therein that he obtained permission of the court appointing said receiver in the cause or action in which he was appointed to make him a party defendant herein.

Fifth. That said complaints do not state a cause of action,
(470) for the reason that plaintiff fails to allege therein that he obtained, before the institution of this action and in the cause in which the receiver was appointed, the permission of the court to sue the receiver.

Sixth. That said complaints do not state a cause of action, in that there is no allegation that plaintiff has ever presented his claim in writing to the receiver of the defendant company, or that said receiver ever passed on same and reported his finding thereon to any term of Superior Court, or that the plaintiff has ever excepted to a finding and report on said claim by the receiver and demanded a jury trial thereon.

Seventh. That said complaints do not state a cause of action, for the reason that it does not appear therein that the lumber alleged to have been furnished was furnished to the receiver in or for the operation of the property in his hands as receiver.

Eighth. That said complaints do not state a cause of action, because there is no allegation therein that the lumber alleged to have been furnished by plaintiff was furnished with the understanding between plaintiff and defendant company that same was to be used in building or repairing buildings on the purchaser's land or otherwise improving the same.

The demurrer was overruled, and the receiver excepted and appealed.

No counsel for plaintiff.

R. W. Herring and Sinclair & Dye for defendant.

ALLEN, J. Every presumption is in favor of the regularity of the proceedings in the Superior Court, and that the judgment rendered is one authorized by law, and as there is nothing in the record to show the date of the appointment of the receiver, or to indicate that he was not appointed after the commencement of the action, we must assume that the action was commenced when there was no receiver—if necessary to sustain the judgment.

The dates of the several steps taken in the action would also seem to justify us in doing so. The action was commenced against the corporation in July, 1909, and no answer was filed suggesting a reason for not proceeding against it, and the application to make the receiver
(471) a party was not until May, 1910—a period of ten months having elapsed after the commencement of the action, during which the receiver could have been appointed.

As it does not appear that the corporation was in the hands of a receiver at the institution of the action, the demurrer was properly overruled, the plaintiff having the right upon these facts to proceed against

the corporation, and it being competent to make the receiver a party defendant. High on Receivers, sec. 258.

It was not only within the power of the court to direct that the receiver be made a party, but it was proper to do so in view of the fact that the Revisal, sec. 1224, vests in him the title to all the property of the corporation, and it is made his duty under section 1227 *et seq.* of the Revisal to investigate all claims against the corporation for the purpose of protecting creditors and stockholders.

If the fact were otherwise, and it appeared that the receiver had been appointed prior to the commencement of the action, we would hold that the action could not be maintained on the allegations of the complaint as they now are.

The Revisal, sec. 1219 *et seq.*, regulating the appointment of receivers of insolvent corporations, clearly contemplates the settlement of all questions involving claims against the corporation in one action, and while we do not think it withdraws from the court of equity the power to permit a separate action to be prosecuted, this should not be done until the receiver has at least had the opportunity to pass on the claim.

By section 1227 the receiver is given power "to send for persons and papers, and to examine any persons, including the creditors and claimants, and the president, directors, and other officers and agents of the corporation, on oath or affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions, and its estate, money, goods, chattels, credits, notes, bills, and also respecting its debts obligations, contracts, and liabilities, and the claims against it; and if any person shall refuse to be sworn or affirmed, or to make answers to such questions as may be put to him, or refuse to declare the whole truth touching the subject-matter of the said (472) examination, the court may, on report of the receiver, commit such person as for contempt."

By section 1228 it is provided that "The court may limit the time within which creditors shall present and make proof to such receiver of their respective cliams against the corporation, and may bar all creditors and claimants failing to do so within the time limited from participating in the distribution of the assets of the corporation. The court may also prescribe what notice, by publication or otherwise, shall be given to creditors of such limitation of time," and by sections 1229 and 1230: "Every claim against an insolvent corporation shall be presented to the receiver in writing; and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver shall direct, and shall produce such books and papers relating to the claim as shall be required; and the receiver shall have power to

examine, under oath or affirmation, all witnesses produced before him touching the claims, and shall pass upon and allow or disallow the claims or any part thereof, and notify the claimants of his determination. It shall be the duty of such receiver to report to the term of the Superior Court subsequent to any finding by him as to any claim against the corporation, and exceptions thereto may be filed by any person interested, within ten days after notice of such finding by the receiver, and not later than within the first three days of the said term; and if, on any exception so filed, a jury trial shall be demanded, it shall be the duty of the court to prepare a proper issue and submit the same to a jury; and if such demand is not made in the exceptions to the report the right to a jury trial shall be deemed to have been waived. The judge may, in his discretion, extend the time for filing such exceptions."

It is the purpose of these sections to save expense and to avoid needless litigation and costs, and to this end it is required that every claim against the corporation shall be presented to the receiver, and he is given full power to investigate. *Pelletier v. Lumber Co.*, 123 N. C., 601; *Crutchfield v. Hunter*, 138 N. C., 54.

If he disallows a claim, the claimant may except and have his
(473) rights passed on by a jury, which gives him all the advantages of a separate action; and if he recommends payment, the court will usually act favorably on his report, and the costs of a separate action will be saved.

We are, therefore, of opinion that when a receiver has been appointed before the commencement of the action the plaintiff must allege and prove that he had presented his claim to the receiver and it had been disallowed, and that he had obtained permission from the court to institute a separate action, which ought not to be granted as a matter of course, but for good cause shown.

This will enable the court having jurisdiction of the appointment of the receiver and the administration of the assets of the corporation to have before it the claims of all parties, and to consider the receivership as a whole.

No definite rule can be adopted as to what is "good cause," but the place where the cause of action arose, venue, the convenience of witnesses, additional costs, and other circumstances, addressed to the discretion of the court, should be considered.

We have been induced to consider this question, which is not directly presented, because of an expression in the brief of the appellant, indicating that the receiver in this case had been appointed when the action was commenced; but for the reasons first stated the judgment is

Affirmed.

(474)

ANNIE E. ALEXANDER, BY HER NEXT FRIEND, v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 3 April, 1912.)

1. Telegraphs—Mental Anguish—Surgeon—Notice of Importance—Substantial Damages.

For mental anguish proximately resulting from the negligence of a telegraph company in sending an affirmative reply from a surgeon to a message reading, "Young lady appendicitis; can't pay anything till fall. Will you operate? Answer," and signed by the physician of the patient, substantial damages are recoverable by the patient for whose benefit it was sent, the message giving notice of the character of damages that would likely result.

2. Telegraphs—Reasonable Stipulations—Message—Blank.

Telegraph companies may make reasonable stipulations restrictive of liability to the extent that they are not relieved thereby from the obligations of diligence superimposed by law in the performance of their duties.

3. Same—Messenger—Agent of Sender—Principal and Agent—Telephone—Evidence.

A telegraph company cannot avail itself of a stipulation in its message blank to the effect that a messenger boy is to be deemed the agent of the sender in taking a telegram to the telegraph office for transmission, without liability on the part of the company, when it appears that the sender of the message got into communication with a person answering the telephone number call of the company and the messenger came in accordance with a request that one be sent, and was evidently sent by the company for the express purpose of getting the message for transmission.

4. Same—Prima Facie Evidence.

Testimony that the sender of a message called the well-known telephone number of a telegraph company's office and requested the one responding thereto that a messenger be sent to take a telegram to the office, and that the messenger appeared in consequence and received the message, affords evidence that the messenger was the duly authorized agent of the company for the purpose of receiving the message for transmission.

5. Telegraphs—Mental Anguish—Surgeon—Measure of Damages—Evidence.

In this case damages were demanded for mental anguish caused the plaintiff on account of the failure of the defendant telegraph company to transmit a telegram replying affirmatively to one sent to a surgeon by the plaintiff's physician, reading, "Young lady appendicitis; can't pay anything till fall. Will you operate? Answer." Evidence upon the measure of damages *Held* competent which tended to show that the attending physician, not hearing from his telegram, did not call upon his patient until several hours after his usual time for a visit, desiring to make arrangements elsewhere; that in this interval of waiting the plain-

tiff, not understanding his absence, suffered mental anguish in apprehension that she could not get operated on, from which she supposed that she would die, etc.

6. Appeal and Error—Incompetent Evidence—Instructions—Harmless Error. Instructions by the court in this case to the jury, that they must not consider certain incompetent evidence in an answer of a witness, on the question of the measure of damages for plaintiff's mental suffering alleged to have been caused by the negligence of defendant telegraph company in failing to transmit a message, *Held*, sufficient, and no error is found therein.

BROWN, J., dissenting.

(475) APPEAL from *Cline, J.*, at December Term, 1911, of BEAUFORT.

Action to recover damages for negligent failure to deliver a telegraphic message. There was verdict for plaintiff establishing negligent failure to transmit message pursuant to contract, and awarding recovery of substantial damages by reason of mental anguish. Judgment on verdict, and defendant excepted and appealed.

Ward & Grimes for plaintiff.

George H. Fearons, Small, MacLean & McMullan, and A. S. Barnard for defendant.

HOKE, J. It was chiefly urged against the validity of this recovery:

1. That there was no evidence that the message had ever been received for transmission by defendant company.

2. That there was no sufficient evidence of mental anguish to justify an award of substantial damages on that account.

But we are of opinion that neither position can be sustained.

There was testimony on part of plaintiff tending to show that she resided with her mother about 300 or 400 yards from Swain, a local railroad station in a remote country district, and on 19 July, 1909, she became imminently ill with an attack of appendicitis. That her attending physician was of opinion that an operation was immediately necessary; that he was unwilling and unable to undertake it there with the facilities afforded, and that she should go to a hospital for that purpose. That the plaintiff and her people were unable to pay ready money for such operation, and the doctor, who lived in 150 yards of the telegraph office, undertook to communicate by telegram with Dr. Leigh at (476) Norfolk and ascertain if the patient could be received in the hospital there and given the necessary treatment. This was 2 P. M. Monday afternoon; that at 4 P. M. Dr. Speight sent Dr. Leigh at Norfolk a message of inquiry as follows:

DR. SOUTHGATE LEIGH, ROPER, N. C., 19 July, 1909.
Norfolk, Va.

Young lady appendicitis; can't pay anything till fall. Will you operate? Answer. J. H. SPEIGHT.

This message was shortly received at Norfolk, and within thirty minutes after receipt of same Dr. Leigh placed with a messenger boy, sent from defendant company's office for the purpose of taking the same, a return message, as follows:

DR. J. W. SPEIGHT. July 19, 1909.

Yes; send patient at once. What train?
SOUTHGATE LEIGH.

That this message was never received, and the doctor, not having heard, did not go to see the patient the following morning by 8:30, as he would have done, nor until 2 or 3 P. M., and then told the parties that no message had been received. That it was then arranged that the patient should go to Dr. Tayloe at Washington, N. C., and she did go there on Wednesday and was there treated successfully. That Dr. Tayloe was a skilled surgeon and the patient's case was properly treated at Washington. As tending to show a degree of mental suffering amounting to mental anguish, the plaintiff, testifying in her own behalf, among other things was allowed to say: "He said I had to go to the hospital right away. He could not operate on me. He said that he would wire Dr. Leigh that afternoon and let us know the next morning, and when my mother asked him why he did not come, he said it was because he had not heard from Dr. Leigh."

"Tell us whether you were alarmed or not about your condition, and to what extent, as best you can?"

(Objection by defendant; overruled, and defendant excepts.)

"I was alarmed. I was scared. I never thought of going to the hospital before. My mother was crying and my sister, too, and of course they came in the room crying, and that scared me." (477)

(Defendant objects to this form of answer and moves that the same be stricken out. Objection overruled, and defendant excepts. Here the court charged the jury that they should not consider the crying of the mother nor anything except the plaintiff's mental and physical condition directly due to her failure to hear from Dr. Leigh as to whether he would operate).

"I did not know of anywhere I could get relief except from Dr. Leigh during that whole day, until Dr. Speight came late in the evening and said he had not heard from Dr. Leigh, and fixed for me to go to the Washington Hospital."

Q. What impression was made on your mind by Dr. Speight—that you would die if you did not get operated on? A. He said that an operation had to be performed, and so I thought it was an operation or death.

Q. Why was it that you had to look to Dr. Leigh? A. Because that was all Dr. Speight had told me.

Q. Did you have any money to pay cash for your operation? A. I did not.

And again:

Q. From the time Dr. Speight said he could not hear from Dr. Leigh, on through the balance of the afternoon and night and next morning until you heard from Dr. Speight that Dr. Tayloe would operate on you, what was your mental condition with reference to the question as to whether you could get anybody to operate on you at all? A. I thought the reason that Dr. Leigh had not answered the telegram was that I did not have the money to pay him with, and I did not know whether I could get anybody else to operate on me or not. I did not know whether Dr. Tayloe would operate on me without the money or not, and my mind was all torn up because I did not know whether I could get anybody to operate on me or not. If I had heard from Dr. Leigh I would have known whether he would operate on me or not, and
(478) would not have been uneasy.

And further:

"I was conscious of everything that was happening. I was studying whether I could be operated on or not. I did not want to be operated on, but after Dr. Speight said I had to be operated on, I thought I would have to be operated on right away or die one. My mother and sister were crying because they were afraid of the operation and death, too, I suppose. What was troubling me was that Dr. Speight said I had to be operated on and we didn't hear from Dr. Leigh, and I didn't know of anywhere else I could get operated on." . . . "I did not know why he did not hear from Dr. Speight. I did not know whether he thought I would die before I could get to the hospital or not. I was lying there thinking that he thought I was too low to go to the hospital, and that I would die before I could get there. I thought he was waiting to let me die before he let us know what was the matter. That annoyed my mind."

Q. To what extent? A. I was in agony. I did not know what to do or what to think. I just thought he was waiting for me to die.

On the same subject Walker Alexander, a brother of plaintiff, testified as to his sister's suffering as follows: "She would ask me when I would go to the room, 'Bud, have you heard from the doctor yet?' and I said

no. She said, 'Do you think I am going to die?' and I said, 'No, I hope not.' All she talked about was believing she was going to die."

The right of an addressee or a beneficiary whose interest has been made known to the company to recover for a negligent failure to deliver a message of this character is fully established with us, and a persual of this testimony will clearly bring plaintiff's cause within the principle of our decisions where substantial damages by reason of mental anguish have been allowed. *Christmon v. Telegraph Co.*, 159 N. C., 195; *Kivett v. Telegraph Co.*, 156 N. C., 296; *Suttle v. Telegraph Co.*, 148 N. C., 480; *Dayvis v. Telegraph Co.*, 139 N. C., 80; *Green v. Telegraph Co.*, 136 N. C., 489; *Bright v. Telegraph Co.*, 132 N. C., 317; *Kennon v. Telegraph Co.*, 126 N. C., 232; *Young v. Telegraph Co.*, 107 N. C., 370.

As to the receipt of the message by the company, the relevant facts appearing in the record as we understand them, are that (479) the original message was received by Dr. Leigh in due course, at his office in Norfolk on the afternoon of 19 July, and the doctor then dictated a return message, which was written by his secretary on a company blank, kept regularly in his office for the purpose. The secretary then called over the telephone for 165, the telegraph company's number, and asked them to send a boy for the telegram. The witness stating that "165 was the defendant company's phone number, as she had called it several hundred times before. That in fifteen or twenty minutes, not over a half hour, a boy came for the return message, and it was delivered to him in the office of Dr. Leigh.

There was evidence for defendant from the different employees of the office that no such message was received in the office of the company, and the office record, the call sheet on which all entries of the kind were made, was referred to by the witnesses, who stated that it showed no call for a messenger on that date for any purpose, and on consideration of the testimony and the authorities applicable, we are of opinion and so hold, that there was a receipt of the return message for transmission on the part of the company, or rather testimony from which such receipt could be properly inferred, and this notwithstanding a stipulation appearing on the blank that no responsibility regarding messages should attach to the company unless accepted at one of its transmission offices, and if a message is sent to the office by one of the company's messengers, he acts for the purpose as "agent of the sender."

It is well understood here and in other jurisdictions that a telegraph company may make reasonable stipulations restrictive of its liability and to the extent that they are not relieved thereby from the obligations of diligence superimposed by law in the performance of their duties. *Sherrill v. Telegraph Co.*, 109 N. C., 527; *Thompson v. Telegraph Co.*,

107 N. C., 449. And there is authority to the effect that the stipulations in question here appearing on a blank on which the sender writes the message shall bind the sender as a part of the contract. *Stamey v. Western Union,* 92 Ga., 613. If this, however, may be allowed to prevail under ordinary conditions, it is qualified, as a general propo-
(480) sition, by decisions which hold that if a messenger is instructed by the company to procure an answer, for this last purpose the messenger will be considered the company's agent and the stipulation referred to is not controlling. And this limitation should apply, we think, when in response to a specific request the company sends a messenger for the express purpose of taking a message. *Will v. Telegraph Co.,* 3 App. Div. N. Y., 22; *Ayers v. Telegraph Co.,* 3 App. Div. N. Y., 149; Jones on Telegraph and Telephone Companies, sec. 408; 37 Cyc., 1692, note 68.

The case of *Ayers v. Telegraph Co.,* 65 N. Y., *supra,* cited by defendant, recognizes the limitations on the general principle established in the former case. *Will v. Telegraph Co., supra.* In this connection it was further insisted for defendant that there was no evidence that the messenger boy was sent by the company for the purpose of receiving the message, and that the message given over the telephone wire to the telephone number of defendant company was not sufficient as testimony in the absence of evidence *ultra* that this message was received by an agent of defendant company authorized for that purpose, citing *Planters Oil Co. v. Telegraph Co.,* 126 Ga., 621. While there is some difference in the facts of that case, we do not think it can be upheld as authority on the facts presented here, where the number is called, known to be that of the telegraph company, "tried as such, several hundred times," as stated by the witness, and responded to by a company messenger. In such case, on the better reason and by the weight of authority, we are of opinion that a messenger sent in response to such a request should be considered *prima facie* an agent of the company, and certainly under such circumstance there is evidence from which authority of the company could be inferred. *Reed v. R. R.,* 72 Iowa, 166; *R. R. v. Potter,* 36 Ill. App., 590; *Gore v. Tel. Co.,* Tex. Civ. App.; Jones on Evidence (2 Ed.), 262.

There were also several objections to the admission of evidence, chiefly as to the physical and nervous condition of the plaintiff at the time in question, but none of the exceptions can be sustained or held for re-
versible error. Most of the testimony was directly relevant as
(481) tending to show mental suffering that would naturally arise under the conditions indicated, and where it was otherwise, the trial court in its clear and comprehensive charge was so careful to restrict

the recovery and the effect of the evidence to the suffering directly attributable to the failure to deliver the message and to that alone that the jury could not have been misled. There is no error, and the judgment below must be affirmed.

No error.

BROWN, J., dissenting: The facts upon which this action is based are as follows: Plaintiff, who resided with her mother at Roper, N. C., was stricken with appendicitis. Her physician, Dr. Speight, advised an operation, and on Monday, 19 July, at 4 P. M., in plaintiff's behalf, wired Dr. Leigh at Norfolk, Va., in regard to performing it.

Dr. Speight told his patient that he would see her next morning, and let her know what Dr. Leigh said. Dr. Speight did not visit his patient next morning, as promised, but called to see her at 2 P. M. that day, Tuesday, and informed her that he had not heard from Dr. Leigh, and that he had arranged for her to go to the Washington (N. C.) Hospital to be treated by Dr. David Tayloe, an acknowledged expert in his profession.

Dr. Speight says that plaintiff could not have left her home and arrived at Norfolk until 4 P. M., Wednesday, the 21st, and that she arrived at Washington Hospital in safety at 11 A. M. that day, five hours earlier than she could have reached Norfolk. She would have been compelled to travel *eighty-four* miles to Norfolk, and only traveled *forty* to Washington.

Plaintiff admits "that she came to as good hospital as she would have gone to if she had gone to Dr. Leigh's, and got as good surgical attention."

Dr. Tayloe kept the plaintiff until 28 July, on account of slow development of the disease, before operating. The operation was successful, and plaintiff returned home completely recovered.

1. The defendant excepted because the court permitted testimony that the plaintiff traveled from Roper to Washington on a (482) "mixed" freight and passenger train, and the record shows that this evidence was repeated to the jury in several different forms over the objection of the defendant.

It is true that his Honor, at the time when the objection was first made, stated to the jury that they were not to consider the riding on a freight train as a measure or cause of damage, and if the evidence had been terminated then and there under such instruction, it might be regarded as a harmless error.

But the record shows that this testimony was repeated by several witnesses after that admonition to the jury over the subsequent objection

of the defendant, and strongly impressed upon them, and undoubtedly they had a right to suppose that such testimony as was allowed by the court, after the admonition given, was intended to be considered. Such evidence was utterly erroneous and very harmful.

The record shows that the plaintiff was brought in the baggage car on a cot. According to the testimony of Dr. Tayloe, himself, she need not have come on the "mixed" train, but could have taken the regular passenger train, and arrived at Washington at 4 P. M., the same hour at which she would have arrived at Norfolk.

Notwithstanding these facts proven by the plaintiff's own witnesses, and after the admonition of the judge, the plaintiff was permitted to testify that this "mixed" train, which she voluntarily took, without any necessity, was jarring in its motion, had to go in on side-tracks and get freight cars, log cars, and switch cars in and out.

No one can read the evidence in this case without being impressed with the undeniable fact that this evidence must have had great effect upon the jury in estimating the damages. That such evidence is incompetent, harmful to the defendant, and could not possibly have been in the contemplation of the parties, is shown by overwhelming authority. *Hancock v. Telegraph Co.*, 142 N. C., 163; *McCoy v. R. R.*, 142 N. C., 383.

I am of opinion that a new trial should be granted for this flagrant and material error. Other incompetent evidence was received by the court over the objection of the defendant, on which it is not
(483) necessary now to comment.

2. I am of opinion that there is no evidence in this record upon which a legitimate claim for damages for mental anguish suffered by the plaintiff because she did not hear from Dr. Leigh can be founded. It is admitted by the counsel for the plaintiff that the only period of time when the plaintiff could have suffered any mental anguish on such account covered only a very short time. She was told by Dr. Speight that he could not hear from Dr. Leigh until some time Tuesday morning, when he would come over and inform her of the result. He did not come until 2 P. M. on Tuesday, at which time he informed her that he had not heard from Dr. Leigh, and had made arrangements to take her to Washington. She left for Washington the next morning, and arrived there at 11 A. M., and could not be operated upon until the 28th, on account of the condition of her appendix.

I fail to find in the testimony of the plaintiff herself anything whatever which tends to prove that from the time that she expected to hear from Dr. Leigh Tuesday morning until 2 P. M., when Dr. Speight came, she could reasonably have suffered any mental anguish because she had not heard from Dr. Leigh.

During that time, according to her own testimony, she had grown very weak from the acute and sudden attack of her disease; she was greatly under the influence of drugs given to deaden this pain, which according to all the evidence was of such acute character as to render the plaintiff practically oblivious to her surroundings, and to the fact that she had not heard from the telegram sent to Norfolk.

Again, his Honor permitted, over the objection of the defendant, not only the plaintiff herself, but her physicians to describe to the jury her physical condition, her acute and agonizing suffering, for none of which could this defendant be held responsible, and all of which was well calculated to appeal to the sympathies of any jury and greatly and grossly aggravated the damages assessed.

Upon the facts as set out in this record I am bound to conclude, with all deference to my brethren who differ with me, that the plaintiff should be permitted to recover $1,000 for alleged mental anguish in not hearing from Dr. Leigh, when her body and mind were (484) tortured by agonizing disease, which undoubtedly excluded every other thought, is a great miscarriage of justice which should not be permitted to take place in the courts of this State.

The majority of courts in this country, as well as Great Britain, repudiate this doctrine of "mental anguish" because of the inequalities it produces and the impossibility of establishing any uniform rule of damage, as well as on account of the frivolous character of many cases where the doctrine is applied.

I am of opinion that the facts of this case disclose no reasonable or just foundation upon which to base a recovery, and that it should be dismissed by the Court.

CHARLES S. RILEY ET AL. v. T. J. CARTER ET AL.

(Filed 3 April, 1912.)

1. Wills—Foreign Probate—Registration—Title—Evidence—Practice.

It is necessary to the registration of a copy of a will in North Carolina, which has been probated in another State, that the copy or exemplification of such will be duly certified and authenticated by the clerk of the court in which it had been proved or allowed (Revisal, sec. 3133), and if it has been allowed to be registered here under the certificate and seal of the register of deeds in another State it is ineffectual as evidence in a claimant's chain of title.

2. Same—Act of Congress—Copies.

In a controversy concerning lands the plaintiff claimed title under a will which had been probated in another State under a certificate of the register of deeds there executed under his own seal, without certificate from the clerk of the court there, and admitted not to conform to the act of Congress, relating to such registration: *Held*, the probate was ineffectual, for copies of letters testamentary or administration, for certain purposes, must be "properly certified" (Revisal, secs. 1618, 1619), either according to the act of Congress or by the proper officer of the State or territory from whence they come, our statute requiring such certificate to be from the clerk of the court. Revisal, sec. 3133.

(485) APPEAL from *Cooke, J.*, at September Term, 1912, of PENDER.

This is an action by Charles S. Riley & Co. to recover of the defendants the timber described in the complaint, and for a restraining order restraining the defendants, Carter & Pratt, from cutting the timber pending the action.

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

John D. Bellamy, Bland & Bland, and Herbert McClammy for the plaintiff.

E. K. Bryan and R. G. Grady for the defendant.

BROWN, J. The question involved in this controversy is the legal title to the timber on a certain tract of land in Pender County, known as the Raynor land, conveyed by S. W. Raynor *et al.* to the Peregoy-Jenkins Company.

The plaintiffs deraign their title through a number of mesne conveyances which it is unnecessary to set out; among others, the will of C. Morton Stewart, dated November, 1899, admitted to probate in the city of Baltimore, Maryland, and registered in the registry of wills for Baltimore County on 21 August, 1900.

This writing testamentary appears to be an essential link in the plaintiffs' chain of title. When the same was offered in evidence, the defendant objected, and it was admitted by the court, and this forms the second assignment of error. The ground of objection is that the record of the said will is not properly proven, or exemplified, as required by law. The paper-writing appears to have been offered for probate in the Orphans' Court of Baltimore County, and the court adjudged that the same be admitted to probate as the true and genuine will of C. Morton Stewart. This decree is signed by the three judges of the said court. A copy of the will was offered for probate in the Superior Court of Pender County before the clerk thereof upon the following certificate only, to wit:

In testimony that the aforegoing is a true copy taken from (486) Willis, Liber H. R. No. 12, folio 32, one of the books in the office of Register of Wills for Baltimore County, I hereunto subscribe my name and affix the seal of my office, this 29 July, 1905.

Test: HARRISON RIDER,
(Seal.) *Register of Wills for Baltimore County.*

We are of opinion that the certificate upon which the will was admitted to probate in this State was insufficient, and that his Honor should have excluded it as muniment of title.

It is admitted that the record of the will has not been certified in accordance with the act of Congress (U. S. Rev. Stat., sec. 905), because there is no "certificate of the judge, Chief Justice, nor presiding magistrate, that the said attestation is in due form." 2 Pell's Rev., 129.

Nevertheless, it is claimed that the will is properly authenticated under the statutes of North Carolina which authorize its admission to probate without the certificate of the judge, Chief Justice, or presiding magistrate of the court in which the will was probated in Maryland, and in support of this we are cited to sections 1618 and 1619, Revisal of 1905.

It will be observed that those sections simply authorize the introduction of copies of letters testamentary or of administration for certain purposes, but only upon "being properly certified" either according to the act of Congress or by the proper officer of the State or territory from whence they come.

Section 3133 is the statute which we think is applicable to this case. That section reads as follows:

"Whenever any will, made by a citizen or subject of any other State or country, is duly proved and allowed in such State or country according to the laws thereof, a copy or exemplification of such will duly certified and authenticated by the clerk of the court in which such will has been proved and allowed, if within the United States, etc., etc., when produced or exhibited before the clerk of the Superior Court of any country wherein any property of the testator may be, shall be allowed filed and recorded in the same manner as if the original, and not the copy, had been produced, proved, and allowed before such clerk."

The act of Congress requires that these records shall be proved by the attestation of the clerk of the court, and the seal of the court annexed, with the additional certificate of the judge, Chief Jus- (487) tice, or presiding magistrate of the court. The only change that our statute makes is to no longer require the certificate of the judge of the court, but it requires specifically that the record of the will shall

be certified and authenticated by the clerk of the court in which such will shall originally have been proved and allowed.

This Court has held in several cases that "Records of other States, to be used in evidence in this State, must have the attestation of the clerk of the court whose record is offered, and the seal of the court, if it have one. If there be no seal, this must appear in the certificate of the clerk, and the judge, Chief Justice, or presiding magistrate of such court must certify that the record is properly attested. *Kinseley v. Rumbough,* 96 N. C., 193; *Hunter v. Kelly,* 92 N. C., 285.

Under section 3133 of the Revisal, the certificate of the presiding judge, so far as the record of wills goes, seems to be no longer necessary; but the statute is peremptory in requiring that the copy or exemplification of such will be duly certified and authenticated by the clerk of the court in which such will has been proved and allowed, if within the United States.

There is nothing in this record tending to prove that Harrison Rider, the Register of Wills for Baltimore County, was the official clerk of the Orphans' Court in which the said will was offered for probate. It is true that he appears to have an official seal, but so has our register of deeds, and it is well known that he has no authority to take the probate of a deed, and has no connection with the Superior Court.

It may be that on another trial a proper exemplification of this will may be procured and probated, or that Harrison Rider, the register of wills, may be shown to be the official clerk of the Orphans' Court of Baltimore County.

New trial.

Cited: *Smathers v. Jennings,* 170 N. C., 604.

(ACC)

EMMA R. BOYNTON v. LEO D. HEARTT, PUBLIC ADMINISTRATOR.

(Filed 3 April, 1912.)

1. Public Administrator—Period of Appointment—Unexpired Term—Interpretation of Statutes.

The term of a public administrator is fixed by statute as eight years, without provision when that of any appointee, as such, is to begin or terminate, or power of appointment for an unexpired term. Hence the appointment of a public administrator is for eight years, and is not affected by a mistake of the clerk in stating in the appointment that it was for the unexpired term of his predecessor, or fixing the term of the new appointee for a less period.

2. Same—Removal—Application—Parties Entitled.

One who is a proper and competent person to act as public administrator, and has qualified, as such, on the estate of deceased, should not necessarily be removed for the reason that his term of office expired before his qualification, and this should not be done except at the instance of one having a prior right to administer.

3. Executors and Administrators—Supervision—Power of Courts—Distributee.

The right of administration is not now as important as it was before our statute of distributions was enacted, for he now acts under the direction of the court, whose duty is to see that a competent person is appointed; and the appointee cannot, by any act of his, affect the right of those entitled to share in the distribution of the estate.

4. Public Administrator—Removal—Application—Nonresidents—Interpretation of Statutes.

One who has qualified as public administrator of a decedent's estate here is not subject to be removed upon the application of a nonresident guardian of nonresident minors, heirs at law, they having no right of appointment in consequence of not having the right to administer upon the estate in North Carolina. Revisal, sec. 5, subsec. 2. *Wallis v. Wallis*, 60 N. C., 78, and that line of cases relating to the appointing powers of minors, etc., cited, distinguished, and discussed by ALLEN, J.

APPEAL from WAKE, from order rendered by *Daniels, J.*, at chambers, 11 December, 1911.

This is a proceeding to remove an administrator.

Harry O. Bannister, who resided in the city of Raleigh since April, 1907, as manager of the Western Union Telegraph office, died 2 May, 1911, at Richmond, Va. His father and mother, as well (489) as his wife and infant child, and all of his brothers and sisters, had predeceased him. His sister, Mrs. Lydia M. Boynton, *née* Lydia M. Bannister, who died in December, 1910, residing in the city of Richmond, Va., who was married to George A. Boynton of that city, left children surviving her, Emma R. Boynton, Gussie Oscar Boynton, Frank Elisha Boynton, and Oscar Bannister Boynton, all being infants, under fourteen years of age.

On 1 June, 1911, Leo D. Heartt, public administrator, applied to Millard Mial, Clerk of the Superior Court of Wake County, for letters of administration upon the estate of H. O. Bannister. No notice was given or attempted to be given to any of the next of kin, nor was any renunciation or waiver by any one filed. The estate of H. O. Bannister consisted of some personal property in Raleigh to the value of $200 and two insurance policies, which aggregated $1,800. The clerk issued the letters of administration to Leo D. Heartt, the public administrator.

The said Bannister was a comparative stranger in Raleigh, and had no known heirs or next of kin, and he left creditors in Raleigh whose debts aggregate about $600, all of whom resist the petition.

J. C. Marcom, who was appointed a public administrator of Wake County on 24 April, 1902, died in July, 1903, and on 11 July, 1903, Leo D. Heartt was appointed public administrator for the county, the appointment stating that the term expired 24 April, 1910.

This proceeding was begun in August, 1911, asking for the removal of Heartt, administrator, and the appointment of A. B. Andrews, Jr., who claims to be the nominee of the next of kin.

The next of kin are four children under fourteen years of age, who are nonresidents, and the said Andrews is recommended for appointment by their guardian, who is also a nonresident.

The clerk dismissed the petition, and this ruling was affirmed by the judge of the Superior Court, and the petitioner appealed.

(490) *A. B. Andrews, Jr., for plaintiff.*
Armistead Jones & Son for defendant.

ALLEN, J. J. C. Marcom was appointed Public Administrator of Wake County on 24 April, 1902, and died in July, 1903, and Leo D. Heartt was appointed such administrator on 11 July, 1903, the appointment stating that the term expired 24 April, 1910, eight years after the date of the appointment of said Marcom. On 2 May, 1911, H. O. Bannister died in the city of Richmond, having lived in Raleigh up to a short time before his death, leaving in Raleigh a small personal estate and several creditors. He was a comparative stranger in Raleigh, and at the time of his death had no heirs or next of kin anywhere, so far as known, in this State.

On 1 June, 1911, letters of administration were issued to the said Heartt on the estate of said Bannister, upon his application as public administrator.

The petitioners contend, on these facts, that the term of the public administrator is eight years; that as the said Marcom was appointed on 24 April, 1902, and died in July, 1903, that the appointment of the said Heartt was for the unexpired term of Marcom, ending 24 April, 1910, and that therefore he was not public administrator at the time of his application for letters of administration on the estate of said Bannister, while the said Heartt contends that he was appointed for a full term of eight years.

An examination of the sections of the Revisal (sections 19 to 21 inclusive) relating to the appointment of a public administrator show

that he may be appointed for a term of eight years, and that no period is fixed when the term shall begin or end, and no provision is made for filing a vacancy, or for making an appointment for an unexpired term.

Under these circumstances the courts hold with practical unanimity that an appointee to a public office holds for the full term, although the prior occupant had only held for a part of his term, and in our opinion the principle applies with greater force to one who is not strictly a public officer, as is the case of a public administrator. *S. v. Smith,* 145 N. C., 476.

The cases are collected in the note to *S. v. Corcoran,* 206 Mo., (491) 1, as reported in 12 A. and E. Ann. Cases, 573.

The fact that the clerk was mistaken as to the effect of the appointment, and said it would expire 24 April, 1910, cannot affect the title of the administrator.

If, however, it appeared that Leo D. Heartt was not public administrator at the time of his appointment as administrator of Bannister, it would not follow necessarily that he would be removed. It is found as a fact that he is a man of very high character, and is capable and competent to act as administrator, and the creditors of Bannister, instead of asking for his removal, join in a request that he be retained, and he has been appointed administrator of Bannister and has given bond as such, and it would not, therefore, be proper to remove him except at the instance of one having a prior right to administer.

This brings us to the principal question debated by counsel, which is as to the rights, under our statute, of the nominee of a nonresident guardian of nonresident minors to administer.

The petitioner contends that such nominee has the right to administer, and relies on *Ritchie v. McAustin,* 2 N. C., 251, decided in 1793, which holds that the nominee of an alien nonresident has this right; *Carthey v. Webb,* 6 N. C., 268, decided in 1813, holding that where the next of kin are aliens and residents of a country at war with the United States, that the nominee of the kindred next in degree is to be preferred to a creditor; *Smith v. Munroe,* 23 N. C., 351, decided in 1840, holding that one residing abroad may nominate; *Little v. Berry,* 94 N. C., 437, decided in 1886, that next of kin who are residents may nominate; *Williams v. Neville,* 108 N. C., 565, decided in 1891, that the next of kin who are residents may nominate; *In re Meyers,* 113 N. C., 548, decided in 1893 that the husband, a resident, may nominate the administrator of his deceased wife.

These authorities would be conclusive as to the right of a nonresident, who is next of kin, to nominate, if the qualifications and disqualifica-

tions of those claiming the right to administer had remained the same from 1793, when the first of these cases was decided, and 1893, the date of the last; but it will be found that there have been important and material changes in the statutes during this period and since
(492) then; and in considering these changes it must be remembered that no case has been found since *1868* holding that an alien nonresident may nominate, and none since *1905* holding that a nonresident may do so.

We have been unable to find any statute prior to 1868 which prevented a nonresident, whether an alien or not, from qualifying as administrator in this State, and the diligent and learned counsel for the petitioner concedes that there is no such statute.

In 1868, C. C. P., sec. 457, the courts were prohibited from issuing letters of administration to "an alien who is a nonresident of this State," and the statute remained in this condition until the Revisal of 1905, when it was changed to read: "is a nonresident of this State, but a nonresident may qualify as executor." (Revisal, sec. 5, subsec. 2.)

It follows that prior to 1868 a nonresident, whether an alien or not, could qualify as administrator in this State, and being entitled to qualify, he could, under the rules of the common law, nominate some one to act in his place, and from 1868 to 1905 a nonresident, who was not an alien, for the same reason had the right.

If, therefore, the right to nominate is dependent on the right to administer, the cases from our reports, referred to, were correctly decided, and are not in conflict with the position that a nonresident, who cannot administer under the Revisal of 1905, has no such right.

There is much conflict of authority in the different States as to whether the right to nominate is dependent upon the right to administer, some of the courts holding that the next of kin, when disqualified under the statute from acting as administrator on account of nonresidence, may nominate, and others holding to the contrary, the decisions being frequently dependent on the language of a statute expressly conferring the right to nominate, and we have no such statute.

The right to administer is not as important now as it was before the statute of distributions, as is clearly pointed out by *Chief Justice Pearson* in *Stoker v. Kendall*, 44 N. C., 242, and approved in an opinion by *Chief Justice Nash* in *Atkins v. McCormick*, 49 N. C., 274. *Judge Pearson* says: "The object in appointing an administrator is
(493) to have the estate of the intestate taken care of. Since the statute of distributions, it in fact makes but little difference who is appointed administrator, so that he is a fit person and gives the bond required by law. Prior to that statute, as the administrator had a right

to the surplus, after the debts were paid, it was a matter of very considerable consequence to obtain letters of administration, and there were frequently contests about the right."

When it is remembered that under our statute the administrator has no interest in the estate, and that he acts under the direction of a court, whose duty it is to see that a competent person is appointed, and that he cannot, by any act of his, affect the rights of those entitled to share in the distribution of the estate, it would be strange if one who is disqualified to act as administrator could name the person who must be appointed.

While, as we have said, there is authority to the contrary, the better view, as we think, is that the right to nominate depends on the right to administer.

The law is so stated in Croswell on Ex. and Admr., p. 92: "In many of the United States, however, by statute or by judicial decision, the person entitled to administration, whether resident in the State or not, may nominate some other person to the administration in his stead. And if the person who is entitled to administer renounces in favor of another, the appointee may proceed to have letters which have been wrongfully granted to a third person revoked, and himself appointed instead. . . . In other States it is held that the right to administer is merely personal, and does not include the right or power on the part of the person possessing it to nominate or select another person to be appointed in his stead. When the power of nomination is conferred by express statute, it will be limited to the persons named in the statute, and will not be extended to their representatives. . . . The right of persons who are entitled to administer, but who reside out of the State, to appoint some resident of the State to take administration in their stead is in some States recognized, at least as far as a surviving husband, widow, and next of kin are concerned, without regard to statutes. But by statute in some States, nonresidence in the State renders the person otherwise entitled to administer incompetent, and in such case his appointee is also incompetent, and the appointment in nuga- (494) tory. . . . Generally, if the person entitled to adminstration is incompetent for any cause, his right of nomination fails, and, except as above stated, no right of nomination exists."

In the case of *In re Muersing,* 103 Cal., 587, a nonresident next of kin attempted to exercise the power of nomination, and the Court says: "The father not being a resident of the State, was not competent or entitled to serve as administrator, and being incapable himself of administering, it was not competent for him to nominate an administra-

tor," and other cases to the same effect are cited in the notes of Croswell on Ex. and Admr., *supra.*

The recent case of *Butcher v. Kunst,* 65 W. Va., 390, is in point, as appears from the following excerpt from the opinion:

"The first question is, Had Louisa Butcher, as distributee of said estate, the right of administration or the right of nomination, as claimed? Second, if she had not such right, had she, by virtue of her interest in said estate, right of protest, and advice in the appointment of an administrator and right of appeal from the adverse judgment? Prior to the amendment of section 4, chapter 85, Acts of Legislature 1903, chapter 13, now section 3258, Code of 1906, if sole heir and distributee and a competent person, she would have had precedence in right of administration, but by that amendment, being a nonresident, that right was wholly taken away. That amendment added the proviso, 'that no person not a resident of this State shall be appointed or act as such personal representative, unless the decedent be a nonresident of the State at the time of his death, and names in his will a nonresident as his executor.' It is quite evident that counsel on both sides in this controversy have overlooked this amendment. Without such authority given by the statute, her nomination would not bind the court in exercising sound discretion in the appointment of some suitable person. 18 Cyc., 92. The statute is plain and does not call for interpretation. Its terms clearly precluded Louisa Butcher, a nonresident, from administering said estate, and her appointees and next of kin acquired no rights under her to administer thereon. This answers the first question."

We are of opinion, therefore, that the right to nominate depends upon the right to administer, and that the nominee of the nonresident
(495) guardian of nonresident minors was not entitled to have the appointment of Heartt revoked.

The petitioner says, however, that the disqualification of a nonresident to administer is in the same section with the disqualification of one because under twenty-one years of age, and that it has been held in this State, in *Wallis v. Wallis,* 60 N. C., 78; *Little v. Berry,* 94 N. C., 437, and in *Williams v. Neville,* 108 N. C., 561, that an infant, who cannot administer, may nominate.

An examination of these cases will show that the question was not raised in either.

In the *Wallis case* the county court appointed the widow of the intestate administratrix. In the Superior Court the order was reversed, because the widow was under the age of twenty-one, and the court appointed the nominee of the mother of the intestate. In the Supreme Court it was held that the nominee of the mother was entitled to admin-

istration, but that it ought to have been granted *durante minoritate,* and that the Superior Court, instead of granting the administration, ought to have directed the county court to do so. There is a statement in the opinion that the court might have granted letters to the nominee of the widow, and two cases are cited in support of the *dictum, Ritchie v. McAustin,* 2 N. C., 251, and *Pearce v. Castrix,* 53 N. C., 71, in neither of which was the right of an infant to nominate involved, and the *Wallis case* was approved in the *Little case* and in the *Williams case,* in support of the proposition that the next of kin, who are entitled to administer, may appoint, the next of kin being, so far as the cases disclose, of full age and residents.

If, however, the law is stated correctly in the *Wallis case,* there is a distinction between the disqualification on account of nonage and nonresidence, because, in the first, the right to administer continues to exist, while the exercise of the right is suspended during minority, and in the case of a nonresident he has never had the right to administer.

Applying these principles to the facts appearing in the record, we conclude that the nominee of the guardian is not entitled to have letters of administration issued to him, and that the appointment of Leo D. Heartt ought not to be revoked. (496)

Affirmed.

Cited: Salisbury v. Croom, 167 N. C., 228; *S. v. Knight,* 169 N. C., 361.

J. H. THOMAS AND WIFE v. F. W. ASHCRAFT.

(Filed 3 April, 1912.)

Damages—Fright—Profane Language—Instructions—Appeal and Error.

In this action for damages alleged to have been caused to *feme* plaintiff, among other things, by fright from profane language used by defendant in an "angry and mad manner," plaintiff's request for special instructions was properly refused, as from her own testimony it appears that she was not frightened by the defendant's manner and language.

APPEAL from *Allen, J.,* at February Term, 1911, of UNION.

The following issues were submitted by the Court:

1. Did the defendant assault the plaintiff, Mima Thomas, as alleged in the complaint?

3. What damage, if any, is the feme plaintiff entitled to recover?

The jury answered the first issue "No."

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

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

Redwine & Sikes for plaintiff.
Williams, Lemmond & Love, and Stack & Parker for defendant.

BROWN, J. The plaintiff requested the court to submit the following issue: "Did the defendant use profane language towards the plaintiff, Mima Thomas, and thereby frighten her, as alleged in the complaint?"

Plaintiff further requested the court to instruct the jury, "If the jury should find from the evidence that the defendant used profane language towards the plaintiff, and did this in an angry and mad manner,
(497) and this conduct frightened the plaintiff, then the jury should answer the second issue 'Yes.'"

His Honor refused to submit the said issue and to give the said instruction. The plaintiff excepted.

There is abundant evidence upon the part of the *feme* plaintiff to prove that the defendant assaulted her, all of which is flatly denied by him, and the jury have taken his version of the matter.

It is unnecessary to discuss the propriety of the second issue as tendered by the plaintiff as a matter of law, for there is no evidence whatever in the record tending to prove that Mrs. Thomas was either frightened or injured by the defendant's "cussing."

On the contrary, we judge from reading the evidence in this case that the *feme* plaintiff would be quite a match for the defendant, or any other ordinary man. She says that she has always been a stout woman, that she has never taken but one dose of medicine in her whole life, and that she never had a doctor to attend her except at the birth of her children, and that she did all of her housework, cooking, washing, ironing, etc.

That "cuss" words were not at all unfamiliar to her, and not calculated to frighten her, is manifested by her own testimony. She says: "I have often heard my brother Josh and my other brothers and all of my sisters curse. I have, also, heard my mother curse. It does not scare me to hear people curse. It was Mr. Ashcraft's jumping at me that scared me so bad, and caused me to give way."

Now, the jury have negatived the fact that Mr. Ashcraft jumped at her, for that was the sole basis of an assault. We think, under the testimony, his Honor very properly refused both the issue and the instruction.

No error.

(498)

VIRGINIA AND CAROLINA SOUTHERN RAILROAD COMPANY
v. MARSHALL McLEAN AND WIFE.

(Filed 3 April, 1912.)

1. Railroads—Easements—Rights Acquired—Use by Owner of Lands.

Only an easement in lands passes from the owner to a railroad company under condemnation proceedings (Revisal, sec. 2575), divesting all the rights of owners who are parties to the proceedings in such easement during the corporate existence of the company (Revisal, sec. 2587), but allowing them to use and occupy the right of way in any manner not inconsistent with the easement acquired.

2. Railroads—Easements—Use by Railroad—Necessity—How Determined.

A railroad company may use and occupy a right of way acquired by it under condemnation proceedings, when, in its own judgment, the proper management and business necessities of the road may require it.

3. Railroads—Easements—Additional Burdens—Owner's Compensation.

When a railroad company puts additional burdens upon a right of way which it has acquired by condemnation, not properly embraced in the general purpose for which it was obtained, the owner is entitled to compensation for them.

4. Railroads—Easements—Measure of Damages—Mineral—Special Circumstances.

In awarding damages to the owner of lands for an easement therein acquired for railroad purposes, there should, as a general rule, be included the market value of the land actually covered by the right of way, subject to modification under special circumstances, as where there is a mineral deposit of the use of which the easement does not interfere.

5. Railroads—Easements—Measure of Damages—Special Benefits.

The owner of lands through which a railroad has acquired a right of way by condemnation is entitled to recover therefor the damages done to the remainder of the tract or portions of the land used by him as one tract, deducting from the estimate the pecuniary benefits or advantages which are special and peculiar to the tract in question, but not those which are shared by him in common with other owners of lands of like kind in the same vicinity.

6. Appeal and Error—Objections and Exceptions—Instructions.

An instruction to the jury that the plaintiff was entitled to recover of a railroad company, for condemning his land for a right of way, the actual market value of the land thus taken, will not be held for reversible error on appeal when no exception is entered.

APPEAL from *Whedbee, J.*, at October Term, 1911, of CUM- (499)
BERLAND.

Proceedings to condemn land for a right of way for plaintiff company, heard on appeal from clerk of Superior Court on an issue as to the amount of damages.

The following issue was submitted and answered by the jury: "What damages are defendants entitled to recover of plaintiff on account of the condemnation and appropriation of the 3.12 acres of land described in the petition filed in this cause? Answer: $462.50."

Judgment on the verdict for the amount and condemning the land in question "as a perpetual right of way for plaintiff company to be used for railroad purposes and for such other purposes as may be permitted by statute," etc.

Plaintiff having duly excepted, appealed, and assigned and urges here for error the following direction with others given by the court as a rule for estimating the damages: "That in assessing the damages which the defendant may be entitled to, you will allow the defendants the actual market value of the three and 12-100 acres covered by the right of way that the plaintiff seeks to condemn, as described in the petition."

McLean, Varser & McLean and H. L. Cook for plaintiff.
Shaw & McLean and Sinclair & Dye for defendant.

HOKE, J. Under the general law, Revisal, secs. 2575 *et seq.*, and ordinarily under special statutes applicable, only an easement passes to the railroad under condemnation proceedings, and that and the effect of it is the interest usually involved in such an inquiry. In section 2587, the one which more especially refers to the judgment in these cases and the vesting of the title, the determinative language is: "And on the payment by said company of the sum adjudged, together with the costs and counsel fees allowed by the court in the office of the clerk, (500) then and in that event all persons who had been made parties to the proceedings shall be divested and barred of all right, estate, and interest in such easement in such real estate during the corporate existence of the company aforesaid; and this view has very generally prevailed with us. *Parks v. R. R.*, 143 N. C., 289; *R. R. v. Sturgeon*, 120 N. C., 225.

In practical application of this principle, the Court has held that to the extent that the right of way is not presently required for the purposes of the road, it may be occupied and used by the original owner in any manner not inconsistent with the easement acquired. *Lumber Co. v. Hines Bros.*, 126 N. C., 254. A position that finds support in a line of cases which hold that for any additional burden put upon the right of way not properly embraced in the general purposes for which condemnation was had, the compensation shall accrue to the owner and not

to the company. *Brown v. Power Co.,* 140 N. C., 333; *Hodges v. Telegraph Co.,* 133 N. C., 225. And it has been further decided that this right of way, when once acquired, may be occupied and used by the company to its full extent, whenever the proper management and business necessities of the road may require, and the company is made the judge of such necessity. *R. R. v. Olive,* 142 N. C., 257-275.

The easement, then, and its effect on the property being the question involved, the law aims at making the owner a "just compensation" for the injuries likey to arise from the imposition of such a burden upon the land, the statute so requires, and, stated in a general way, the rule is to "Award the owner the difference in the market value of the whole lot or tract before the taking and the market value of what remains to him after such taking, uninfluenced by any general rise in values of property due to the improvement." Elliott on R. R., sec. 995 (2 Ed.). In determining this difference, and owing to the fact that the easement is perpetual in its nature and in all probability likely to become permanent, and to the position just referred to, that the entire right of way may be at any time appropriated and used for railroad purposes whenever in the judgment of the company such uses is required, it is held by the weight of authority that the damages allowed the owner, as a general rule, shall include the market value of the land ac- (501) tually covered by the right of way, subject to the modification that under special circumstances, showing, for instance, the existence of mineral or other deposits of value below the surface to the extent that they could be made available to the owner without interference with the easement, such conditions should be considered by the jury in estimating the damage to be allowed on this account. *Brown v. Power Co.,* 140 N. C., 333; *R. R. v. Land Co.,* 137 N. C., 330-335; *Hollinsworth v. R. R.,* 63 Iowa, 443; *Weyer v. R. R.,* 68 Wis., 180; *So. Pa. R. R. v. San Francisco So. Union,* 146 Cal., 490; Lewis on Eminent Domain (3 Ed.), sec. 694.

In *R. R. v. Land Co., supra,* speaking to the question of allowing the market value of the land actually covered by the right of way, *Associate Justice Douglas,* delivering the opinion, said: "It is well settled that the defendant is entitled to recover not only the value of the land taken, but also the damage caused to the remainder of the land. Even if the plaintiff should not use the entire right of way, the rule would be the same, as it is not what the plaintiff railroad actually does, but what it acquires the right to do, that determines the quantum of damages."

In addition to market value of the land actually taken, the compensation to be allowed the owner shall include the damage done to the

remainder of the tract or portions of land used by the owner as one tract, and in ascertaining this amount the rule generally obtaining in this State requires that there shall be deducted from the estimate the pecuniary value of any benefits or advantages which are special and peculiar to the tract in question, but not for the benefits or advantages shared in common with other lands of like kind in the same vicinity. *R. R. v. Platt Land,* 133 N. C., 266; *R. R. v. Wicker,* 74 N. C., 220; *Freedle v. R. R.,* 49 N. C., 89; *Bost v. Cabarrus,* 152 N. C., 535. There are some helpful suggestions in these authorities on the question of general and special benefits, but there being no exception to the charge of the court in this respect, the matter is not further pursued, and on consideration of the principles stated, we are of opinion that there was no reversible error in allowing recovery for the market value of (502) the land covered by the right of way as an element of damages.

No error.

Cited: *Power Co. v. Wissler,* 160 N. C., 276; *Coit v. Owenby,* 166 N. C., 138; *R. R. v. Armfield,* 167 N. C., 465, 467; *R. R. v. Bunting,* 168 N. C., 580; *R. R. v. Mfg. Co.,* 169 N C., 162; *McMahon v. R. R.,* 170 N. C., 458.

J. A. VANCE, TRADING AS J. A. VANCE & CO., v. G. F. BRYAN ET AL., AND R. K. BAUGHAM, TRADING AS CAROLINA MACHINERY COMPANY.

(Filed 3 April, 1912.)

Bills and Notes—Indorsee in Due Course—Vendor and Vendee—Principal and Agent—Evidence.

The holder of a negotiable instrument, indorsed for value and before maturity, etc., by the vendor of machinery, who retained a lien on the goods sold under a conditional sale, is not affected by subsequent payments made to the vendor, which were not entered on the note and of which he had no notice; and, on the facts presented, there was no evidence upon which the vendor's agency to accept the payments in behalf of the indorsee could properly be submitted to the jury.

APPEAL from *Whedbee, J.,* at October Term, 1911, of CUMBERLAND.

On the trial it was made to appear that plaintiff, holding two notes by indorsement, for value and before maturity, each for sum of $251.34, given for a sawmill, engine, boiler, etc., and a registered lien, in the form of conditional sale, instituted the present action to recover on the notes and enforce the lien, etc. The property, having been seized by

ancillary process of claim and delivery, was replevied by G. F. Bryan and others, the purchasers, and defendants G. F. Bryan *et al.*, admitting the purchase of the property and execution of the notes, alleged payment of the notes to their codefendant, R. K. Baugham, their immediate vendor.

The jury returned the following verdict:

1. Is the plaintiff the owner and entitled to the possession of the property seized by the sheriff in this action? Answer: Yes.

2. Does the defendant wrongfully withhold possession of same from plaintiff? Answer: Yes. (503)

3. If so, what damage has plaintiff sustained thereby? Answer: Six per cent interest on amount due on notes from date of seizure by the sheriff.

4. What was the value of the property seized by the sheriff in this action on the day of the seizure? Answer: $600.

5. Was the plaintiff a purchaser of the two notes sued on before maturity and for value? Answer: Yes.

6. Have said notes, or any part thereof, been paid by the defendants to the plaintiff? Answer: Yes; $100, 26 November, 1906, to Mr. Alexander, attorney for the plaintiff.

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

H. L. Cook and J. E. Alexander for plaintiff.

V. C. Bullard and Sinclair & Dye for defendants.

HOKE, J. We have carefully examined the case and find no reversible error to plaintiff's prejudice. On the trial it was made to appear that, on 1 March, 1904, defendant R. K. Baugham, trading as the Carolina Machinery Company, sold to his codefendants, G. F. Bryan *et al.*, the engine, boiler, and sawmill and took from the purchasers two notes therefor in the sum of $251.34 each, one payable 1 July, 1904, and the second 1 November, 1894, and also a lien on the property to secure the same in the form of a conditional sale, which was duly registered; that at the time the said notes were executed or within a few days thereafter they were indorsed for full value by the payee to plaintiff, and that no payment had been made thereon to plaintiff except the $100, as established by the verdict. It was chiefly contended by the purchasers that, except the $100 referred to, they had paid for the sawmill, etc., to the Carolina Machinery Company, their immediate vendor, and that, on the testimony, the question should have been submitted to the jury whether the machinery company, at the time the payments were claimed

to have been made, was not the agent of plaintiff for the purpose and duly authorized to receive the same; but we concur with his Honor below, in the opinion that there was no evidence tending to sup-
(504) port the position, and no facts appearing from which the same could be reasonably inferred. The plaintiff being holder of the notes in due course, by indorsement for value and before maturity, etc., his demand is not affected by payments made to the payee, which were not entered on the notes and of which the holder had no notice. *Bank v. Michael,* 96 N. C., 53; *Blackmer v. Phillips,* 67 N. C., 340. There is No error.

W. C. GORHAM AND W. B. TAYLOR v. SOUTHERN RAILWAY COMPANY.

(Filed 10 April, 1912.)

1. Condemnation — Easements — Cartways — Situation of Lands — Proposed Buildings—Evidence.

In proceedings to lay out a cartway over the lands of another whereon there is a right of way of a railroad company, it is competent for the petitioner to show at the trial the exact situation of his lands, the uses to which they were susceptible, and hence, in this case, evidence was properly admitted which tended to show that the petitioner intended to erect a dwelling on his lands east of the railroad, from whence there was no proper outlet; its location; that the timber to be used for the purpose was to be cut from the west side of the railroad, and its location, and the distance between the timber and the proposed dwelling by the crossing in use at the time of filing the petition, and by the proposed new cartway.

2. Objections and Exceptions—When Taken—Practice.

The evidence in this case objected to *Held* to have been without prejudice as it had theretofore been testified to, in substance, without objection.

3. Condemnation — Easements — Cartways — Board of Supervisors—Order—Evidence—Corroboration—Harmless Error.

At the trial in the Superior Court, on appeal from an order of the board of supervisors allowing a cartway to be established over the lands of another, the order of the board is properly admitted in evidence to show the jury the location of the cartway, and in corroboration of the supervisors who have testified; and *Held*, further, the fact that the order had been made would necessarily imply that the cartway located was necessary, just, and reasonable, and its introduction would, in any event, be without prejudice to the respondent.

4. Condemnation—Easements—Cartways—Former Requests—Different Locations—Evidence.

Evidence that a petitioner for a cartway over the lands of another had theretofore requested a cartway at a different location to the one laid off, which as not objected to by the respondent, is incompetent, as it would not be an aid to the jury in determining the matter and would not be a bar to the proceedings.

5. Objections and Exceptions—Questions and Answers—Materiality—Appeal and Error.

An objection to the exclusion of a question asked a witness must show that the answer would have been material and competent, to constitute reversible error on appeal.

6. Condemnation—Easements—Cartways—Permissive Ways—Evidence—Interpretation of Statutes.

Under the language and spirit of Revisal, sec. 2686, a petitioner for a cartway over the lands of another becomes entitled thereto by showing that there is no public road leading to his lands; that the proposed cartway is necessary, reasonable, and just; and the existence of a permissive way is evidence for the consideration of the jury, but not fatal to his demand. *Ford v. Manning*, 152 N. C., 151, cited and approved.

7. Condemnation—Easements—Cartways—Railroad Crossings—Danger—Questions for Jury.

The mere fact of danger of crossing a railroad right of way will not bar the rights of a petitioner for a cartway across one, the danger of crossing at the proposed location being for the consideration of the jury.

APPEAL from *O. H. Allen, J.*, at November Term, 1911, of (505) GRANVILLE.

The petitioners filed their petition in November, 1910, before the Board of Supervisors of Salem Township, Granville County, asking that a cartway be established from the land on which they lived, across the track and right of way of the defendant, to a public road. Notice was issued to the defendant, and on 28 November, 1910, said supervisors made the following order:

"This cause coming on to be heard before the undersigned (506) Road Supervisors of Salem Township, Granville County, upon the petition of W. R. Taylor and W. C. Gorham, after due notice to the Southern Railway Company and Mrs. Wright, both parties being represented by counsel, after hearing the statements and contentions of both petitioners and the Southern Railway Company, we went upon the lands desired as cartway and made personal inspection of the same, and we find that it would be necessary, reasonable, and just that the petitioners be allowed a cartway from the dwelling-house of said W. C. Gorham and W. R. Taylor over the lands of said W. R. Taylor, Mrs.

E. L. Wright, and the Southern Railway right of way and railroad track to the public road leading from Oxford to Stovall, and that said cartway be laid off and kept open as laid off by said Gorham, except that it should cross the railroad on the south side of the second telegraph pole from the crossing described in the plat hereto attached. Said Gorham is to cut two feet off face side of cut in railroad up to level between the telegraph pole at crossing asked for and the one hereby established, if the railroad agrees to it.

"And it is ordered that said cartway be laid off and kept open across said lands of the parties in accordance with the laws of North Carolina.

"And for want of a constable in said township, the Sheriff of Granville County is hereby ordered to summon a jury of five freeholders to view the premises and lay off the cartway hereinbefore granted to width of fourteen feet, and assess any damages the owner of said land may sustain thereby, and the cartway herein allowed shall be marked and staked out in accordance with the findings above set out. And said cartway shall be kept open according to law."

The defendant appealed from the order to the Board of Commissioners of Granville County, which affirmed the order of the supervisors, and the defendant then appealed to the Superior Court, where the following verdict was returned by the jury:

1. Are the plaintiffs settled upon the land to which no public road is leading? Answer: Yes.

(507) 2. Is the proposed cartway necessary, reasonable, and just? Answer: Yes.

On the trial it appeared that the plaintiffs were the owners of about 300 acres of land in Salem Township, and that the track and right of way of the defendant ran through this tract of land, leaving about 280 acres, on which the home of the plaintiffs was situated on the east side, and about 20 acres on the west side.

It also appeared that there was a public road on the land on the west of the railroad, running parallel with it, and the cartway proposed was to run from the land on the east side of the railroad to said public road.

It further appeared that at the time of filing the petition a grade crossing was maintained across said railroad and right of way over which the plaintiffs could pass on their own land, except possibly a short distance on the Booth land, to said public road, but that this was permissive and not of right.

One of the petitioners testified as follows: That Lewis station was not more than one mile from the dwelling of the plaintiff witness, but in order to reach it he had to go ever 800 yards toward Oxford, and then 840 yards back along the public road until he reached a point

opposite his house, on the railroad, which was 345 yards from his dwelling, where he asked that the cartway cross the railroad; that he wished to haul his heavy freight, such as fertilizers, farm machinery, lumber, and other things, from Lewis station; that the crossing at that place was necessary to enable him to reach the cultivated land west of the railroad more conveniently; that he was preparing to build a dwelling near the tenant-house in which he was living; that a sawmill had been established just east of that place, and a very considerable portion of the timber he expected to use was on the west side of the railroad and the public road, which he would have to haul across the proposed crossing; that there was a grade crossing 800 yards southwest of his present dwelling, which was in use when he went to live there; that between said crossing and the public road there was a narrow point of the Booth land, and plaintiff's land comes up to the crossing on the east side, and the roadway thereto on east is on plaintiff's land.

Witness was asked where he proposed to erect the new dwelling of which he had spoken. (508)

(Defendant objected; objection overruled.)

Witness then testified that he intended to erect the dwelling between present house and the railroad.

Witness was asked where the timber was on the west side, of which he had spoken, which he intended to cut and haul for his new dwelling.

(Defendant objected; overruled; exception.)

Witness stated that it was on the northwest part of the land, and it would be much shorter to haul it by the proposed crossing than to go 840 yards to the present crossing and then more than 800 yards to the new mill.

(Defendant objected; overruled; exception.)

Witness testified that there were signs of an old road along the proposed cartway and crossing of the railroad.

On cross-examination witness testified that his present house fronted south towards the present crossing, 800 yards distant, in sight of the house; that said crossing was a grade crossing used by him and others who lived east of his house without objection from the defendant; that his house was on about the highest part of the farm. Defendant then asked witness if a grade crossing could not be obtained at almost any point along said railroad for a distance of nearly 400 yards north of the present crossing. Witness replied that a grade crossing could be obtained at several places, but that it would require him to go a much farther distance to reach his dwelling on account of a very great depression, or ravine, between the east side of the railroad, which drained out toward the north (but being easily crossed at a bridge on the proposed

cartway). Witness was asked if there was not another way to reach Lewis station, by going out northeast back of his dwelling. Witness replied there was an old road on his land and that of another person by which he could reach Lewis station, but it was very rough and somewhat longer than the proposed cartway.

The order of the supervisors was introduced, and the defendant excepted.

Each of the supervisors was examined as a witness, and testified that he went on the land and examined it; he described the conditions (509) existing and stated his reasons for making the order.

The cartway was not established by the supervisors at the place requested by the petitioners, but the defendant offered evidence that the proposed location was dangerous.

One of the witnesses for the defendant was asked if the petitioners had asked for a crossing at any other place than the one mentioned in the petition, and if any objection had been made on the part of the defendant to granting a crossing at any point south of the said cut.

(Objection by petitioner; objection sustained; defendant excepted.)

The defendant requested that the jury be instructed as follows:

1. If you find that plaintiff owns the land on both sides of defendant company's railroad and has been using a crossing from east to west to and from a public road which runs through the land on the western side of the defendant company's right of way, and that plaintiffs still have the right to use the said crossing on their land over said roadbed of defendant, then I charge you that the plaintiffs would not be entitled to the cartway asked for.

2. If the petitioners own the land on both sides of the railroad, and now have an unobstructed way to go from the east side to the road on the west side over their own lands, or the lands of another, then they would not be entitled to the cartway asked for.

3. If you find that petitioners have a way to the station and public road at Lewis, other than the one on the east side, then they would not be entitled to the cartway asked for.

4. If the crossing asked for is at such a place as to make it dangerous for passengers or to the passers over said track, the same would not be reasonable, necessary, and just.

5. If petitioners can have a grade crossing at another place along said track at a place where it would be safe for passengers and travelers wishing to cross the same, the same would not be reasonable, necessary, and just.

Judgment was rendered in accordance with the verdict, and the (510) defendant appealed.

Graham & Devin for plaintiff.
Hicks & Stem for defendant.

ALLEN, J. The exceptions from 2 to 6, inclusive, present the same question, and are directed to evidence introduced by the petitioners to prove that they intended to erect a dwelling on the land east of the railroad; where it was to be located; that the timber they would cut for the dwelling was on the west side of the railroad, and its location; and the distance between the timber and the dwelling, by the crossing in use at the time of filing the petition, and by the proposed new cartway.

In our opinion, this evidence was competent, for the purpose of showing the jurors the exact situation of the plaintiffs and giving them a true concept of the land and the uses of which it was susceptible; and these were circumstances proper to be considered in the determination of the issue as to whether the proposed cartway was necessary, reasonable, and just.

If this is not true, the defendant has not been prejudiced by the evidence, because it appears that the witness had, without objection, testified to the same facts, in substance.

The order of the board of supervisors was properly admitted in evidence. It was necessary for the jury to understand where the proposed cartway was to be located, and as each of the supervisors testified as a witness, it was also competent in corroboration. Besides this, the statement in the order that the cartway is necessary, reasonable, and just, to which objection is principally urged, would be implied from the making of the order, and the jury already knew that the order had been made.

We do not see the relevancy of the question asked a witness for the defendant for the purpose of showing that the petitioners had requested that another crossing be located, and that the defendant made no objection, as the answer to the question, if in the affirmative, would not aid the jury in determining the issue submitted, and it cannot be claimed that such a request would be a bar to this proceeding; and, further, it does not appear from the record what would have been the answer of the witness. *Stout v. Turnpike Co.*, 157 N. C., 366.

The first, second, and third requests for special instructions (511) present the question whether the existence of a private way, the use of which is permissive, will prevent the location of a cartway by petition, under the provisions of the Revisal, and the defendant relies on *Lea v. Johnson*, 31 N. C., 19, which has been followed in several cases. *Lea v. Johnson* was decided in 1848, when the Revised Statutes were in force, which provided, in section 33, ch. 104: "If any person

shall be settled upon or cultivating any land to which there is no public road leading and no way to get to and from the same, other than by crossing other persons' lands, and it shall not be necessary to establish a public road, it shall be lawful for such person to file his petition in the county court, praying for a cartway or wagon way, to be kept open across another person's land, leading to some public road, ferry, bridge, or public landing." And by reference to the Revisal of 1905, sec. 2686, it will be observed that the important and material words in the Revised Statutes, "and no way to get to and from the same," are omitted in the statutes now in force.

Justice Hoke adverted to the tendency of the early decisions to construe the statute strictly, in *Ford v. Manning,* 152 N. C., 151, and said: "And while many of the decisions are to the effect that these statutes, being in derogation of common right, should be strictly construed, and the petitioner required to bring himself clearly within the meaning of their terms, there is doubt if some of the cases have not gone too far in applying this principle of construction, and if it is not a more wholesome rule to construe the statute in a way to promote its principal and beneficent purpose."

Following this view, we are of opinon that the petitioners have brought themselves within the language and spirit of the statute by showing that there is no public road leading to their lands, and by offering evidence that the proposed cartway is necessary, reasonable, and just, and that the existence of the permissive way is not fatal to their demand.

Nor do we think the defendant was entitled to have the fourth and fifth prayers for instruction given.

It has been said frequently that a railroad track is notice of danger, and the traveler is required to look and listen before crossing it, because it is understood that there is danger, and if we were to hold that a cartway could not be granted across the right of way and track
(512) of a railroad because dangerous, we would, in effect, forbid it in any case.

His Honor properly charged the jury that they must consider the existence of the permissive way, and the danger of the crossing as it was proposed to locate it, in determining whether it was necessary, reasonable, and just, which we think was fair to the defendant.

Upon a review of the whole record we find

No error.

CITY OF WINSTON v. WACHOVIA BANK AND TRUST COMPANY.

(Filed 10 April, 1912.)

1. Taxation—Bond Issues—Vote of the People—Unrelated Propositions—Single Ballot.

When a popular vote is required to authorize or validate a municipal indebtedness the proposition should be single, and when the question presented embodies two or more distinct and unrelated propositions, and the voter is only afforded opportunity to express his preference or decision on a single ballot, and on the question as an entirety, the election as a rule is invalid and, on objection made, in apt time and in a proper way, may be disregarded and set aside.

2. Same—Constitutional Law—Legislative Control.

The general rule that a proposition to authorize or validate a municipal indebtedness should be single, not embodying two or more distinct and unrelated propositions, is not, in North Carolina, regulated by our Constitution, and the method of voting on a proposition of municipal indebtedness, under all ordinary conditions, is for the Legislature.

3. Same—Interpretation of Statutes.

Where a popular vote is required to authorize a municipal indebtedness, the voter should be afforded an opportunity to cast his ballot for a single proposition, and an act of the Legislature will not be construed as authorizing an election in contravention of this principle unless such purpose is expressed in clear and unmistakable terms.

4. Same—Ordinance.

Among other things, the Legislature provides that the city of Winston, for the issuance of bonds for several unrelated classes of municipal indebtedness, shall first pass "an ordinance specifying the purpose of the debt and the amount thereof," with the general provision, "with such regulations and rules governing such voting as the board of aldermen may prescribe": *Held*, the statutory provision first mentioned did not authorize the submission by the board of aldermen of the various distinct and unrelated propositions to the voters in a single ballot, and that this position was not affected by the general statutory provision, for that was only intended to refer to the time and place of voting, and other mere formal regulations concerning the election.

APPEAL from *Daniels, J.*, at February Term, 1912, of FORSYTH. (513)

Demurrer to the complaint. The action was to collect the purchase price, which defendant had agreed to pay for certain municipal bonds of the city of Winston, to the amount of $160 000, which defendants had contracted to take at par and interest. The bonds having been tendered and all the facts relevant to their validity and issuance having been fully stated in the complaint, defendant demurred, assigning for cause that the bonds tendered were not binding on the city for the reason

that, in submitting the question to the popular vote, several distinct and unrelated propositions were combined and voted for on a single ballot. There was judgment overruling the demurrer, and defendant excepted and appealed.

Manly, Hendren & Womble for plaintiff.
Watson, Buxton & Watson for defendant.

HOKE, J., after stating the case: The charter of the city of Winston, chapter 72, sec. 46, Private Laws 1909, conferred upon its gov-
(514) ernment on approval of the popular vote, the power to incur indebtedness and to issue bonds therefor, in terms as follows:

"That for the purpose of improving streets and sidewalks, purchasing, establishing, equipping, extending, or maintaining waterworks, sewerage, gas plant, electric light or power plant, public schools, or for any public improvement, or to fund or pay any bonded debt now existing, on or before the date when same shall fall due, the board of aldermen is hereby authorized and empowered to create a public debt and issue bonds therefor, under the following provisions: That an ordinance specifying the purpose of the debt, the amount thereof, the time when same shall fall due, and such other provisions the board may adopt, shall be passed by a three-fourths vote of the entire board at two separate regular meetings, submitting the question of creating a debt to the vote of the people, with such regulations and rules governing such voting as the board of aldermen may prescribe, and the said debt shall become a valid obligation, and bonds may be issued in accordance with the ordinance if the same is approved by the vote of a majority of the qualified registered voters having voted in favor thereof; that the board may order a new registration whenever such question is submitted to the voters. . . ." By an amendment in 1911, the words "hospital or hospitals" were added, as one of the purposes to be inserted in the original act, just after the words "public schools."

Undertaking to exercise the power thus conferred, the board of aldermen, by the required majority and at two separate regular meetings, passed an ordinance providing: "That an election be held in the three wards of the city of Winston, on Tuesday, the 8th day of August, 1911, at which said election the qualified registered voters of the said city of Winston shall be allowed to vote upon the question of creating an indebtedness of $350,000; of which sum the amount of $75,000 shall be for permanent improvements to streets and sidewalks; the amount of $85,000 shall be for increasing the sewerage facilities; the amount of $40,000 shall be for the extension of water mains and improvements in

the waterworks system; and the amount of $60,000 shall be for the erection and equipment of additional public school buildings; and the amount of $90,000 for improved and larger hospital facilities in the city of Winston and the acquisition, by purchase or otherwise, of a site and the erection and equipment of a hospital; and it is further ordained, that the mayor and board of aldermen be authorized to prepare, issue, and sell bonds to the amount of $350,000 as aforesaid; the proceeds to be used for the purposes and in the amounts herein named. . . . The said bonds shall be sold and delivered as the necessi- (515) ties of the work and improvements and payments authorized may require." The ordinance then made certain regulations as to the time, place, and methods of conducting the election, the giving of proper notice, etc., and concluded as follows: "The secretary and treasurer of the city shall provide and furnish the necessary ballots for each ward, and these ballots shall be of the uniform size and color, to be selected by the secretary and treasurer; and those who vote at the election, if in favor of the issuance of said bonds and the creating of the indebtedness, shall vote a ticket with the word 'Approved' written or printed thereon; and those opposed to the proposition shall vote a ticket with the words 'Not Approved' written or printed thereon."

That pursuant to the ordinance and its requirements, an election was held and the proposition to incur the indebtedness for the different purposes specified was approved by the voters with practical unanimity, there being only ten votes cast against the measure. The ballot used was single, with the words "Approved" or "Not Approved" printed thereon, and was taken on the proposition as an entirety, as directed by the ordinance; that under authority vested in them by these different proceedings, the board of aldermen, by resolution duly passed at a meeting in September, 1911, determined on issuing bonds to the amount of $160,000, the proceeds to be used for "the following purposes and none other, to wit: $60,000 for the erection and equipment of additional school buildings; $20,000 for the extension of water mains and improvements in the waterworks system; $42,500 for increasing the sewerage facilities; $37,500 for permanent improvements to streets and sidewalks; all making a total of $160,000 par value of bonds"; and, having bargained said bonds at par to defendant and tendered the same, payment was refused, defendant contending that the bonds are invalid.

On these, the controlling facts relevant to the inquiry, the Court is of opinion that the position of defendant is well taken and that the proposed bond issue is without warrant of law. It has come to be well understood, certainly it is sustained by the great weight of authority, that when a popular vote is required to authorize or validate a

municipal indebtedness the proposition should be single, and when the question presented embodies two or more distinct and unrelated propositions, and the voter is only afforded opportunity to express his preference or decision on a single ballot, and on the question as an entirety, the election as a rule is invalid, and, on objection made, in apt time and in a proper way, may be disregarded and set aside. This was recognized by this Court in *Goforth v. Construction Co.*, 96 N. C., 538, a suit to set aside an election and prevent a bond issue pursuant to same, and in which *Merrimon, J.*, delivering the opinion, said: "We do not deem it necessary at this time to decide what effect the taking of the vote upon the propositions to subscribe for stock of two distinct companies as a single proposition may have on the election, except to say that it was certainly irregular and improper to do so." And there are numerous decisions in the courts of other States in which such an election is directly held to be invalid. *Ross v. Lipscomb,* 83 S. C., 156; *Johnston v. Roddy,* 83 S. C., 462; *Rea v. LaFayette,* 130 Ga., 771; *Bethany v. Allen,* 186 Mo., 673; *Gas and Water Co. v. Alyria,* 57 Ohio St., 374; *Williams v. People,* 132 Ill., 583; *Supervisors v. R. R.,* 21 Ill., pp. 338-373; *Lewis v. Commissioners,* 12 Kan., 186; *Leavenworth v. Wilson,* 69 Kan., 74; *McMillan v. Lee County,* 3 Iowa, 311; *Stern v. Fargo,* 18 N. D., 289; *City of Denver v. Hayes,* 28 Col., 110; *Trust Co. v. Sioux Falls,* 131 Fed., 891; *McBryde v. Montesano,* 7 Wash., 69; and many others could be cited. The ruling and the reasons upon which it is generally made to rest are very well presented by *Stockton, J.*, delivering the opinion in *McMillan v. Lee County,* 3 Iowa, *supra,* as follows: "The law, in our opinion, has provided no such mode of submitting these questions to the vote of the people. The evils which might be permitted to grow up under such a system are so obvious and apparent that any extended discussion of the question by us would be superfluous. It may be sufficient to suggest that if it were allowed, measures in themselves odious and oppressive might by means of it become fastened upon a county, which in no other way could have obtained the number of votes requisite to insure their adoption but by being connected with some other proposition, which commended itself to the favor and (517) suffrages of the people by its inherent merits and popularity. They must be adopted or rejected together. After the same manner, a measure desirable and necessary to a people of a county may, when offered for their adoption, be rejected by their votes and fail to become a law by reason of its connection with some other measure or measures unpopular and uncalled for. In either case there is an evil. An unpopular measure may be forced upon an unwilling people, or a necessary and desirable one may be denied them, in spite of their

wishes. It is sufficient for us to say that the law, in our opinion, intended to provide for no such system of contradictions. A measure wise and salutary in itself needs no adventitious assistance to recommend it to the suffrages of the people or to insure its adoption by them. It may demand that its enactment into a law shall be made to depend upon its sanction alone. A pernicious measure is not entitled to such assistance and should be permitted to stand or fall by its own inherent merits or defects"; and by *Brewer, J.*, in *Lewis v. Commissioners, supra:* "It may be conceded that two or more questions may be submitted at a single election, provided each question may be voted on separately, so that each may stand or fall upon its own merits. But that is a very different matter from tacking two questions together, to stand or fall upon a single vote. It needs no argument to show the rank injustice of such a mode of submission. By it several interests may be combined and the real will of the people overslaughed. By this combination an unpopular measure may be tacked on to one that is popular, and carried through on the strength of the latter. A necessary matter may be made to carry with it some private speculation for the benefit of a few. Things odious and wrong in themselves may receive the popular approval because linked with propositions whose immediate consummation is deemed essential. It is against the very spirit of popular elections, that aims to secure freedom of choice, not merely between parties, but also in respect to every office to be filled and every measure to be determined. A voter at a State election would be shocked to be told that because he voted for a person named for Governor on one ticket he must vote for all other persons named thereon; or that, voting for one person, he was to be understood as voting for all. He would feel that his free- (518) dom of choice was infringed upon. None the less is it so by such a submission as this." And continuing further, he said: "A mode of submission which is so obviously unjust, so contrary to the spirit of election, and has received such condemnation from the courts, will not be imputed to the intention of the Legislature, unless necessarily demanded by the language used"; citations made with approval in the learned opinion of *Chief Justice Fish* in *Rea v. LaFayette, supra.*

A persual of the authorities will disclose that in much the larger number of them the rule, as stated, is made dependent on the proper interpretation of the legislative statutes applicable to and controlling the question, and is not referred by them to any constitutional principle. True, the Georgia case, above cited, declares that "such an election contravenes the spirit of their Constitution," as embodied in the requirement that "No *law* or *ordinance* shall pass which refers to more than one subject-matter"; but so far as examined no decision rests the posi-

tion on any express constitutional provision except the case from Colorado. *Denver v. Hayes, supra.* In that case their Constitution specified: "That no city or town shall contract any debt by loan in any form except by means of an ordinance, . . . specifying the purposes to which the funds to be raised shall be applied. . . . But no such debt shall be created unless the question of incurring the same, at a regular election, . . . shall be sanctioned by a majority of those voting on the question, by ballot deposited in a separate ballot box, etc., shall vote in favor of creating the debt, etc," and the Court, construing the section and a statute which authorized the creation of a municipal debt for certain specified purposes, held that the correct interpretation of the Constitution and the statute was one and the same, and both required that, in order to a valid election the voter should not be required to vote for dual propositions on a single ballot.

But the Constitution of North Carolina, while it clearly requires the approval of a popular vote to sanction an indebtedness for any purpose other than for necessary expenses, Article VII, sec. 7,
(519) and contains direct admonition that the General Assembly shall safeguard municipalities so as to prevent abuses in the matter of taxation, assessment, and the incurring of debts. Article VIII, sec. 4, deals with the subject otherwise in very general terms, the exact language of the constitutional provision referred to being as follows:

ARTICLE VII, SEC. 7. *No debt or loan except by a majority of voters.* 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 collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein.

ARTICLE VIII, SEC. 4. *Legislature to provide for organizing cities, towns, etc.* It shall be the duty of the Legislature to provide for the organization of cities, towns, 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.

In view of the very general terms in which these provisions are expressed and the undoubted position that, except where regulated by the Constitution, this question of election methods is, to a large extent, legislative in its character, we conclude that an election of the kind we are discussing does not, with us, offend against any constitutional principle, and, as to the methods of ascertaining the popular vote and the restrictions to be imposed upon municipalities, in respect to taxation, assessment, and the contracting of debts, the subject is left in a large measure to legislative discretion. This view finds support in a concur-

ring opinion of *Chief Justice Jones,* in one of the South Carolina cases cited, *Johnston v. Roddy,* in which he says: "I concur in the judgment. When the statute confers upon the municipality the power to contract for waterworks and sewerage in an aggregate sum and to submit the question of bond issue therefor as a single proposition, I do not think the courts have a right to interfere because, in their view, such submission is unwise and dangerous. If the municipal action is within statutory power granted, and no constitutional inhibition appears, courts cannot annul"; and the latter portion of the citation from (520) *Judge Brewer's* opinion, *supra,* "A mode of submission which is so obviously unjust, so contrary to the spirit of election, and has received such condemnation from the courts, will not be imputed to the intention of the Legislature, unless necessarily demanded by the language used," gives clear indication that the distinguished jurist regarded and was dealing with the subject as being within legislative control. Two decisions of this Court are in general approval of this position, *Lumberton v. Nuveen Co.,* 144 N. C., 303, and *Smith v. Belhaven,* 150 N. C., 156, and while the question of voting in separate ballot boxes was chiefly urged upon our attention, an examination of the record and decision of the last case will disclose that the question of voting for dual propositions on a single ballot was also presented and such an election was upheld because the statute clearly provided that the vote should be taken in that way.

From these considerations and the authorities cited, we take it as established in this State:

1. That, in reference to the question we are discussing, the method of voting on a proposition of municipal indebtedness, under all ordinary conditions, is for the Legislature.

2. In view of the position so generally recognized, that where a popular vote is required the voter should be afforded opportunity to cast his ballot for a single proposition, an act of the Legislature will not be construed as authorizing an election in contravention of this principle unless such purpose is expressed in clear and unmistakable terms. Applying these principles to the cause in hand, we are of opinion, as stated, that this election must be declared invalid. While some of the decisions have perhaps gone too far in holding that several propositions shall be considered distinct and unrelated, here is an aggregate indebtedness of $350,000, embracing various propositions, some of them undoubtedly distinct and voted on by the single ballot, containing the words "Approved" or "Not Approved," as the case may be, and there is nothing in section 46 of the charter, as we construe it, which requires or permits that these differing questions should be voted for on a single ballot.

While the various purposes are enumerated in the section, the law provides that "An ordinance specifying the purpose of the debt and
(521) the amount thereof" shall be first passed—almost the very language made the basis of the decisions cited in which elections of the kind have been declared invalid, and the result is not changed or in any way affected by the general provision, "with such regulations and rules governing such voting as the board of aldermen may prescribe." This, in our opinion, refers, and was only intended to refer, to the time and place of voting and other merely formal regulations concerning the elections, and may not be construed as authorizing the board of aldermen to provide for and hold an election in direct contravention of the wise and wholesome principle that a voter should not be required to vote on single ballot for two or more distinct and entirely unrelated propositions. We are of opinion, and so hold, that the demurrer of defendant must be sustained.

Reversed.

Cited: Briggs v. Raleigh, 166 N. C., 150; *Moran v. Comrs.,* 168 N. C., 290; *Keith v. Lockhart,* 171 N. C., 457.

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(522)

H. C. KEARNEY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 10 April, 1912.)

1. Carriers of Passengers—Mixed Trains—Risks Assumed—Duty of Carriers—Negligence.

While a passenger on a train carrying passengers and freight assumes the usual risks incident to traveling on such trains, the employees of a railroad having such trains in charge are held to the highest degree of care of which they are susceptible, for his safety and protection, and he has a right to assume that the train will be run accordingly.

2. Carriers of Passengers — Stations — Stopping of Trains — Invitation to Alight.

When a railroad train stops at its usual place at its station for passengers to leave the train, it is evidence of an invitation to the passengers thereon to alight.

3. Same—Reasonable Time—Starting of Train—Negligence.

When a railroad train carrying passengers reaches its usual stopping place at its station for the passengers to alight and leave, it is the duty of its employees in charge to exercise the highest degree of care prac-

ticable in affording them sufficient time for the purpose; and it is actionable negligence for them to suddenly start the train to the injury of a passenger then alighting.

4. Carriers of Passengers—Stations—Place to Alight—Degrees of Safety—Custom—Duty of Carrier.

When it is customary for passengers to alight from either side of a train at its regular stopping place at a station, and one side is more dangerous than the other, it is the duty of the carrier to have an employee present to warn the passengers in alighting at the more dangerous place.

5. Carriers of Passengers—Alighting from Trains—Reasonable Time—Duty of Passenger—Negligence—Proximate Cause.

A passenger, in failing to leave a train which has stopped at its customary destination at a railway station, with reasonable promptness, and to exercise the care of a reasonable person in doing so, is negligent in his duty to the carrier, and may not recover damages for an injury thereby proximately caused.

6. Carriers of Passengers—Stations—Safe Place to Alight—Degrees of Safety—Custom—Duty of Carrier—Nonsuit—Evidence.

When there is evidence tending to show that the plaintiff, a passenger on a mixed train which had stopped at its usual place for the passengers to get off, where they were in the habit of alighting on each side of the coach, but one side was more dangerous for the purpose than the other, got off on the more dangerous side and that no employee of the defendant railroad company was there to advise or assist him, or place the step used for the purpose; that while he was getting off with reasonable promptness he was injured by a sudden and unexpected movement of the train, a judgment of nonsuit should be denied, as it is sufficient to take the issue of negligence to the jury.

7. Carriers of Passengers—Alighting from Trains—Manner of Alighting—Contributory Negligence—Questions for Jury.

When there is evidence of negligence on the defendant carrier's part, in causing an injury to the plaintiff, a passenger on its train, by the sudden and unexpected movement of the train as he was alighting therefrom, it will not be held contributory negligence, as a question of law, that he, a man of 69 years of age, let himself go to the ground gradually and slowly, on the side opposite to the station, where passengers customarily got off without objection from the carrier, especially as he had a right to assume that the defendant would not be negligent.

8. Carriers of Passengers—Alighting from Trains—Contributory Negligence—Negligence—Proximate Cause.

The negligence of the plaintiff, a passenger on defendant's train, in alighting at the usual place at defendant's depot, will not be held contributory when the real or proximate cause of the injury complained of was the sudden and unexpected movement of the train.

9. Same—Starting of Trains—Negligence.

When, in alighting from defendant's train at a station, the plaintiff has negligently put himself into a position which would not have directly produced the injury, and the injury would not have occurred except for the defendant's negligent act in suddenly starting the train, the situation of the plaintiff, at the time of his injury, is a mere condition, and not the direct or contributing cause thereof.

10. Carriers of Passengers—Riding on Platform—Stopping of Trains—Alighting—Interpretation of Statutes.

Revisal, sec. 2628, relieving the carrier from liability for injuries to passengers, under certain conditions, while riding on the platform while the train is in motion, etc., is for the protection of passengers and should be reasonably construed, and has no application when the injury complained of has been received as the passenger was alighting at a regular station after the train had stopped for that purpose, though he may have ridden in violation of the statute before the train had stopped.

11. Same—Instructions—Construed as Whole.

In an action against a carrier of passengers for damages for a personal injury received by a passenger, there was evidence tending to show that the plaintiff had ridden on the platform of the car to his destination, and was injured after the train had stopped at the station while alighting in the customary manner. There was evidence *per contra*. Among other things, the judge charged the jury that the plaintiff "would be entitled to recover" if they found that the train stopped at the usual place for the purpose, and, before the plaintiff had reasonable time to alight, it moved forward and inflicted the injury. In this case *Held*, the charge, construed with the other portions, showed no reversible error.

12. Instructions—Power of Court—Request of Counsel—Practice.

The trial judge on his own motion, or counsel for the parties may request the judge, to instruct the jury upon general principles applicable and necessary to an understanding of the cause being tried.

13. Carriers of Passengers—Alighting—Moving Trains—Instructions—Negligence.

In an action to recover damages for a personal injury received by a passenger while alighting from a passenger train at a station, alleged to have been caused by the carrier's negligence, the verdict must be construed with reference to the trial; and a refusal to give a requested instruction that the plaintiff could not recover if he received the injury by jumping from a moving train not held for reversible error, as the judge properly charged the law arising from the evidence so that the jury could not fail to understand the principle contended for.

BROWN, J., dissenting; HOKE, J., concurring in opinion of Court.

(524) APPEAL from *Ferguson, J.*, at October Term, 1911, of FRANKLIN.

Action to recover damages for personal injuries caused by a car, on which plaintiff had been riding as a passenger, passing over his foot, making amputation necessary.

The plaintiff, a man 69 years old, was a passenger on defendant's train on the night of 26 October, 1910, from Louisburg, N. C., to Franklinton, N. C. The train consisted of six box cars and two passenger coaches. The defendant operates a branch line between Louisburg and Franklinton, and in getting into the station at the latter point the trains pass through a switch north of the passenger depot. On the night of this accident the engine stopped at this switch to have it changed, in order to permit the train to pass onto a side-track and up to the passenger depot. When the engine stopped at this point, which was 386 feet from the depot, the passenger coach on which plaintiff was riding was seven car lengths further from the depot, making a total distance of more than 700 feet. At this point the plaintiff went on the platform of the car. In describing the circumstances under which he went out on the platform, the plaintiff says: "At any rate, just before Mr. White had gotten on, or about the time he got on the steps—had stepped down there—was when I came out of the coach, and the train had kind of slowed a little and there was a slack between the cars (lost motion) by the connection being a foot, probably, on the box cars especially. There is a foot difference, probably—a foot play between two box cars. There is not so much difference between the coaches; that is, the box cars in front. Those box cars were in front of me. It being dark there, and I couldn't see, there was a jerk, and I caught hold of the iron rod and sat down, like this, with my feet down here, and when I sat (525) there I looked to see, and the only thing was Professor White right across on the steps.

"I sat down on the platform of the coach with my feet on the first step. I think there are about four steps, counting the top one, down to the bottom one of the steps to get off. When that jerk came I had hold of this iron, and sat right down on the end of the coach, not on the seat."

The plaintiff remained in this position, sitting on the platform and steps of the car, until the train reached the usual place for slowing down the train, for the purpose of permitting passengers to alight when the train reached a point opposite the passenger station, and according to his evidence it then stopped.

The passenger station is on the southeast side of the track at Franklinton, and a light is kept burning in front of the station. Plaintiff says that there was a light at the station where it stops regularly, on

the east side, and the evidence of all the witnesses familiar with the depot is to the same effect.

It is agreed that plaintiff was attempting to alight on the side of the train opposite the passenger station.

There was evidence on the part of the plaintiff that passengers were in the habit of alighting on the side opposite the passenger station, without objection by the defendant, and that two passengers got off on that side to one on the other, and that it was equally safe, except it was a few inches lower and there was no light on that side.

There was also evidence on the part of the plaintiff that the train stopped at the usual stopping place for passengers to alight, and that he was then sitting on the top step of the platform; that after the train stopped, holding to the iron rail with one hand, he slid off until his feet were on the ground, and as he was straightening up there was a sudden jerk of the train; that he was stricken in the back, knocked down, and dragged eight or ten feet, when the train stopped again.

Other passengers were on the platform with the plaintiff, and got off about the same time, and on the same side.

The defendant offered evidence tending to prove that the usual (526) and proper place for passengers to alight was on the side next to the passenger depot; that the plaintiff was injured on the platform, or while trying to alight while the train was in motion.

The plaintiff also offered evidence that the step on which passengers alighted was left on the platform, and that no employee of the defendant was present to assist or notify passengers.

There was a verdict in favor of the plaintiff, and from a judgment rendered thereon the defendant appealed.

Bickett, White & Malone for plaintiff.
Murray Allen and F. S. Spruill for defendant.

ALLEN, J. At the conclusion of the evidence the defendant moved for judgment of nonsuit, upon three grounds:

(1) That there was no evidence of negligence on the part of the defendant, causing injury to the plaintiff.

(2) That the plaintiff was guilty of contributory negligence, on his own evidence.

(3) That the plaintiff was injured while riding on the platform of the train, in violation of section 2628 of the Revisal.

In the determination of this motion, we must accept the evidence of the plaintiff as true, and, guided by the rule of the "prudent man," which is the standard, must consider not only the evidence of the wit-

nesses, but also the situation of the parties and the circumstances surrounding them.

The plaintiff was a passenger on a train carrying passengers and freight, and as such assumed the *usual* risks incident to traveling on such trains, *when managed by prudent and careful men in a careful manner, Marable v. R. R.,* 142 N. C., 563; *Usry v. Watkins,* 152 N. C., 760; but he was entitled to the highest degree of care of which such trains are susceptible, and had the right to assume that the employees of the defendant would perform their duties and that the train would be operated with care. *Suttle v. R. R.,* 150 N. C., 673. The train had reached Franklinton, which was a terminus of the line, and had stopped at the usual place for passengers to leave the train. This was evidence of an invitation to alight. *Nance v. R. R.,* 94 N. C., 619; *Denny v. R. R.,* 132 N. C., 340; *R. R. v. Cousler,* 97 Ala., 235; *Roub v.* (527) *R. R.,* 103 Cal., 473; Fetter on Carriers, sec. 58.

When the train reached its destination, it was the duty of the defendant to exercise the highest degree of care practicable, and to give the plaintiff sufficient time and opportunity to leave the train, and if it failed to do so, and there was a sudden start of the train as he was alighting, this would be negligence. Hutchison on Carriers, sec. 1118; *Smith v. R. R.,* 147 N. C., 450.

If passengers could leave the train on either side, and one side was more dangerous than the other, it was the duty of the defendant to have some employee present to advise the passengers. *Ruffin v. R. R.,* 142 N. C., 128.

It was also the duty of the plaintiff to leave the train with reasonable promptness, and to exercise the care of a person of ordinary prudence in doing so, and if he failed in this duty he was negligent.

These are the duties imposed by law upon the plaintiff and defendant respectively, and when considered in connection with the evidence of the plaintiff, viewed in the light most favorable to him, as it is our duty to do in passing on a motion to nonsuit, we are of opinion that there was evidence of negligence on the part of the defendant, and that the plaintiff could not be declared guilty of contributory negligence as a matter of law.

According to the evidence of the plaintiff, the train had reached its destination and had stopped at the usual place for passengers to alight; no step for passengers was placed on either side of the train, and no employee of the defendant was present to advise or assist, and while he was getting off the train with reasonable promptness there was a sudden movement of the train, which injured him.

This is undoubtedly evidence of negligence. Moore on Carriers, 674;

Hutchison on Carriers, sec. 1118; *Nance v. R. R.*, 94 N. C., 619; *Tillett v. R. R.*, 118 N. C., 1031; *Smith v. R. R.*, 147 N. C., 450.

When the train stopped, the plaintiff was sitting on the platform, and he immediately attempted to get off on the side opposite the passenger station. He had been a frequent passenger on the train and usually got off on this side as did a majority of the passengers, and
(528) without any objection from the defendant. He did not rise to his feet, but held on to the iron railing and slided off, and after his feet reached the ground and he was getting in an erect position, or, as he says, straightening up, the sudden movement of the train injured him.

We are not prepared to hold, as matter of law, that it is negligence for a passenger, 69 years of age, when alighting from a train in the night, to let himself to the ground gradually and slowly, and particularly so in view of the fact that he had the right to assume that the defendant would not be negligent, and that the train would not move before he was given a reasonable time to get off; nor can we say it was negligent to get off on the side he did, when it was in evidence that he had done so repeatedly, without objection by the defendant, and that passengers usually got off on that side.

His Honor gave to the defendant all it was entitled to on the question of contributory negligence when he instructed the jury, in substance, that the plaintiff was negligent if he failed to exercise the care of one of ordinary prudence similarly situated.

If, however, it should be held that there is evidence of negligence on the part of the plaintiff, this would not prevent a recovery unless it was contributory, and it could not be contributory unless a real proximate cause of the injury, and according to the evidence of the plaintiff, if believed, the real cause was the negligent act of the defendant in moving its train while the plaintiff was alighting.

The principle is applied by *Justice Brown* in *Darden v. R. R.*, 144 N. C., 1, to one attempting to alight from a train in motion, which was stronger evidence of contributory negligence than is shown by the plaintiff's evidence, and he there says: "It is useless to discuss the alleged negligence of the plaintiff in attempting to alight from a moving train, for if his evidence is to be believed, the proximate cause of his injury in being thrown to the ground was the premature signaling to the engineer by the brakeman to 'Go ahead.' Had it not been for the brakeman's negligence, the plaintiff would doubtless have stepped safely to the ground."

The situation of the plaintiff at the time of his injury, if his
(529) evidence is believed, was not a cause, but a mere condition, and

the distinction between the two is well recognized. In *Black v. R. R.*, 193 Mass., 450, the Court, speaking of this distinction, says: "Negligence of a plaintiff at the time of an injury caused by the negligence of another is no bar to his recovery from the other unless it was a direct, contributing cause to the injury, as distinguished from a mere condition, in the absence of which the injury would not have occurred. . . . The application of this rule sometimes gives rise to difficult questions. But in this connection the doctrine has been established that, when the plaintiff's negligence or wrongding has placed his person or property in a dangerous situation which is beyond his immediate control, and the defendant, having full knowledge of the dangerous situation, and full opportunity, by the exercise of reasonable care, to avoid any injunry, nevertheless causes an injury, he is liable for the injury. This is because the plaintiff's former negligence is only remotely connected with the accident, while the defendant's conduct is the sole, direct, and proximate cause of it."

Nor do we think the fact that the plaintiff was on the platform immediately before his injury bars a recovery under section 2628 of the Revisal, which reads as follows: "In case any passenger on any railroad shall be injured while on the platform of a car, or on any baggage, wood, or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside the passenger cars then in the train, such company shall not be liable for the injury: *Provided,* said company at the time furnish room inside its passenger cars sufficient for the proper accommodation of its passengers."

The case does not come within the letter or spirit of the statute, because the plaintiff was not injured "while on the platform," nor was he at the time of his injury violating the printed regulations of the defendant which prohibit passengers from going on the platform only when the car is in motion.

The statute was intended for the protection of passengers and railroads, and should be reasonably construed, and there is as much reason for saying that a passenger who remains in his seat until the train stops, and is injured as he is stepping from the train, is injured "while on the platform," as there is for that construction to be placed on (530) the plaintiff's version of his conduct.

As was said in *Shaw v. R. R.*, 143 N. C., 315, and affirmed in *Smith v. R. R.*, 147 N. C., 451: "The statute, in plain terms, relieves the company from liability in the case of a passenger injured while on the platform of a moving train, when the company, as in this case, has complied with its terms," and as the train was not in motion at the time of his injury, the statute has no application under the circumstances in this case.

Nor did the fact that the plaintiff had been on the platform have anything to do with his injury. If he had lost his rights as a passenger because violating the statute, the train, according to his evidence, had stopped, and he then had the right to get off, and if in doing so he was injured by the negligence of the defendant, his being on the platform prior to that time was not even a contributing cause.

The language used by the Court in *Wood v. R. R.*, 49 Mich, 372, is in point: "It is claimed that it was negligence on the part of the plaintiff in going onto and standing upon the car platform and steps while the car was in motion. This may be true and might have prevented a recovery had the plaintiff been injured while standing there before the train stopped. Such, however, was not the fact, and his standing there neither caused nor contributed to the injury, other than by enabling the plaintiff to step off the train immediately upon its coming to a stop. Upon the stopping of the train he had then a right to get off, whatever his position up to that time may have been, and the danger of his position up to then cannot be charged against him, if he then, in the usual and customary manner and place, attempted to get off."

His Honor charged the jury on this phase of the case as follows: "My attention has been called to a statute passed by the Legislature, which I will read to you: 'In case any passenger on any railroad shall be injured while on the platform of a car, or any baggage, wood, or freight car, in violation of printed regulations of the company, posted at the time in a conspicuous place inside its passenger cars then in the train, such company shall not be liable for the injury: *Provided,* (531) said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of its passengers.' It is admitted, gentlemen, that the notices which have been introduced, one placed on the outside of the passenger coach which reads, 'Passengers not allowed to stand on the platform,' and notices posted inside the coach, 'Passengers are prohibited from going on platforms or between cars while the train is in motion, and are warned not to allow their heads or limbs to project from car windows.' The defendant company cannot make a contract which would excuse it from responsibility for its own negligence; neither could it makes rules or regulations for the movement and control of its trains which would excuse it from its own negligence; but the Legislature has seen proper to pass a law which prohibits a passenger from recovering if he stands on the platform, if he is injured while on the platform, contrary to notices which are posted. So that, if you should find from the evidence that the plaintiff went out and stood upon the platform, or sat down on the platform with his feet on the steps, while the train was in motion; and while it was in motion,

he having placed himself there in violation of a notice, he is prohibited by the statute from recovering, if he received injury while on the platform. And that means, not simply if he might get his hand mashed by the cars coming together, but if he placed himself there so that he was thrown from that place to the ground by the ordinary movement of the cars, he would be prohibited from recovering by reason of the notice, and it would be your duty to answer the second issue 'Yes,' whatever you might find as to the first; for, although the defendant might have been negligent in not moving its train with proper skill and proper care, still, under the law and the posted notices, its engineer could not anticipate that a passenger could be standing on the platform, and if he were standing or sitting there and the train in motion, and were thrown out, he could not recover. But although you might find that he went out and sat down on the platform while the train was in motion, and he remained there without injury until the train stopped, if you find it did stop, and when it stopped at the usual place of stopping the train for passengers to alight from the train, while it was stationary, and before he had reasonable time to alight, the train (532) moved forward, and by its motion is going forward struck him and knocked him down and ran over his foot and injured him, he would be entitled to recover."

The latter part of this instruction is the subject of exception by the defendant, because it concludes with the words, "would be entitled to recover," and this exception finds support in what is said in *Miller v. R. R.*, 143 N. C., 115, but this language does not stand alone, and must be considered with reference to the other parts of the charge, and when so considered it will be found that his Honor gave specific directions as to how the issues should be answered by the jury, according to their findings on the different contentions of the parties.

It was not intended to be decided in the *Miller case,* nor do we think it has been so decided in any other, that counsel may not ask the judge presiding to instruct the jury upon general principles applicable and necessary to an understanding of the case, nor that the judge cannot do so of his own motion.

The defendant also excepts because, as it contends, his Honor refused to instruct the jury to answer the first issue "No," if they found the plaintiff was injured while attempting to jump from a moving train.

As was said in *Cox v. R. R.,* 149 N. C., 87: "The verdict, like the charge, must be construed with reference to the trial."

His Honor instructed the jury that they could not answer the first issue "Yes" unless they found that the plaintiff was injured while getting off the train after it stopped, and then presented the defendant's

contention that the train was in motion at the time of the injury. He said: "If you find from the evidence that the train was being properly conducted and in motion, and shall further find that while it was in motion the plaintiff placed himself on the steps of the platform, and while the train was in motion the plaintiff, from his position in which he had placed himself, either fell from his position or attempted to alight from the train while it was in motion, and fell or was knocked down by the cars, the defendant would not be guilty of negligence, and it would be your duty to answer the first issue 'No.' One who (533) rides on a mixed train—that is, a train made up partly of freight cars with coaches attached—must take notice of the mode of moving such trains, and give a due regard thereto; and if you shall find from the evidence that the engineer slowed down his train and did not stop his engine, and thereby stop the movement of the passenger coaches, but moved slowly, and when he stopped his engine the passenger coach on which the plaintiff moved stopped at the time he stopped his engine, and afterwards and while plaintiff was attempting to alight, the passenger coach moved forward on account of the freight cars in front and between the passenger coach and the engine, taking up slack, it would not be negligence of the defendant, and you would answer the first issue 'No.' Contributory negligence is where the negligence is a contributing cause to the negligence already in motion, or put in motion during the existence of the contributing act of negligence; and if by the joint negligence of the two the injury is caused, each in part being the cause of the injury—to illustate: if the defendant was negligent and the defendant's negligence was the proximate cause of the injury to the plaintiff, and the plaintiff was negligent and his negligence contributed to the injury, it would be a case of negligence on the part of the defendant and contributory negligence on the part of the plaintiff. If you shall find from the evidence, by its greater weight, that the plaintiff attempted to alight from a moving train, it would be a case of negligence on his part, because it was the duty of the defendant to stop its train at the station, and a reasonably prudent man, careful of himself to avoid injury, would observe that the motion of the train, stepping from that to the ground, which was stationary, was calculated to throw him—cause him to fall and get hurt; and should you so find from the evidence, it would be your duty to say that he was contributing to the act of the defendant, if you find the defendant was negligent."

We do not think the jury could fail to understand from this charge that the issues should be answered against the plaintiff if he was injured in attempting to jump from the train or while it was in motion. Indeed, his Honor, we think inadvertently, went too far in behalf of the defend-

ant, when he substantially told the jury to answer the second (534) issue "Yes" if they found the plaintiff was careless.

The defendant further excepted to the following charge: "I charge you that if you shall find from the evidence, by its greater weight, that the train was slowed down on approaching the depot at Franklinton, at the usual place of slowing down the train, and shall further find from the evidence that the train came to a stop before the plaintiff attempted to alight from the train, and that just as the plaintiff was in the act of alighting and before he had a reasonable time to alight, and before the passengers who were to alight at the station had a reasonable time to alight, the defendant's engineer suddenly, without notice, moved the train forward, which motion of the train caused the plaintiff to fall, or struck him and knocked him down, and the train ran over his foot and injured him, it is your duty to answer the first issue 'Yes,' although the plaintiff was getting off on the opposite side of the train from the station, and on the side that passengers were not accustomed to alight."

This instruction presents the question of proximate cause, and is equivalent to charging the jury that although the plaintiff was negligent in getting off on the wrong side of the train, and in the manner adopted by him, that if the train had stopped at the usual place, and he was attempting to alight and was injured by a sudden movement of the train, a reasonable time not being given to leave the train, that the sudden movement of the train was the proximate cause of the injury, which is in accordance with authority. *Darden v. R. R.*, 144 N. C., 3; *Smith v. R. R.*, 147 N. C., 451.

The following excerpt from Moore on Carriers, sec. 38, is quoted and approved in *Smith v. R. R., supra:* "The duty resting upon a carrier involves the obligation to deliver its passenger safely at his desired destination, and that involves the duty of observing whether he has actually alighted before the car is started again. If the conductor fails to attend to this duty and does not give the passenger time enough to get off before the car starts, it is necessarily this neglect of duty which is the primary and proximate cause of the accident, if injury be occasioned thereby to the passenger. It is not a duty due a person solely because he is in danger of being hurt, but it is a duty (535) owed to a person whom the carrier had undertaken to deliver and who was entitled to be delivered safely by being allowed to alight without danger."

We have discussed the principal questions raised by the exceptions, and those mainly relied on on the oral argument and in the briefs, and have also considered the other exceptions not referred to, and upon the whole record find no error which entitles the defendant to a reversal of the judgment.

There are thirteen exceptions to evidence, which are not discussed in the brief, because counsel were doubtless of opinion, as we are, that they were without merit.

No error.

BROWN, J., dissenting: The plaintiff, a man 69 years old, who had been Sheriff of Franklin County more than thirty years, was a passenger on defendant's train on the night of 26 October, 1910, from Louisburg, N. C., to Fraklinton, N. C., consisting of six box cars and two passenger coaches. The defendant operates a branch line between Louisburg and Franklinton, and in getting into the station at the latter point the trains passed through a switch north of the passenger depot.

On the night of this accident the engine stopped at this switch to have it changed, in order to permit the train to pass onto a side-track and up to the passenger depot. When the engine stopped at this point, which was 386 feet from the depot, the passenger coach on which the plaintiff was riding was seven car lengths further from the depot, making a total distance of more than 700 feet. At this point the plaintiff went on the platform of the car. In describing the circumstances under which he went out on the platform, the plaintiff says: "At any rate, just before Mr. White had gotten on, or about the time he got on the steps—had stepped down there—was when I came out of the coach, and the train had kind of slowed a little and there was a slack between the cars—lost motion—by the connection being probably a foot, on the box cars especially. There is a foot difference, probably—a foot play between two box cars. There is not so much difference between the coaches, that is, the box cars in front. Those box cars were in (536) front of me. It being dark there, and I couldn't see, there was a jerk and I caught hold of the iron rod and sat down, like this, with my feet down here, and when I sat there I looked to see, and the only thing was Professor White right across on the steps.

"Q. You sat down on what? A. On the platform of the coach, with my feet on the first step. I think there is about four steps, counting the top one, down to the bottom one of the steps to get off. When that jerk came I had hold of this iron, and sat right down on the end of the coach, not on the seat."

The plaintiff remained in this position, sitting on the platform and steps of the car, until the train reached a point which, according to his testimony was the usual place for slowing down the train for the purpose of permitting passengers to alight when the train reached a point opposite the passenger station.

The passenger station is on the southeast side of the track at Franklinton, and a light is kept burning in front of the station to enable passengers to alight in safety. Plaintiff says there was a light at the station where it stops regularly, on the east side, and the evidence of all the witnesses familiar with the depot is to the same effect.

It is agreed that plaintiff was attempting to alight on the side of the train opposite the passenger station.

The proper place for passengers to alight at Franklinton, and the place provided by the defendant for that purpose, is on the side of the train on which the passenger station is located. There is a light on that side, and the conductor goes on that side of the train to permit passengers to alight, and puts his box down there for that purpose.

On the night of this accident the conductor had gone to the telegraph office for orders in connection with his train, and was in the act of passing around the rear of his train to get to the passenger depot to put down his box on the east side, when his attention was called to sheriff Kearney who had fallen on the west side of the train. (537)

"It was dark," Sheriff Kearney says, and "couldn't see to get off, because I had fallen twice there by reason of the distance being greater. They usually put down a step for passengers to get off the cars. There was no step put there that night."

With these conditions existing on the west side of the train, the plaintiff described the manner in which he was hurt as follows:

"The car had stopped. . . . The coach had stopped—the coach that I was on—and the one in the rear. I don't know about the box cars, or whether the engine had just stopped, or how it was. . . . I didn't raise up on the platform. With my feet on that first step there, and sitting here I just kind of slid down; did it because it was dark there, except right between the coaches, but the distance was more than a step. The distance from the bottom step of the coach down to the ground, I can't tell exactly, but I suppose it must be some fifteen inches, though. At any rate, it is a little more, probably, on that side than it is on the other—not more than that (indicating a distance with his hands), but the step when it is put down makes it about equal between the ground and the first step of the car. And when my foot got on the ground I had hold of the rod with one hand—which one I won't be positive; I can't remember for my life. I know I had my grip in my hand, and I raised up, and when I raised up I did not quite straighten, and know then I turned my left hand, with my face to the left, to catch hold of the iron to get up straight. I lacked a little bit of getting up straight, and couldn't recover it. If I could have gotten hold of the iron

I might have done it. I saw that I would sit back, and just at that time the coach in front of me moved, and the one in the rear, I think. Now, I won't be positive about it—which part of the coach that struck me right under the shoulder blade."

The following testimony of Sheriff Kearney is also descriptive of the manner in which he alighted:

Q. This was at night? A. Yes, sir.

Q. And a dark night? A. It was, that night.

(538) Q. There was a light burning on the passenger side of that train? A. I reckon there was; I didn't see it. I said they usually had that light, but I didn't notice it.

Q. You didn't look for the light—you stepped off on the opposite side of the train? A. I stepped off on the right-hand side.

Q. You stepped off on the opposite side from the passenger depot? A. Yes, sir.

Q. And it was dark where you stepped off? A. No; it was not dark right in front of me, because I could see the ground, and so stated. I said when the train stopped I could see the light underneath it.

Q. But you sat down on the platform and slid down to your feet on the side opposite from the pasenger depot? A. Yes, sir; that is right.

Q. Did you get off, looking back towards Louisburg? A. No; I turned and then slid off, when I heard that the train had stopped.

Q. Slid off, right down the steps? A. No; I don't think I did; don't think I raised up at all; that is my recollection of it.

The plaintiff says that this was a mixed train and he was using all the caution he could, because he could not see well at night.

Q. You know how box cars, with slack, how they come together that way? A. Yes, sir; I have seen it many times.

And the plaintiff further explains that his knowledge of the jerking of a mixed train is what caused him to sit down when the train first stopped at the lower switch. (Record, p. 31).

As further explaining the manner in which he fell, plaintiff was asked:

Q. Now, you say the car came to a stop after you sat down, and you slid down. Did you catch on your feet? A. Yes, sir; my feet went on the ground.

Q. You don't remember which hand you had your bag in? A. I think I had hold of the railing with my left hand.

Q. Tell me which direction the jerk was? A. As I got down and my feet went on the ground, I necessarily had to turn the way I was going, and when my feet got down and I raised up this way to get up, having

hold of this iron, I did not take leverage enough to carry my body straight up, and caught a new hold there with my left (539) hand, or with the other hand. That is the time the jerk came and I dragged.

Q. Was that the impact of the cars as they came together that way? A. Yes, sir; I think that is what struck me. It was two weeks after it was done before I knew the bruise was on my back.

Q. The slack in the train caused that car behind you—the railing or the end of the bumper, or something—to hit you in the back? A. Yes, sir.

Q. Now, you were sitting on the top of the platform, with your feet on the first step, and then below there are two steps more? A. I think so.

Q. And you straightened your feet and slid down? A. My feet got to the ground.

Q. You were still in a sitting posture? A. Yes, sir. I let my feet get on the ground until they struck the ground, and brought a swing to get up straight, and lacked a little bit of getting up and down, and saw I was going back on the car, and that was the time the bump came.

Q. You were still sitting on one of the steps? A. I can't say I was sitting.

Q. So, when you went to swing up and down, you didn't get the impetus to go forward—your weight was on the step, and you didn't get the impetus to pull up? A. That is right, and before I could recover, this jerk came.

It is not denied that defendant's train was being handled by a competent engineer and conductor. Sheriff Kearney says Engineer Sine and Conductor Finlator are competent men. Nor is it disputed that the cars were properly equipped with airbrakes.

There was sufficient room in the car for plaintiff to sit down, and he admits that he knew it was against the defendant's rules to ride on the platform.

It is also admitted by the plaintiff that the defendant had posted in its cars the following notices:

"Passengers are prohibited from going on the platforms or between cars while the train is in motion, and are warned not (540) to allow their heads or limbs to project from car windows."

And it is admitted that there were plates on the doors which read:

"Passengers not allowed to stand on the platform."

The defendant offered the evidence of its train crew and other witnesses to show that the train was moving when plaintiff fell from the car and was injured, and an eye-witness testified that he was within eight feet of the train and saw the plaintiff fall while the train was moving.

1. I think the motion of nonsuit should have been granted upon the ground, first, that there is no evidence of negligence on the part of the defendant causing injury to the plaintiff. There can be no dispute as to the law as laid down in our decisions, that a passenger on a mixed train assumes the usual risks incident to traveling on such trains when managed by prudent and careful men and in a careful manner. *Marable v. R. R.*, 142 N. C., 563; *Usury v. Watkins*, 152 N. C., 760. This rule does not change the burden of proof. The burden is upon the plaintiff to satisfy the jury by a preponderance of the evidence that the injury did not result from one of the usual risks incident to traveling on such trains. The plaintiff must show negligence. It would not be presumed from the mere fact that a mixed train moved after having momentarily stopped at a station. The plaintiff must show by a preponderance of the evidence that the movement of the train was due to the failure of the defendant to exercise care in the operation of the train.

There is not only an absence of evidence in the record that the movement of the train was such as is not ordinarily incident to the movement of a mixed train, but the plaintiff's positive testimony is to the effect that the movement of the car which knocked him down was the result of the box cars in the train taking up slack. The plaintiff testified that he was familiar with the manner in which box cars take up slack when a train stops. He said there is probably "a foot play between two box cars." The following evidence shows the cause of the movement of the cars.

Q. Was that the impact of the cars as they came together that (541) way? A. Yes, sir; I think that is what struck me.

Q. The slack in the train caused that car behind you—the railing or the end of the bumper or something—to hit you in the back? A. Yes, sir.

2. I think the motion of nonsuit should have been granted upon the further ground that upon plaintiff's own evidence he was guilty of contributory negligence which was the proximate cause of his injury. The law requires a passenger in alighting from a train to exercise reasonable care for his safety in taking hold of railings and in stepping off in the proper direction and manner, and if his injury results from his failure to exercise such care, he is charged with contributory negligence. The evidence of the plaintiff in itself and without argument seems to me to establish conclusively that he failed to exercise the care of a prudent man in alighting from this mixed train. He knew the place was dangerous. He says he had fallen twice there by reason of the distance being greater on that side. He did not step from the train as is custo-

mary and prudent, but slid down the steps. It does not meet this to say that he slid off the steps because of the darkness. He selected the dark side knowing the conditions. It is no answer to say that the defendant should have notified him to get off on the depot side. He required no notice. As long as the railroad had been running Sheriff Kearney had been riding on this train and he knew the place to alight was on the depot side. The Court lays stress upon the fact that the box used for passengers to alight was not put down and no one was present to notify passengers. While there was evidence for the plaintiff that this box or step was left on the platform and no employee of the defendant was present to assist or notify passengers, there was also evidence from plaintiff and his witnesses, which is not disputed, that this step would not have been placed on the side on which plaintiff attempted to alight. There was no duty on the defendant to notify the plaintiff as to the proper place to alight. He admits that he knew all about the locality; that he knew the location of the depot and the light; that he knew the difference in the distance from the bottom step to the ground on the two sides of the train. Was the defendant required to notify a passenger that the proper place to alight was on the side of the train next to the depot where the light is kept burning for the (542) purpose of enabling passengers to alight in safety? Was the defendant required to notify a passenger of the danger of alighting on the dark side of the train, when the passenger admits frankly that, "It was dark and I couldn't see to get off, because I had fallen twice there before by reason of the distance being greater?" This admission is in itself sufficient to eliminate all questions of the defendant's duty to notify plaintiff of the conditions existing at the Franklinton station. Experience had given him a lasting notice.

It is said in the opinion of the Court that the fact that plaintiff was riding on the platform in violation of the rules of the defendant and the notices posted in the cars had nothing to do with his injury. The case relied upon is *Wood v. R. R.*, 49 Mich., 372. In my opinion, this case is so far different from the facts in our case as to make it inapplicable as an authority. I think the present case falls within the exception noted in *Wood v. R. R.*, in the following language: "Had the plaintiff been in an improper position when the cars stopped and because thereof attempted or been obliged to resort to unusual methods to alight, and been injured while so doing, the case would be different, as the second wrongful act would contribute directly to the injury." The decision in that case turned entirely upon the fact that the plaintiff was alighting in the *usual and customary manner and place.* Sheriff

Kearney's violation of the posted notices and the rules of the company was a cause in the absence of which the accident would not have occurred, and he is denied the right to recover by section 2628 of the Revisal. *Wagner v. R. R.*, 147 N. C., 315.

3. If this case was properly submitted to the jury, as is held by the majority of the Court, I am convinced that the defendant was seriously prejudiced in the trial by the charge of the court and by the refusal to give the defendant's requests for special instructions. One of the principal exceptions to the charge is contained in the following instruction:

"But although you might find that he went out and sat down
(543) on the platform while the train was in motion, and he remained there, without any injury, until the train stopped, if you find it did stop, and when it stopped at the usual place of stopping the train for passengers to alight, he then being in the position on the platform, attempted to alight from the train while it was stationary, and before he had reasonable time to alight, the train moved forward, and by its motion in going forward struck him and knocked him down and ran over his foot and injured him, he would be entitled to recover."

While the defendant objects to the form of this instruction, and its form has been repeatedly held to be erroneous, *Ruffin v. R. R.*, 142 N. C., 120; *Witsell v. R. R.*, 120 N. C., 557; *Bottoms v. R. R.*, 109 N. C., 72, the defendant also attacked the instruction for error in its substance, and I think the point is well taken and finds direct support in the opinion of *Mr. Justice Walker* in *Miller v. R. R.*, 143 N. C., 123. In the *Miller case* it was held to be error to instruct the jury, "If you find as a fact from the evidence that, at the time he got on the caboose, it was not hitched on and connected, coupled with the engine, he was on the car wrongfully, and he cannot recover in this action." In discussing the reason for holding this instruction to be erroneous, *Mr. Justice Walker* says: "The liability of the defendant did not exclusively depend upon whether the caboose, when the plaintiff got on it, was coupled to the engine. If it was not, there were other facts and other questions to be considered, both in regard to defendant's negligence and plaintiff's contributory negligence."

The objection to the form of the question given in the present case is noted in the Court's opinion, but no reference is made to the objection to the substance, which was the objection insisted upon by the defendant. I am of opinion, as argued by the defendant, that the instruction had the effect of telling the jury that if they believed certain parts of the plaintiff's testimony *he would be entitled to recover*, without regard to the other evidence. The instruction contains a statement of the law

governing this case that is in conflict with every decision of this Court on the subject of a carrier's liability for injury to passengers traveling on a mixed train. It contains the statement that the plaintiff would be entitled to recover *if the train moved forward.* No (544) reference is made to the requirement that the movement must have been negligent and that it would not be negligent if it was due to the cars "taking up slack," as testified to by the plaintiff and which is one of the usual incidents to the operation of a mixed train. This instruction eliminates the plaintiff's conduct in alighting from the train on the side opposite the station, in the dark, at a point at which he had fallen twice before and when he knew the probability that the cars would take up slack, and it eliminates his conduct in alighting from the train at a place where the distance to the ground was six inches greater than on the side towards the depot, and by sitting on the platform in violation of the rules of the company, which he knew, and the notices posted in the cars in compliance with the statute, and by sliding down the steps in a sitting posture holding to an iron rail with his left hand. The instruction eliminates the fact, as shown by the defendant, that passengers invariably get off on the east side of the train because provision is made for them on that side, and it deprives the jury of the right to consider whether the plaintiff would have been knocked down by the movement of the train if he had been alighting from the train at the proper place and in the proper manner, and, in violation of the very fundamental principle of all actionable negligence, it omits all reference to proximate cause. The baneful effect of this charge could not be cured by general instructions on the issues, and I think the defendant is entitled to a new trial.

The charge does not contain a definition of proximate cause, and his Honor repeatedly charged the jury and omitted all reference to that material element of actionable negligence. Because of this omission, the following instruction is, in my opinion, erroneous: "I charge you that if you shall find from the evidence, by its greater weight, that the train was slowed down on approaching the depot at Fraklinton, at the usual place of slowing down the train, and shall further find from the evidence that the train came to a stop before the plaintiff attempted to alight from the train, and just as the plaintiff was in the act of alighting, and before he had a reasonable time to alight, and before the passengers who were to alight at the station had a reasonable time to (545) alight, the defendant's engineer suddenly, without notice, moved the train forward, which motion of the train caused the plaintiff to fall, or struck him and knocked him down, and the train ran over his foot and injured him, it is your duty to answer the first issue "Yes," al-

though the plaintiff was getting off on the opposite side of the train from the station and on the side that passengers were not accustomed to alight."

In sustaining this charge the majority of the Court find it necessary to hold that proximate cause upon the facts of this case is a question of law. This can only be done by holding that there is no evidence of contributory negligence on the part of the plaintiff. In considering this instruction the defendant is entitled to the strongest evidence in the record tending to show contributory negligence, whether offered by the plaintiff or the defendant, because the jury was at liberty to accept the defendant's evidence as true. There was evidence to the effect that it was very dark on the side of the train on which plaintiff alighted; that it was not the proper place to alight, and that passengers invariably alighted on the opposite side; that the plaintiff knew of danger in alighting; that the difference in the distance to the ground on the two sides is six inches by actual measurement; that the plaintiff knew there was a foot slack between the box cars and that this would cause the train to move forward after the engine had stopped; that immediately upon the train stopping, and without waiting to see if the stop was final, the plaintiff attempted to alight; that he was siting upon the platform in violation of the rules of the company and printed notices, and without arising he slid in a sitting posture down the steps, holding to the iron rod only with his left hand, and that on account of his failure to have sufficient power, on account of his position, to get up straight, and when he was about to sit back on the steps and in an unbalanced condition due to the manner in which he was alighting, he was knocked down by the movement of the train, and there is no evidence that the movement of the train would have knocked him down if he had been alighting in a proper manner on the side of the
(546) train provided for that purpose. Can it be that that recital of the evidence in this case contains no evidence of a failure on the part of the plaintiff to exercise the care of a prudent man? If it is conceded to contain such evidence, under the decisions of this Court the question of proximate cause was a matter for the jury, and it was necessary that they should find that defendant's negligence was the proximate cause of the injury before they could answer the first issue "Yes." The Court refuses to sustain the exception to this instruction because, as is said in the opinion, "according to the evidence of the plaintiff, if believed, the real cause was the negligent act of the defendant in moving its train while the plaintiff was alighting." Is there no evidence from which the jury could find that the plaintiff's conduct was the cause of his injury? Is proximate cause to be tested by plain-

tiff's evidence alone? I cannot agree with the conclusion of the majority of the Court. I have failed to find in plaintiff's evidence the statement that the defendant moved the train, but on the other hand I find the plaintiff's positive statement that the train was caused to move by the slack in the cars being taken up. I find upon examining the cases that whenever the question has been presented to this Court it has always been held that proximate cause is a question for the jury whenever the facts would admit of two conclusions. It has been held invariably that it is improper to charge that certain facts, if found to be true, would constitute contributory negligence and bar a recovery, without adding the *essential element of proximate cause.* A striking illustration will be found in *Roberts v. R. R.,* 155 N. C., 89, in which the defendant's request for an instruction that if certain facts were found to be true the plaintiff would be guilty of contributory negligence was modified by adding the element of proximate cause. The Court in an opinion by *Mr. Justice Hoke* holds that this modification was proper and that the Court could not have made the conduct of the plaintiff "determinative and controlling, and as a matter of law the proximate cause of the injury." In the recent case of *Boney v. R. R.,* 155 N. C., 95, will be found three special instructions requested by the defendant, each containing the recital of certain facts which the defendant regarded as constituting contributory negligence, and (547) upon the basis of the finding of such facts by the jury the defendant requested the court to charge the jury to answer the issue of contributory negligence "Yes." These instructions were given, except that the element of proximate cause was added to each, which this Court said was proper. The very theory upon which the *Boney case* was submitted to the jury was that proximate cause is a question for the jury, and that principle was invoked in denying the defendant a new trial for refusal to give certain instructions requested. In an elaborate discussion of proximate cause by *Mr. Justice Allen,* it is held that: "When it appears that plaintiff's intestate, an engineer, was killed by a collision of his passenger train with another train at a station which it was entering, the rules of the company, known to him, prescribing that under the conditions a speed over six miles an hour was prohibited and he was running thirty miles an hour, an instruction that the jury should find the intestate guilty of contributory negligence which would bar his recovery leaves out the essential point that it must approximately cause the injury, and is an improper one."

That proximate cause is a question for the jury when more than one inference can be drawn from the evidence is nowhere more vigorously maintained than by the *Chief Justice* and *Mr. Justice Hoke* in their

dissenting opinions in *Kearns v. R. R.*, 139 N. C., 470, and they cite the differing views of the members of this Court as proof positive that more than one inference could be drawn from the evidence in that case. The *Chief Justice* speaks of proximate cause as "a matter of fact eminently for a jury to decide."

It was held in *Ramsbottom v. R. R.*, 138 N. C., 38, that "Where two different conclusions could be fairly drawn as to whether there was a negligent breach of duty in not stopping a train, and whether the injury was one that any man of ordinary prudence might have expected from the facts as they existed, an instruction that withdrew the decision of both of these elements of actionable negligence from the jury and submitted to them only the question whether the failure to stop the train caused the injury was erroneous."

It has been frequently held by this Court that an instruction which makes the liability of the defendant depend upon its negligence, (548) without regard to whether such negligence was the proximate cause of the injury, is erroneous. *Butts v. R. R.*, 133 N. C., 82. And cases are almost as numerous as the leaves that fall sustaining the principle that proximate cause is for the jury when more than one conclusion can be drawn from the evidence. *Stout v. Turnpike Co.*, 153 N. C., 513; *Muse v. R. R.*, 149 N. C., 451; *Wagner v. R. R.*, 147 N. C., 325; *Boney v. R. R.*, 145 N. C., 248; *Whisenhant v. R. R.*, 137 N. C., 349; *Lassiter v. R. R.*, 133 N. C., 244; *Dunn v. R. R.*, 126 N. C., 343.

It is said in the opinion of the Court that if it should be held that there is evidence of negligence on the part of the plaintiff, this would not prevent a recovery unless it was contributory, and that it could not be contributory unless *the real proximate cause of the injury*. This is, I think, an incorrect idea of contributory negligence. It is not essential that the plaintiff's negligence should be the real proximate cause of the injury. It is sufficient if it is, as the words imply, a contributing cause. If the plaintiff's negligence is the real proximate cause of the injury in the sense of sole proximate cause, the act of the defendant would not be the real proximate cause, and, therefore, would not be actionable. The injury would then be the result of plaintiff's own negligence and not his contributory negligence. It cannot be said as a matter of law that the movement of the train was the real proximate cause when it does not appear that plaintiff would have been injured if he had been alighting in a proper manner. Plaintiff's own testimony shows that he was in an unbalanced position due to his own conduct. Could not the jury say that such position contributed to cause the fall, and that he would not have fallen if he had exercised the care

of a prudent man? The true rule, as laid down by Beach on Contributory Negligence, secs. 34, 35, is that if the negligence of the plaintiff contributed in any degree to cause or occasion the accident there can be no recovery. Mr. Beach says: "However it may have been expressed, the principle underlying all these decisions seems to be, and verily it is, the only sound basis upon which they can rest, that whenever the plaintiff's case shows any want of ordinary care under the circumstances, even the slightest, contributing in any degree, even (549) the smallest, as a proximate cause of the injury for which he brings his action, his right to recover is thereby destroyed. . . . There can be no middle ground; either the truth of these elementary propositions must be conceded or the whole theory of our modern law of contributory negligence must be abandoned."

I think the evidence shows conclusively that the plaintiff's conduct was the proximate cause of his injury; other members of the Court draw the conclusion that the movement of the train was the proximate cause as a matter of law. Would it not be as little as the defendant is entitled to to submit that question to the jury under proper instructions from the court?

There is no similarity in *Darden v. R. R.*, 144 N. C., 1, referred to as sustaining the position of the Court that the conduct of the defendant in this case was as a matter of law the proximate cause of plaintiff's injury. In that case the plaintiff was alighting at a proper place and was *stepping* from the train in a proper manner. There was no evidence that his manner of alighting was in any way the cause of his injury. On the other hand, it appeared that when the train had almost come to a complete stop and some one had called out, "All off for Springhill," plaintiff went out on the platform and just as he was in the act of alighting, "one foot on the bottom step and the other on the ground," the brakeman threw his lantern and halloaed, "All off for Springhill," and the engineer opened his throttle and the train jerked off. It appeared that the brakeman was in position to see the plaintiff as he was alighting, and it was his duty to see that passengers had descended from the steps to the ground before signaling the engineer. It is doubtful if there was any evidence of negligence on the part of the plaintiff in that case. The negligence complained of was his attempting to alight from a moving train, and there was no evidence in the case that the speed of the train was such that it would have thrown him if the train had not been suddenly jerked while he was in the act of alighting. There was no evidence that the plaintiff's manner of alighting in any way contributed to cause his injury, and under such circumstances it was said that *the proximate cause of the injury was the prema-*

(550) *ture signaling to the engineer by the brakeman to "go ahead."*

I do not think such facts are similar to the facts in this case, and I cannot agree with the Court in saying that case presented "stronger evidence of contributory negligence than is shown by the plaintiff's evidence in this case." Darden was, in the most unfavorable light of the evidence, attempting to alight from a moving train after his station had been called and the usual place of alighting reached; the brakeman nearby signaled the engineer ahead while he was alighting; the engineer, in obedience to such signal, suddenly jerked the train; the brakeman knew that Darden was going to alight at that point. In this case Sheriff Kearney, without the knowledge of any of defendant's employees, immediately upon the stopping of a mixed train attempted to alight by sliding down the steps; he lost his balance as the result of the manner and place in which he alighted and saw he was going to sit back on the steps, and while in that uncertain position the train moved forward and he was injured. There is nowhere in the record a single word of evidence that supports the view that Sheriff Kearney would have been hurt if he had been in the act of alighting from the train in a proper manner. The facts alone would seem to distinguish this case from *Darden's case.*

I have examined *Smith v. R. R.,* 147 N. C., 451, and I am unable to find anything in the facts or the law of that case to sustain the position that the movement of the train was as a matter of law the proximate cause of the injury to this plaintiff. There the plaintiff was a passenger on the defendant's train bound for Mebane, N. C., and when the train reached that point it stopped at a place about fifty yards east of the usual stopping place; the plaintiff thereupon went upon the platform for the purpose of alighting and discovered that a train of box cars was on the side-track on the north side and a train with engine attached was on the south side of the car on which she arrived; that the side-tracks were close to the track on which was the car she was on; that no one of the train crew was there to assist her to alight, as she was well acquainted with the ground; that passengers are usually received and discharged on the south side of the track where the

(551) depot is situated; that when plaintiff reached the platform the local train began to move east along where she stood on the platform; that she hesitated to attempt to alight there, and while she was standing there, not over half a minute, the train on which she was began to move slowly towards the station, and she supposed it was going to pull up to the place to alight, and instead it increased its speed, and, by jerking, threw plaintiff off and injured her. Upon these facts the plaintiff was nonsuited. In an opinion by *Mr. Justice Hoke*

this Court holds that the evidence of negligence was sufficient to be submitted to the jury, and there was no testimony in the record to justify the ruling that *as a matter of law* the plaintiff was guilty of contributory negligence. The question of proximate cause was not presented and is not discussed in the opinion.

The quotation from Moore on Carriers, sec. 38, in the opinion of the Court, should be read in connection with the opening sentence of that section: "It is the duty of the servants of a carrier of passengers, especially when in charge of a railroad train, to stop it a reasonable time to allow passengers to board or alight with safety; and *in the absence of contributory negligence* on the part of the passenger, the carrier is liable for injuries resulting from a failure to perform this duty." In stating that the movement of the train is in such cases the proximate cause of the injury, the author had reference to cases in which the passenger was alighting in a proper manner and at a proper place, and in which the passenger's conduct did not tend to establish contributory negligence on his part.

The defendant requested the court to answer the issue of negligence "No," if they should find that plaintiff attempted to jump from the train as it was moving into Franklinton, or if they should find from the evidence that at the time of his injury plaintiff was attempting to alight from a moving train. These instructions contain correct statements of law and are supported by defendant's evidence. They were refused, and such refusal is conceded to be error unless the requested instructions were substantially given in the charge. The charge quoted by the Court as covering the requested instructions opens with this language: "If you find from the evidence that the train was being properly conducted and in motion," etc. I think it clear that the defendant was entitled to the instructions as requested, without modification. If the train was in motion when plaintiff fell he would not be entitled to recover, and it would make no difference how the train was being operated by the defendant. That part of the charge quoted in the opinion of the Court, as well as other parts of the charge, show that the court below treated the question of plaintiff's alighting from a moving train as one of contributory negligence. It is not a question of contributory negligence. Whether the plaintiff exercised the care of a prudent man or not, if he was injured while the train was moving into the station at Franklinton, the jury would be required to answer the first issue "No."

(552)

His Honor repeats the view that the defendant would not be relieved if plaintiff attempted to alight from a moving train unless the train was being properly conducted, when he charges the jury: "The defend-

ant would not be guilty of negligence if it was moving its train in the ordinary way and without any negligence on its part in the management of its train." In place of this confusing and erroneous charge on the question of defendant's liability, if the train was moving when plaintiff was hurt, the defendant requested the simple, correct instruction: "If you find from the evidence that at the time of his injury the plaintiff was attempting to alight from a moving train, you will answer the first issue 'No,'" which was refused. In this I think there was error prejudicial to the defendant for which a new trial should be granted.

I will notice two other instructions requested by defendant, which are sustained by authority and which the defendant was entitled to have submitted to the jury: "If you find by the greater weight of the evidence, the burden being upon the plaintiff, that the plaintiff was caused to fall by a jerk of the train, the court charges you that in taking passage upon a mixed freight and passenger train a passenger assumes the usual risks incident to traveling upon such trains, when managed by prudent and competent men and in a careful and prudent manner; and unless you find by the greater weight of the evidence, the burden being upon the plaintiff, that this train was not managed by (553) prudent and competent men in a careful and prudent manner, you will answer the first issue 'No.'"

"A passenger on a mixed freight and passenger train takes the risk of jars not caused by the negligence of the railroad company, but which are usual and consequent on such mode of transportation, and the burden is upon the plaintiff to satisfy the jury by a preponderance of evidence that the jerk of which he complains was not such as is usual and consequent upon the operation of a mixed train; and if he has failed to so satisfy you, you will answer the first issue 'No.'"

These instructions are in strict accordance with the principles announced by this Court in *Marable v. R. R.*, 142 N. C., 563; *Suttle v. R. R.*, 150 N. C., 668, and *Usury v. Watkins*, 152 N. C., 760. They were refused, and in this I think there was error. It was of the greatest importance to a correct presentation of the case from the defendant's standpoint to have the burden placed upon the plaintiff of showing by a preponderance of the evidence that this mixed train was not managed by prudent and careful men in a careful manner, and that the injury of which he complained was not such as is ordinarily incident to the operation of a mixed train.

I have written at length in this case because I am convinced that the defendant was seriously prejudiced in the trial, and that the errors complained of are of such nature as to entitle the defendant to a new trial. Specific instructions were requested on all of the most important phases

of the case, all of which were refused. His Honor attempted to cover some of the requests by general statements in his charge. The defendant's request on contributory negligence was particularly full and directed the jury to plaintiff's evidence. In the Court's opinion, it is said that his Honor gave the defendant all it was entitled to on the question of contributory negligence when he instructed the jury in substance that the plaintiff was negligent if he failed to exercise the care of one of ordinary prudence similarly situated. It would be impossible to conceive of a more general instruction on the subject of contributory negligence or a more abstract statement of the law. This Court has repeatedly held that "It is the duty of a trial judge to give a requested prayer for special instruction, which is correct in itself, (554) material to the case, and based upon certain facts reasonably assumed from the evidence; and a general and abstract charge of the law applicable to the case is not sufficient." *Baker v. R. R.*, 144 N. C., 36; *Horne v. Power Co.*, 141 N. C., 58; *S. v. Dunlap*, 65 N. C., 288; *George v. Smith*, 51 N. C., 273.

This case was closely contested and it was important to the parties to have the benefit of their special requests for instruction and that the charge of the court should be free from error. I am of opinion that neither requirement has been observed, and, if the action is a proper one to be submitted to the jury, a new trial should be ordered in order that the defendant may have its cause presented in a manner free from harmful error.

HOKE, J., concurring: I concur in the decision affirming the judgment. The court charged the jury, in effect, that plaintiff was not entitled to their verdict on the issues if he was injured in the effort to get off a moving train or by reason of going on the platform while the train was in motion, or if he was injured by reason of the slack. The verdict, then, has been rendered on the theory necessarily accepted by the jury, that plaintiff received his hurt by reason of defendant's negligence in giving the train a sudden, violent movement forward, eight or ten feet, while plaintiff was in the act of alighting from the train on which he was a passenger; that at the time of the occurrence the train had come to a full stop at the regular place at the station, and plaintiff, at the proper time, was endeavoring to alight from the train on the side where passengers or good numbers of them were accustomed to alight and where it was ordinarily safe to do so, and was taking the precaution to slide down, holding on to the usual supports, in order to avoid a possible injury by making too long a step. In this condition,

when plaintiff had no reason to expect it, the train, as stated, was jerked violently forward, throwing plaintiff down and running over his foot. There was evidence to support the view. The jury have accepted it, and on this theory the question of contributory negligence and of proximate cause involved in it are removed as a matter of law, and on the record the recovery should be upheld both in law and fact. *Thorp v. Traction Co.*, present term, 159 N. C.; *Darden v. R. R.*, 144 N. C., 1; *Clark v. Traction Co.*, 138 N. C., 77; *Hodges v. R. R.*, 120 (555) N. C., 555.

Cited: Thorp v. Traction Co., 159 N. C., 35; *Brown v. Power Co.*, 171 N. C., 558.

J. L. FULGHUM AND WIFE, LOU FULGHUM, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 April, 1912.)

1. Carriers of Passengers—Stations—Safety of Passengers—Flag Stations—Duty of Carriers.

A common carrier is not held to the same high degree of care to provide safe means of access to and from its stations for the use of passengers, at a flag station where the passengers alight at a crossing, and where the law does not require them to keep a depot or platform, as it is at a depot in cities and towns.

2. Same—Negligence—Questions of Law.

At a flag station, where the law does not require the carrier to provide depots or platforms at the station, and where the trains are flagged, it is not negligence for the carrier to lay a few cross-ties at intervals along its right of way for the purpose of repairing its track, where they are in plain view of the passengers and not dangerous to a person exercising ordinary care.

3. Carriers of Passengers—Flag Stations—Safe Egress—Contributory Negligence—Evidence.

Where a passenger has safely alighted in broad daylight at a flag station of the carrier, and is injured by stepping upon a cross-tie left there for the purpose of repairing the track, lying lengthwise on a slanting ditch along the roadbed, which had plainly become slippery with rain and mud and it appears from her own testimony that she could have safely stepped over the cross-tie or have gone around it, her contributory negligence in thus acting will bar her recovery. *Hinshaw's case*, 118 N. C., 1052, cited and distinguished.

4. Nonsuit — Plaintiff's Evidence — Contributory Negligence — Questions of Law.

Where the plaintiff's own evidence discloses such contributory negligence as bars her recovery, a motion to nonsuit should be sustained.

CLARK, C. J., dissenting.

APPEAL from *Peebles, J.*, at September Term, 1911, of JOHN- (556)
STON.

Action to recover damages for personal injury alleged to have been sustained by the *feme* plaintiff at Bagley, N. C., on 29 January, 1909. At the conclusion of the evidence introduced by the plaintiffs, on motion of defendant's counsel there was a judgment of nonsuit. The plaintiffs appealed.

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

F. H. Brooks, Aycock & Winston for plaintiffs.
Abell & Ward for defendant.

BROWN, J. The defendant offered no evidence, and the following is an accurate statement of that offered by plaintiff:

Plaintiff was a passenger on defendant's train on the morning of 29 January, 1909, and left the train at Bagley, N. C., a flag station at which there was no regular depot, station-house, or platform. Passengers alighted generally in the vicinity of the public crossing. The conductor helped the plaintiff off the car, and placed her safely on the ground about sixty feet north of the crossing, on the right side of the track going north, from which point she started towards the crossing.

There were several cross-ties distributed along the right of way for use in repairing the road between the point where she alighted and the crossing. The plaintiff stepped on one of the cross-ties, her foot slipped on the tie, and threw her ankle out of joint.

Plaintiff testifies she knew that the tie she stepped upon was "wet, muddy, and slippery, and one end in the ditch and the other end towards the railroad, and the end towards the railroad was higher." Plaintiff says she stepped on the tie because she thought it safer to step *on it* than *over it.* Plaintiff admits she could easily have stepped over it, and further admits that she could have walked around this cross-tie without stepping on or over it.

The other testimony is that of two witnesses introduced by the plaintiff, which tends to prove that the nearest end of the cross-tie was five or six feet from the car, and that there was ample room for the the plaintiff to pass around it. (557)

The defendant offered no evidence, and moved to nonsuit, which motion was granted.

Upon a review of these undisputed facts, we conclude that his Honor properly sustained the motion to nonsuit: first, because there is no evidence of negligence; second, because the plaintiff's own negligence was the immediate cause of her injury.

1. Bagley is a flag station, having no depot nor station platform of any kind. Passengers are taken on the train in the vicinity of the crossing.

The defendant for purposes of repairing its track had placed a few cross-ties at intervals along its right of way; the exact number does not appear; plaintiff says several, while one of her witnesses says there was only one tie between where she alighted and the crossing.

All the evidence shows there was a space or passway five or six feet wide between the end of the ties nearest the railroad track and the cars. There is nothing in the evidence to indicate that plaintiff could not have walked around the ties with perfect safety.

This occurrence did not happen in a town or city where a regular station is kept, but at a flag station where there was no depot or platform required by law.

We recognize fully the duty of a common carrier to provide safe means of access to and from its stations for the use of passengers, 1 Hutchison on Carriers, sec. 51, but what may be considered a reasonably safe exit under conditions existing at Bagley would not be so regarded in populous towns and cities.

We are not prepared to hold that it was negligence upon the part of the defendant to lay a few cross-ties under such conditions at intervals along its right of way for the purpose of repairing its track, where they were in plain view of the passengers in broad daylight, and not in the least dangerous to a person exercising ordinary care.

2. It is well settled in this State that where the plaintiff's own evidence discloses such contributory negligence as bars recovery, a motion to nonsuit should be sustained. We think that is the case here.

(558) The plaintiff was assisted from the car by the conductor and landed in a place of safety only sixty feet from the public crossing. It was broad daylight. She started towards the crossing. She admits that she saw the cross-tie before her. It was in an inclined position, one end elevated some and the other in a ditch. She admits that she saw that it was muddy and slippery on top.

She further states that she could have easily walked around it, or have stepped over it. In fact, a ten-year-old child could have stepped over it. Instead of taking the obviously safe course that the most ordi-

nary prudence would have dictated, and either stepping over or walking around it, the plaintiff, with full knowledge of its condition, stepped upon the inclined tie, muddy and slippery as she knew it to be, and sprained or dislocated her ankle. As much as we may sympathize with the plaintiff in her misfortune, a bare statement of the facts is, in our opinion, sufficient to demonstrate that it was caused by her thoughtlessness.

Suppose she had been on a station platform, and had discovered a hole in front of her in time to avoid it, and had stepped in it instead of walking around it; or suppose she had seen a grease splotch ahead of her on the platform, and had deliberately walked through it, instead of stepping across or walking around it, could she have recovered damages for consequent injury? It will scarcely be contended that she could.

This is not like *Hinshaw v. R. R.*, 118 N. C., 1052 (cited by plaintiff), where a passenger is placed suddenly in a position of danger by the carrier's negligence and required to decide at once what course to pursue. He is not expected to exercise infallible judgment, but only ordinary care, and if he does so, he is not held to the consequences of his act if he makes a mistake.

But the plaintiff was not confronted with a sudden danger. She was in a place of absolute safety. The whole situation was open before her. She saw the tie, that it was slanting, muddy, and slippery. She admits she could have stepped over it, or walked around it. She did neither, but deliberately stepped on it. She must bear the unfortunate consequences of her carelessness.

The case is very much like that of *John v. R. R.*, 133 Ga., 525, (559) where a woman with full knowledge that a strip of pavement along the car track had been torn up, decided to step across the excavation, and in doing so stepped on a paving stone and slipped and fell.

The Court says: "The conductor, who was inside the car, had nothing to do with this decision, or the effort to carry it out. When she attempted to step from the car across the opening in the pavement, she placed her foot on a paving stone, or dirt, which gave way, and she was hurt. She took the chance of being able to make the long step successfully, and she failed to do so in safety. Even if the defendant was not altogether faultless, nevertheless, she cannot recover for the results of her own conduct, with full knowledge and in full view of the situation. Her injury was unfortunate, but she has no right to recover from the defendant. This case is not like those involving concealed danger, or dangerous places known to the company and not to the passengers, or where a passenger was ordered, or forced to leave a car, or

where there was a defect in street or sidewalk, which may have been previously known to a passenger, but of the proximity or danger of which by reason of darkness, or other cause, at the time of the injury, he was not aware."

We do not deem it necessary or useful to discuss the cases cited in the brief of the learned counsel for plaintiff. None of them bear even a little resemblance to the case at bar, which is peculiar and unusual in the facts presented.

The judgment of the Superior Court is

Affirmed.

CLARK, C. J., dissenting. When the train stopped at Bagley the *feme* plaintiff started to the rear door of the coach, which was at or near the crossing, to get out. Had she been permitted to do so she would not have been injured. The conductor called her to come to the front door, which was the length of the car, some sixty feet farther from the crossing. When she got upon the ground there were several cross-ties lying along the roadbed between her and the railroad crossing. It had been raining and the walkway around the end of the cross-ties was
(560) muddy and slippery and the sixty feet that she was unnecessarily required to walk to reach the crossing was in a shallow cut. It was negligence in the defendant company to require her to get out at this spot instead of the other end of the coach, where she would have stepped down upon the crossing. The defendant owed to her a decent and safe landing place, all the more so where, this not being a regular station, there was no platform.

The burden was upon the defendant under the statute to prove contributory negligence. It offered no evidence whatever to that effect, and the only evidence on the point was by the plaintiff herself, who said that it seemed to her safer to step on the cross-ties than on the muddy sloping earth in getting back to the crossing. It is patent to any one that this must have been so. If the cross-ties were slanting a little, so was necessarily the ground upon which they lay, and the ground, being soft and muddy, was much more slippery than the cross-ties could have been. If she had fallen by slipping in the mud, as she doubtless would have done, she must have fallen upon the cross-ties and been worse hurt. At any rate, the plaintiff had a right both under the Constitution and the statute to have a jury and not the judge to pass on the facts.

It was the duty of the defendant to have given the plaintiff a safe place to dismount. It did not do so, and would not permit her to get off at the other end of the coach, where she would have been safe. The

burden was upon the defendant to prove contributory negligence. It did not do so, and the only evidence is that of the plaintiff, that she pursued the safest course in stepping upon the cross-ties instead of upon the slippery mud.

The plaintiff was still a passenger when she fell. Being a woman, she was entitled to the attention that the law required to be paid to women and children, who are less able to take care of themselves than men. *Morarity v. Traction Co.,* 154 N. C., 586. The conduct of the defendant company in preventing the *feme* plaintiff from getting out in a safe place and causing her to walk sixty feet through mud and slush was of itself actionable.

Certainly, the judge had no right to say as a matter of law and in violation of the statute that the plaintiff was guilty of contributory negligence because she chose what seemed to her and what the jury doubtless would have found (if she had been allowed her constitutional right to a jury trial) was the safer method of traversing (561) the sixty feet of the sloping cut.

In *Roberts v. R. R.,* 155 N. C., 84, this Court quotes with approval, as it had previously done in *Smith v. R. R.,* 147 N. C., 450, from Hutchison on Carriers, sec. 128, as follows: "It is the duty of railway companies as carriers of passengers to provide platforms, waiting-rooms, and other reasonable accommodations for such passengers at the stations and *at such places* at which they are in the habit of taking on and putting off passengers. Their public profession as such carriers is an invitation to the public to enter and alight from their cars at their stations, and it has been held that they must not only provide safe platforms and approaches thereto, but that they are bound to make safe for all persons who may come to such stations in order to become their passengers or who may be put off there by them all portions of their station grounds reasonably near to such platforms and to which such persons may be likely to go; and for not having provided such stational accommodations and safeguards railway companies have frequently been held liable for injuries to such persons." And in *Mangum v. R. R.,* 145 N. C., 153, *Associate Justice Brown,* in delivering the opinion, said: "It seems now to be almost elementary that one of the recognized duties of a railway company that undertakes to carry passengers is to keep its station premises in a reasonably safe condition, so that those who patronize it may pass safely to and from the cars. *Pineus v. R. R.,* 140 N. C., 450; Wood on Railways, 310, 1341, 1349. This duty extends not only to the condition of the platform itself, whereon passengers walk to and from the trains, but also to the manner in which that platform is allowed by the common carrier to be used. *Western v. R. R.,* 73

N. Y., 935; Wood, *supra.* The defendant owed a duty to plaintiff, and to all other passengers, to keep its depot platforms used by them as a means of ingress and egress free from obstructions and dangerous instrumentalities, especially at a time when its passengers are hur-
(562) rying to and from its cars," citing *Pineus v. R. R.,* 140 N. C., 450, and *R. R. v. Johnston,* 36 Kansas, 769.

The plaintiff not having left the carrier's premises, was still a passenger. *Hansley v. R. R.,* 115 N. C., 602. Being still a passenger, she was entitled to a safe exit. 2 White Personal Injuries, sec. 557. If the railroad offers an egress that is unsafe, it is negligence. 2 White Personal Injuries, 619.

"The railroad should so arrange its station grounds that a passenger who gets off a train at the station, or *at places provided to alight,* may leave the cars without danger, and a reasonably safe passageway or a bridge should be provided leading to and from the station." *Hulbert v. R. R.,* 40 N. Y., 152. There a passenger who fell in a cattle-guard, going from the car to the station, was injured and recovered damages. "Every spot likely to be visited by passengers departing from depots should be made safe and kept so, and passengers injured may have compensation." 1 Bishop on Noncontract Law, sec. 1086, quoted with approval, *Lucas v. R. R.,* 119 Ind., 583; *s. c.,* 120 Ind., 206; *Gaynor v. R. R.,* 100 Mass., 215.

The passageway to and from a depot must be kept safe and passengers are entitled to a suitable place of egress. 1 Fetter on Carriers, 112; 2 Hutchison on Carriers, 1060, 1063. The defendant having required the female passenger to get out, not at the crossing, owed it to her to give her a safe, dry path back to the crossing, and if hurt by any defect in getting to the crossing the defendant is liable. *Autry v. R. R.,* 156 N. C., 293.

The defendant was more negligent, not less so, in making the plaintiff get out at an unsafe place, when she could have gotten out at a safe place at the other end of the coach, as she wished to do, because this was a flag station. She has been deprived of a right guaranteed her by the statute and the Constitution in being arbitrarily refused by the judge the opportunity to have twelve men to pass upon the question whether the railroad was guilty of negligence in causing her to get out of the train not at the crossing place. His Honor was further in error in depriving her of the benefit of the statute which placed upon the defendant the burden of proof to show that the plaintiff was guilty of contributory negligence and in finding himself, not only with-
(563) out any evidence whatever, but in contradiction of the only evidence before him, that she was guilty of contributory negligence.

She testified that she took the safest course. The presumption under the statute is that she did. Revisal, 483. This presumption should be reversed only by a jury, as the statute requires.

The conduct of the defendant and the action of the court below are without any precedent to sustain them. All passengers, and especially ladies, are entitled to better treatment than this plaintiff has received. Her ankle was broken because the defendant put her off at an unsuitable place when she could have gotten off at a safe place, and that, too, when it was apparent that for her to get back to the proper point, the road, she would have to traverse a muddy, slippery, sloping bank encumbered with cross-ties. If necessary for her to get out at the front end of the coach, the train should have been run back till she could have landed at a safe spot.

The plaintiff testified that the usual place for putting off passengers at Bagley was at the crossing. That the egress they gave her was not a safe exit is conclusively shown by the fact that in attempting to get back to the crossing her ankle was dislocated, by reason of which she suffered greatly and was laid up two months. Her testimony that she chose the safest plan must be taken as true on a nonsuit. *Spruill v. Insurance Co.*, 120 N. C., 147; *Powell v. R. R.*, 125 N. C., 372, and cases there cited. In *Wright v. R. R.*, 127 N. C., 228, this Court said: "The Court has heretofore had occasion to condemn the growing tendency to take cases from the jury and limit their sphere in damage cases. The right of trial by jury is guaranteed by the Constitution, and on all disputed issues of fact the courts cannot be too careful to refrain from invading the province of the constitutional triers of fact."

HOKE, J., concurs in the dissenting opinion of CHIEF JUSTICE CLARK.

Cited: *Dunnevant v. R. R.*, 167 N. C., 223; *Horne v. R. R.*, 170 N. C., 660.

UNITED AMERICAN FREE-WILL BAPTIST CHURCH, NORTHEAST CONFERENCE, ET AL. v. UNITED AMERICAN FREE-WILL BAPTIST CHURCH, NORTHWEST CONFERENCE, ET AL.

(Filed 13 March, 1912.)

1. Courts, Superior—Time Allowed to Plead—Discretion—Former Order—Judgment by Default.

An order of the Superior Court judge allowing time to file pleadings, with provision that if the complaint is not filed within a certain time the

plaintiff should suffer a nonsuit, and after the filing of the complaint a judgment by default should be entered if the answer is not filed within a certain time, cannot control the discretion of a judge subsequently holding a term of the court in refusing to sign the judgment by default and allowing the answer to be filed. Revisal, sec. 512.

2. Courts, Superior—Time Allowed to Plead—Court's Discretion—Appeal and Error.

The exercise of the discretion of the trial judge in permitting an extension of time to file pleadings is not reviewable on appeal. Revisal, sec. 512.

APPEAL from *Ward, J.*, at November Term, 1911, of LENOIR. (564)

This action was brought by the Free-will Baptist Church, Northeast Conference, against the Free-will Baptist Church, Northwest Conference, for the adjudication of certain rights of property as between them. When the case was called for trial it was discovered that the pleadings had been lost, and the judge presiding thereupon made an order to the effect that the plaintiff should file a complaint within forty days after the adjournment of court, or suffer a nonsuit, and that defendant should file an answer within a like time after the filing of the complaint, and in the event of its failure to do so the plaintiff was ordered to take judgment by default. A complaint was filed in due time by the plaintiff, but defendant failed to file its answer within the time fixed by the order. At the next term of the court plaintiff tendered a judgment against defendant for the relief demanded in the complaint. *Judge Ward* refused to sign the judgment, and allowed the defendant an extension of time to file its answer, which was afterwards filed within the extended time. Plaintiff excepted and appealed.

H. Wooten and E. R. Wooten for plaintiff.

H. E. Shaw, Harry Skinner, and Loftin & Dawson for defendant.

(565) WALKER, J., after stating the case: It is provided by Revisal, sec. 512, that the judge may, in his discretion, and upon such terms as may be just, allow an answer or reply to be filed, or other act done, after the time limited therefor, or by an order enlarge such time. The judge has a very broad discretion in such matters, and there is every reason why he should have it. No judgment by default had been entered, and when the matter was brought to the attention of *Judge Ward* by the motion for judgment he had the clear right, or discretion, to extend the time for answering. Pell's Revisal, sec. 512 and notes, where the cases upon the subject are noted.

This case is governed directly and pointedly by *Woodcock v. Merrimon*, 122 N. C., 731, and *Cook v. Bank*, 131 N. C., 96, and they are

strong authorities in support of the ruling below. In the first of the cases additional time was allowed to answer, with a stipulation that if defendant failed to avail himself of the privilege within the time so extended, judgment by default should be entered against him. The judge, at the next term, ignored the latter part of the order and gave more time to answer, and it was held that the order was a proper one and entirely within the discretion of the judge, the exercise of which is not reviewable by this Court. It was there said that what order shall be made or judgment rendered in case of default in filing a pleading must be left entirely to the discretion of the succeeding judge, and the judge who ordered the extension of time could not control that discretion. Approving *Gilchrist v. Kitchen,* 86 N. C., 20, and quoting therefrom, the Court said: "Independent of The Code, we hold that the right to amend pleadings in the cause and allow answers or other pleadings to be filed at any time is an inherent power of the Superior Courts, which they may exercise at their discretion. The judge presiding is best presumed to know what orders and what indulgence as to filing of pleadings will promote the ends of justice as they arise in each particular case, and with the exercise of this discretion this Court cannot interfere, because it is not the subject of appeal. *Austin v. Clarke,* 70 N. C., 458." (566)

In *Cook v. Bank* this Court had held in a former appeal that plaintiff was entitled to a judgment by default for want of an answer, and, notwithstanding this decision, it was afterwards held that when the case was transmitted to the Superior Court the judge had the discretion to refuse to enter a judgment by default, according to the opinion of this Court, and to extend the time for answering.

It is too well settled to require or even justify discussion, that the enlargement of the time for filing pleadings is a matter to be decided according to the court's discretion. *Wilmington v. McDonald,* 133 N. C., 548. A judge could not well decide in advance whether the defendant's failure to file an answer within the prescribed time will be due to laches or to such circumstances as will excuse the omission and entitle him to further time.

Appeal dismissed.

Cited: Lloyd v. Lumber Co., 167 N. C., 97.

J. E. LITTLETON v. JOHN HAAR.

(Filed 13 March, 1912.)

Registers of Deeds—Parent and Child—Marriage License—Written Consent—From Whom Obtained—Interpretation of Statutes.

The statute fixes the order in importance of those from whom the register of deeds should obtain the written consent for the marriage of minors under eighteen years of age (Revisal, sec. 2088); and when such minor resides with the father, which the register could reasonably have ascertained, the written consent of the mother only indicates that the subject of the application for the license is under the age specified, and is not a sufficient defense by the register to an action for the prescribed penalty. Revisal, sec. 2090.

APPEAL from *Ward, J.*, at December Term, 1911, of NEW HANOVER.

This case was heard in the Superior Court upon a case agreed, which is, in substance, as follows:

The defendant is register of deeds of New Hanover County, (567) and on or about 27 December, 1910, issued a license for the marriage of Ednia Littleton, daughter of plaintiff, and, at the time, under eighteen years of age. Consent of the father to the marriage of his daughter was never given, but instead the written consent of her mother, Melia Littleton. At the time the mother's consent was given and the license was applied for and issued, the said Ednia Littleton was living in the home of her father and being supported by him.

The court, being of opinion, upon the facts stated, that the plaintiff was entitled to recover the penalty given by Revisal, sec. 2090, adjudged that he recover of defendant the sum of $200 and costs. Defendant excepted and appealed.

George F. Meares for plaintiff.
A. G. Ricaud for defendant.

WALKER, J., after stating the case. The Revisal, sec. 2088, provides that where either party to a proposed marriage is under eighteen years of age and resides with the father, or mother, or uncles, or aunt, or brother, or elder sister, . . . the register of deeds shall not issue a license for such marriage until the consent in writing of the relative with whom such infant resides, or, if he or she resides at a school, of the person by whom the minor was placed at school, "and under whose custody or control he or she is," shall be delivered to him, and the written consent shall be filed and preserved by the register. Section 2090 provides that a register of deeds who shall knowingly, or without

reasonable inquiry, personally or by deputy, issue a license for the marriage of any two persons to which there is any legal impediment, or where either of the persons is under the age of eighteen years without the consent required by law, shall forfeit and pay $200 to any parent, guardian, or other person standing *in loco parentis,* who shall sue for the same. These two sections are *in pari materia* and must, therefore, be construed together. *Bowles v. Cochran,* 93 N. C., 398.

We do not understand that the question of reasonable inquiry by the register as to the age of the applicant for license, or other impediment to the marriage, is involved in this case. There is no suggestion in the record about it. The case agreed presents the single question, whether, upon the admitted facts, the written consent of the (568) mother was sufficient to justify the issuing of a license. There is no controversy as to the age of the applicant, and the written consent of the mother would indicate at once that she was under eighteen years of age, as such consent is not required when the parties are over eighteen years of age. Our opinion is that the issuing of the license upon the written consent of the mother alone, and without the written consent of the father, was not a compliance with the statute. The consent of the persons named in the statute, and in the order named, should be obtained. If a child is not residing with its father, but is residing with its mother, then the written consent of the latter is sufficient, and so on with the others named. The father is considered in law as the head of the household and is entitled preferentially to the custody of his child, his right being superior to that of the mother. He is the child's natural guardian. 29 Cyc., 1588; *Ely v. Gammel,* 52 Ala., 584; *Donk v. Leavitt,* 109 Ill. App., 385; *Gates v. Renfroe,* 7 La. Ann., 569; *Bosworth v. Beiller,* 2 La. Ann., 293. In the case last cited, the Court said: "In case of differences between the parents as to the marriage of a minor child, the father's authority prevails." This, though, is but a general rule, and in its application, when a controversy arises between the father and mother as to the child's custody, the courts are governed by the interests of the child. We stated this principle in *Newsome v. Bunch,* 144 N. C., 15: "The father is, in the first instance, entitled to the custody of his child. But this rule of the common law has more recently been relaxed, and it has been said that where the custody of children is the subject of dispute between different claimants, the legal rights of parents and guardians will be respected by the courts as being founded in nature and wisdom, and essential to the virtue and happiness of society; still, the welfare of the infants themselves is the polar star by which the courts are to be guided to a right conclusion, and, therefore, they may, within certain limits, exercise a sound discretion for the benefit of the

child, and in some cases will order it into the custody of a third person for good and sufficient reasons. *In re Lewis,* 88 N. C., 31; Hurd on Habeas Corpus, 528 and 529; Tyler on Infancy, 276 and 277;
(569) Schouler on Domestic Relations, sec. 428; 2 Kent's Com., 205.

But as a general rule, and at the common law, the father has the paramount right to the control and custody of his children, as against the world; this right springing necessarily from and being incident to the father's duty to provide for their protection, maintenance, and education. 21 A. and E. Enc., 1036; 1 Blackstone (Sharswood), 452 and note 10, where the authorities are collected. This right of the father continues to exist until the child is enfranchised by arriving at years of discretion 'when the empire of the father gives place to the empire of reason.' 1 Blk., 453." The case of *In re Turner,* 151 N. C., 474, is to the same effect, and in it we referred approvingly to the following language of *Chancellor Kent:* "The father, and on his death the mother, is generally entitled to the custody of the infant children, inasmuch as they are their natural protectors, for maintenance and education. But the courts of justice may, in their sound discretion and when the morals or safety or interests of the children strongly require it, withdraw the infants from the custody of the father or mother and place the care and custody of them elsewhere." See, also, *Latham v. Ellis,* 116 N. C., 30; *In re Lewis,* 88 N. C., 31; *Ex parte Alderman,* 157 N. C., 507.

But it is not necessary that we should resort to the principle just considered in order to decide the question before us, except in so far as it may shed light upon the meaning of the statute. The case agreed shows, as we construe it, that the daughter was residing with her father, for it states that she was living in his home and was supported by him. The mother may also have been living in the same house and residing with her husband in his home, but, upon the facts stated, it cannot well be contended that her daughter was residing with her within the meaning and intent of the law. The language of the statute is plain, that if she is residing with her father, his written consent must be produced and delivered to the register before the license is issued; otherwise the officer incurs the penalty.

Construing a somewhat similar statute, it was said in *Riley v.*
(570) *Bell,* 89 Ala., 597: "The minor was a female, under eighteen years of age, and had never before been married. The statute, in such cases, provides that 'the probate judge must require the consent of the parents, or guardians of such minors, to the marriage, to be given either personally or in writing.' Code, sec. 2315. This obviously means the consent of the father, if he be living and is not rendered incapable

of giving it by defect of understanding or other good cause; or, if there be no father then of the mother. The basis of the statute is the common-law principle, that the father, and on his death the mother, is generally entitled to the custody of the children, and that, as parents, they are the natural protectors for maintenance and education. 2 Kent Com., 205, 85-86. The father in this case was living, but at the time temporarily absent from the State. It is shown that the mother gave her written consent to the minor daughter's marriage. This was insufficient to meet the requirements of the statute, and did not exempt the defendant from liability to the penalty in question." If anything, the language of our statute more clearly and strongly calls for the same interpretation and requires the written consent of the father, if living and not unable or disqualified in some way to give it.

It was urged in the argument that this statute, being penal, should be construed strictly, but in *Coley v. Lewis,* 91 N. C., 21, with reference to a similar contention, the Court said: "While penal statutes must, in case of doubt, be strictly construed in their operation against others, a primary rule is to ascertain from the words used the intent of the enactment, and give such reasonable meaning as will prevent the mischief intended to be remedied and secure the ends the statute was intended to subserve." But even a strict construction leads us to the conclusion that there was no error in the judgment.

No error.

Cited: Howell v. Solomon, 167 N. C., 591; *Owens v. Munden,* 168 N. C., 267.

(571)

W. A. WILLIAMS ET AL. v. P. A. LEWIS ET AL.

(Filed 13 March, 1912.)

1. Principal and Surety—Parol Evidence—Equity—Bills and Notes—Subrogation—Exoneration.

As between the signers of a note, it may be shown by parol evidence that some of them were sureties, for the purposes of enforcing exoneration, subrogation, or any other equitable right which will not injuriously affect the payee who loaned his money without knowledge of the relation, though upon the face of the paper they appear to have all signed as principals.

2. Vendor and Vendee—Innocent Purchaser—Notice—Equity—Legal Title.

The protection afforded to an innocent purchaser for value without notice, etc., applies only when he has acquired the legal title, and not an equitable interest in lands.

3. Same—Tenants in Common—Mortgages—Principal and Surety—Bills and Notes—Exoneration—Substitution—Innocent Purchasers.

When tenants in common become sureties on the note of one of them and secure it by mortgage duly registered on the lands held in common, and from the face of the papers it appears that they signed as joint principals, and the real principal on the note subsequently borrows money on a note secured by a mortgage on his interest in the lands, the holder of the second note and its indorsees have for their security only a mortgage on an equity of redemption, and cannot avail themselves of the plea of being innocent purchasers for value without notice, so as to prevent the sureties on the first note from asserting their equities by way of exhonoration, or if they had been compelled to pay the debt, of substitution to the rights of the creditor; and these equitable rights of the sureties accrued to them when they signed the note secured by the mortgage.

4. Same—Inquiry.

One who has acquired by indorsement a note of a tenant in common secured by a mortgage of his equity of redemption in the lands should inquire into the nature and extent of his security and in this case should have ascertained that a prior registered mortgage given on the entire tract of land by all the tenants in common to secure a note which appeared upon the face of the papers to have been given by them as joint principals was in fact made by one of them as principal and the others as sureties.

HOKE, J., concurs in the result.

(572) APPEAL by H. H. Phillips, receiver, from *Ferguson, J.*, at October Term, 1911, of EDGECOMBE.

This case was tried below on the following case agreed:

1. On 27 December, 1905, Howard Carr, Maggie Carr (now Williams), Mollie Carr (now Lewis), executed to J. M. Norfleet, trustee, a deed of trust to secure a note of $500 to L. E. Norfleet, the said deed of trust conveying their three-fourths equal and undivided interest in certain lands therein described, which deed was registered on 28 December, 1905, J. F. Carr owning the other fourth.

2. Howard Carr was principal and Maggie Williams and Mollie Williams were sureties to the said debt, though the note and deed did not show it.

3. The note of $500 was for full value assigned to P. A. Lewis on 15 March, 1909; L. E. Norfleet had no knowledge as to who was principal in said note until after the maturity of the same and prior to its assignment to G. M. T. Fountain, which assignment was after maturity; that G. M. T. Fountain, the assignee of L. E. Norfleet, and P. A. Lewis, the assignee of G. M. T. Fountain, had no knowledge until after the sale of the land as to who was the principal in said note.

4. On 24 June, 1908, Howard Carr borrowed of L. H. Edmondson $133.50 and at the same time executed a note, under seal, for the same, due and payable 1 January, 1909, and mortgaged to him his one-fourth undivided interest in said land to secure the same, which mortgage was duly registered 1 July, 1908, and the said Edmondson had no knowledge of the facts set out in item 2 hereof, except as appeared of record.

5. On 17 March, 1909, the Edmondson note was assigned to P. A. Lewis for full value and without knowledge on the part of Lewis as to who was principal in the $500 note of L. E. Norfleet, dated 27 December, 1905. If Edmondson had known, at the time of taking said note and mortgage, that the interest of Howard Carr in said land was alone subject to the payment of the Norfleet note of $500, he would not have loaned the money, and had P. A. Lewis known (573) at the time of the transfer to him that Carr's interest was alone subject to the payment of the Norfleet debt, he would not have purchased the Edmondson note.

6. On 22 January, 1910, default having been made in the payment of the L. E. Norfleet note, J. M. Norfleet, trustee, sold the three-fourths undivided interest of Howard Carr, Maggie Williams, and Mollie Lewis, in the land described in the deed of trust, at public auction, after due advertisement, for $800, and after paying the cost of sale, taxes, and the amount due on the L. E. Norfleet note, there was left the sum of $373.72, of which amount $124.57 has been paid to Maggie Williams, $124.57 to Mollie Lewis, and he still has left $124.57. There was due upon the note to Edmondson, owned by P. A. Lewis, the sum of $142.25 as of the date of sale, and the sum of $124.57 in the hands of said trustee was claimed by P. A. Lewis under the Edmondson mortgage from Howard Carr, and is now claimed by Phillips, receiver.

7. In July, 1911, P. A. Lewis was duly adjudged a bankrupt, and H. H. Phillips was appointed receiver in bankruptcy of his estate, and now claims that the said sum of $124.57 should be paid on the Edmondson note and mortgage, and Maggie Williams and Mollie Lewis claim that it should be equally divided between them.

Upon the facts stated in the case, the court decided in favor of Maggie Williams and Mollie Lewis, and adjudged that the trustee pay the amount held by him to them equally, whereupon the receiver of P. A. Lewis appealed.

W. O. Howard and J. M. Norfleet for M. Williams and M. Lewis.
G. M. T. Fountain & Son for receiver.

WALKER, J., after stating the case: There has been difference of opinion among the courts as to whether parol evidence is admissible

to show that a person, apparently a coprincipal in a note, is in fact a surety. Some courts have held that parol evidence in such a case is incompetent, because it contradicts or varies the terms of (574) the instrument signed by the surety; others hold that it does not tend to alter or vary either the terms or legal effect of the written instrument, but is simply proving a fact outside of such terms, collateral to the contract and no part of it, and that the evidence is perfectly competent in a court of law; while some others maintain that, though the evidence is incompetent in a court of law, it is competent in a court of equity. But in *Cole v. Fox,* 83 N. C., 463, it was said: "The weight of authority sustains the principle that the evidence is competent in a court of law, and more especially in our courts, having no separate jurisdiction of law and equity, where all the rights of the parties, both legal and equitable, must be adjudicated in any suit where they are litigated and drawn in question. So that, in referring to authorities, it is immaterial whether they are decisions of courts of law or equity." See, also, *Welfare v. Thompson,* 83 N. C., 276; *Goodman v. Litaker,* 84 N. C., 8. The admissibility of such evidence was fully considered in *Williams v. Glenn,* 92 N. C., 253, and it was held that, as between the makers and payee of a note, it is made for the purpose of being the proof of the contract, and cannot be contradicted by extrinsic proof. The only exception to this rule is in the classes of cases like *Welfare v. Thompson* and the other cases of that character cited above. But as between the signers, it was not made or intended to be exclusive proof of the agreement or relation between them. This may be shown by parol proof. "The makers, though all appearing to be joint principals, may be shown to be, some principals and some sureties; an apparent principal may be shown to be a surety; an apparent surety, a principal." Numerous cases were cited to sustain the proposition.

The question whether parol evidence will be admitted to show the true relation of the parties is not the one directly involved in this case, as the parties in their case agreed admit that, in fact, Howard Carr was the principal and the other two signers of the note were merely sureties, though they all appeared on the face of the papers to be coprincipals. But the cases we have cited establish the proposition that, as between the signers of a note, the true relation may be shown, that is, that one who appears to be principal is a surety, or *vice versa,* (575) for the purpose of enforcing exoneration, subrogation, or any other equitable right as between them, which will not injuriously affect the payee who loaned his money without knowledge of the relation.

The defendant contends, though, that while the court would exonerate

the interests of Maggie Williams and Mollie Lewis *pro tanto,* by first applying the proceeds from the sale of Howard Carr's one-fourth interest in the land to the payment of the debt, and resorting to their interests only for the purpose of paying the balance due, if this were a suit between the said sureties and Howard Carr to enforce their equity, either of exoneration or subrogation, it will not do so in this case, as L. H. Edmondson loaned the money to Howard Carr and took a mortgage on his one-fourth interest in the land on the faith of the apparent relation of the parties as shown on the face of the deed of trust made by the parties to J. M. Norfleet, as trustee, to secure the debt to L. E. Norfleet, and that being so, the interest of Carr is liable only for one-third of the Norfleet debt, and as Mrs. Williams and Mrs. Lewis have received each one-third of the balance of the proceeds in the hands of the trustee, J. M. Norfleet, for distribution, the money now in controversy should be paid to him as the receiver in bankruptcy of P. A. Lewis, who is the assignee of L. H. Edmondson.

This contention is based upon the assumption that Edmondson was a purchaser for value and without notice of the equity of Mrs. Williams and Mrs. Lewis. Is that assumption correct? We think not. When Edmondson took the mortgage on Carr's interest to secure his debt, he did not acquire the legal title, which is necessary to make a purchaser for value and without notice, but only an equitable interest, for Carr had only an equity of redemption under the deed of trust he made to Norfleet for L. E. Norfleet. The case is not to be distinguished, in principle, from *Polk v. Gallant,* 22 N. C., 395, in which *Chief Justice Ruffin* said: "Upon the argument, the counsel for the defendants placed not much stress on the defenses brought forward in the answer; and we think very properly, as they are clearly insufficient. In the first place, the sheriff's sale is no bar, even if a legal title had been the subject of it, as the purchaser only succeeds to the defend- (576) ant in the execution, and is affected by all the equities against him. *Freeman v. Hill,* 21 N. C., 389. Much more must this be so when the defendant in the execution has himself but an equity. If it be of that kind which is liable to be sold, the purchaser can only claim to stand in the shoes of the debtor, and get a title only by doing those acts on the performance of which the debtor himself would have been authorized to ask for a conveyance. Precisely on the same footing stands the purchase of the son from the father himself, which was of an equity only. It is only the honest purchaser of a legal title whom equity will not disturb. If the purchase be of the legal title, but with notice of an equity in another; or if it be only an assignment of an

equity, with or without notice of a prior equity in another person: in either case, the estate must, in the hands of the purchaser, answer all the claims to which it would have been subject in the hands of the vendor. Between mere equities, the elder is the better. Against the present defendant, then, the plaintiff is entitled to all the relief which this Court would have given him against the original purchaser, for whom he was surety." *Green v. Crockett,* 22 N. C., 390. So in *Winborne v. Gorrell,* 38 N. C., 117, the Court says, referring to the same question: "This brings up for consideration the defense set up by the trustee and creditors claiming under Hanner's assignment, as peculiar to themselves, and founded on merits independent of those of Hanner and himself. They claim to be just creditors, who have honestly obtained a security for their debts without a knowledge of the plaintiff's equity, and, therefore, entitled to hold it. But they were mistaken in supposing that they had obtained a conveyance of this land as a security. They say that they relied on the decree as determining the rights of the parties and constituting a title. But we have seen that is not so. The deed is only an assignment of an equitable title, and then, were these persons purchasers instead of creditors, the estate itself must answer all claims to which it would have been subject in the hands of the assignor. It is only the purchaser of the legal title without notice of a prior equity who can hold against such equity. *Polk v. Gallant,* 22 N. C., 395."

(577) *Wharton v. Moore,* 84 N. C., 479, presented a state of facts substantially like those in this case, and the Court thus ruled in regard to them: "The effect of these several conveyances was to convey the legal estate of Russ and wife to Jones (or Thompson, the trustee, for his use), and the equity of redemption to J. B. Batchelor, and imperfect equities, first to Carter, the plaintiff's intestate, and then to Moore and Adams, the defendants. The releases of Jones and Batchelor indorsed on the deeds from Russ and wife, not being under seal, did not convey the legal estate to Moore and Adams, but left it in Jones or his trustee. *Linker v. Long,* 64 N. C., 296. So that the deed of bargain and sale executed by Russ and wife to Moore and Adams passed only such an interest as the vendors had at the time, which was a subsequent equity. The purchaser of an equitable title always takes it subject to prior equities. It is only the purchaser of the legal title, without notice of a prior equity, who can take it against such equity. *Winborne v. Gorrell,* 38 N. C., 117." Those cases, which have been frequently approved by this Court, are decisively against the appellant's contention.

In *Wharton v. Moore* the equitable estate acquired by the party claiming to be a *bona fide* purchaser was created by a deed of trust, and in

Polk v. Gallant and *Winborne v. Gorrell* the Court protected the rights of sureties to subrogation or exoneration, as against the purchaser of an equity of redemption.

The equity of Mrs. Williams and Mrs. Lewis, who were really sureties of Carr, was that of subrogation. When Edmondson bought the interest of Carr, it was subject, with the interest of Mrs. Williams and Mrs. Lewis, to the Norfleet mortgage, not only for the payment of the debt of Carr, but also by way of exoneration to the application of his interest to the payment of the debt, so as to protect the rights of his sureties (*Winborne v. Gorrell, supra*), or if these interests had already been taken for the payment of the debt, they were immediately subrogated to the right and lien of the creditor, L. E. Norfleet, in respect to the interest of Howard Carr, their principal. When Edmondson and Lewis purchased the equity of their vendor in the land they should have inquired as to the nature and extent of the encum- (578) brance, and they would have ascertained that the interest of Carr in the land was liable for the whole debt, in the first instance, by way of exonerating his sureties, and, if they had already been compelled to pay the debt, by their substitution to the rights of the creditor and the surety he held. So that the deed of trust to J. M. Norfleet secured not only the debt of L. E. Norfleet, but also the rights of the sureties of Carr, by equitable subrogation or exoneration, and it can make no difference in the result which of the equities was available to them. The equitable rights of the sureties accrued to them when they signed the note with their principal and gave the mortgage or deed of trust to secure it (*Nelson v. Williams,* 22 N. C., 118; *Green v. Crockett, ibid.,* at p. 392), and they existed, therefore, when Edmondson received his mortgage from Carr.

As the proceeds derived from the sale of the interest of Carr in the land were not sufficient to pay the debt, it follows that the amount now in the hands of the trustee belongs to Mrs. Williams and Mrs. Lewis, and the judge was right in so holding.

Affirmed.

HOKE, J., concurs in the result.

Cited: *Lynch v. Johnson,* 171 N. C., 630.

E. R. CHEWNING v. F. C. MASON ET AL.

(Filed 3 April, 1912.)

1. Wills—Interpretation—Intent.

The intent of the testator, to be ascertained under the rules of construction, and gathered from the will construed as a whole, should be given effect.

2. Same—Powers of Disposition—Life Estates—General or Indefinite Estates.

A devise of all of the testator's real property to his wife, "during her natural life, and then to dispose of as she sees proper," does not, by the power of disposition, enlarge the estate devised to her into a fee simple, for the limitation of her estate for life shows the intent of the testator that only a life estate, and not the fee was intended by the gift; and upon her failure to exercise the power of disposition, the estate will revert to the heirs at law of the husband. It is otherwise when an estate is devised generally or indefinitely, with a power of disposition.

3. Wills—Estates for Life—Powers of Disposition—Property—Mere Authority.

A devise for life with the power of disposition creates a life estate only, the power of disposition being a mere authority which can be exercised or not, in the discretion of the life tenant.

4. Wills—Estates—Power of Disposition—Exercise of Power—Donor.

One taking lands under a power of disposition given by will does not take from the one exercising the power, but from the testator or donor of the power.

5. Wills—Estates for Life—Power of Disposal—Interpretation of Statutes.

Revisal, sec. 3138, only establishes a rule between the heirs and devisee in respect to the beneficial interest of the latter, and does not affect the construction of a will devising a life estate in lands with the power of disposition.

(579) APPEAL by defendant from *Whedbee, J.*, at March Term, 1912, of ANSON.

The facts are sufficiently stated in the opinion of the Court by *Walker, J.*

Robinson & Caudle for plaintiff.
Gulledge & Boggan, F. J. Coxe, and W. E. Brock for defendant.

WALKER, J. This is a controversy between the parties to this action, arising out of the following facts: Plaintiffs, who are the heirs of Thomas Chewning, claim that they are the owners of the tract of land, which is the subject of the controversy; and defendants, who are the

heirs of Martha Chewning, dispute this claim and assert ownership in themselves. The land was owned by Thomas Chewning, who by his will devised it to his wife, Martha Chewning, in these words: "I give and bequeath (after all my just debts shall have been paid) all of my real and personal property, together with all debts owing my estate, to my wife, Martha Chewning, during her natural life, and then to dispose of as she sees proper." If under this clause of the will (580) Martha Chewning acquired a life estate only, with power of disposal, the plaintiffs are entitled to the land, as she failed to exercise the power; but if the grant of the power enlarged the esate for life, which is expressly given, into an estate in fee, then the defendants are the owners of the land. The court below was of opinion with the plaintiffs and rendered judgment accordingly, from which the defendants appealed.

There is a marked distinction between property and power. The estate devised to Mrs. Chewning is property, the power of disposal a mere authority which she could exercise or not, in her discretion. She had a general power annexed to the life estate, which she derived from the testator under the will. If she had exercised the power by selling the land, the title of the purchasers would have been derived, not from her, who merely executed the power, but from the testator or the donor of the power. "The appointer is merely an instrument; the appointee is in by the original deed. The appointee takes in the same manner as if his name had been inserted in the power, or as if the power and instrument executing the power had been expressed in that giving the power. He does not take from the donee, as his assignee." 2 Wash. R. P., 320; 1 Sugden on Powers (Ed. 1856), 243; 2 Sug. Pow., 22; *Doolittle v. Lewis,* 7 Johns Ch. 45. "In the execution of a power there is no contract between the donee of the power and the appointee. The donee is the mere instrument by which the estate is passed from the donor to the appointee, and when the appointment is made, the appointee at once takes the estate from the donor as if it had been conveyed directly to him." *Norfleet v. Hawkins,* 93 N. C., 392. It does not follow, because she could sell and convey the land under the power, that she thereby became the owner in fee. We must ascertain the intention of the testator, for that is the prevailing consideration and the supreme rule of interpretation, keeping in mind, of course, the rules of construction as our guide, and looking at the will in its entirety. If the testator, in this case, intended to devise the fee to his wife, it is strange that he should have expressly and definitely limited the estate to one for her life. Naturally,

(581) he would have given it to her without restriction. The reasonable meaning of the clause is that she should have and enjoy the property for the term of her life, with a general power of appointment or disposal of the reversion by her will, or, at least, subject to her life estate, if she chose to exercise it, and the great weight of authority sustains this construction. The doctrine was clearly expressed by *Chancellor Kent:* "If an estate be given to a person generally or in definitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee." 4 Kent Com., 520, 521; *Jackson v. Robbins,* 16 Johns., 537.

It has been held that a devise to A, with power to dispose at pleasure, is considered as conveying *property,* not as conferring *power;* for the words of power will not be permitted to take away what, without them, is expressly given. 2 Prest. on Est., 81, 82; 13 Ves., 453. But where there is an express and inconsistent estate for life given, the construction of the instrument is altogether different; for the express estate for life negatives the intention to give the absolute property, and converts these words into words of mere power, which, standing alone, would have been construed to convey an interest. This appears to be very clearly established by the cases, which further lay it down that where an *interest,* and not a mere *power,* is conferred, the absolute property is vested, without any act on the part of the legatee; but where a power only is given, the power must be executed, or it will fail. We may, therefore, take the rule to be settled that where lands are devised to one generally, and to be at his disposal, this is a fee in the devisee; but where they are devised to one expressly for life, and afterwards to be at his disposal, only an estate for life passes to the devisee, with a bare power to dispose of the fee. Anonymous, 3 Leon., 71; *Leefe v. Saltingstone,* 1 Mod., 189; *Tomlinson v. Dighton, Salk,* 239 (*s. c.,* 1 Peere Wins., 149); *Burleigh v. Clough,* 52 N. H., 267; *s. c.,* 13 Am. Rep., 23 (where many of the cases are collected and reviewed and there is a learned discussion of the (582) question); *Stuart v. Walker,* 72 Maine, 145; *Collins v. Wickwire,* 162 (N. S.) Mass., 143; 31 Cyc., 1089; 22 A. & E. Enc. of Law, 1097; *Steiff v. Seibert,* 128 Iowa, 746 (6 L. R. A., 1186).

The text-writers thus state the general rule: "A devise of a life interest in express terms, coupled with a power in the life tenant to dispose of the fee simple in the property by his will, either absolutely and at his full discretion among a class of objects to be selected by

him or among a class of objects pointed out by the testator, gives the first taker a life estate only, but with a power to appoint the fee simple by his will." 2 Underhill on Wills, sec. 688. "A general power of disposition includes a power to dispose of the property by deed or will, and practically clothes the donee with all functions of ownership. In view of this fact, it has occasionally been provided by statute, and a few courts have reached the conclusion, without the help of the Legislature, that the devisee of a life estate, with a general power of disposition, takes a fee simple, and that a limitation over is void. But, by the overwhelming weight of authority, no fee results from the union of the life estate and the power, but both remain distinct, and the limitation over is good unless defeated by the exercise of the power by the life tenant." Gardner on Wills, p. 476. This doctrine has been adopted and applied by this Court in several cases. It is stated in *Patrick v. Morehead,* 85 N. C., 62, to have been settled upon unquestionable authority that, if an estate be given by will to a person generally, with a power of disposition or appointment, it carries the fee, but if it be given to one for life only and there is annexed to it such a power, it does not enlarge his estate, but gives him only an estate for life. The case of *Long v. Waldraven,* 113 N. C., 337, seems to be directly in point. The property in that case was given to the testator's wife during her natural life, and after her death to be divided among the heirs of her brothers and sisters, except as to one-third thereof, which was left "at the disposal of his wife, to be left as she may will." The Court held that she acquired but an estate for life, and "that an express estate for life to the wife, with a power to dispose of the fee, shall not turn her estate for life into a fee," citing *Sherer v. Sherer,* 1 (583) Wash., 266 (1 Am. Dec., 460); *Bass v. Bass,* 78 N. C., 374; *Patrick v. Morehead, supra; The Church v. Disbrow,* 52 Penn. St., 219, and stating that the principal case should be added to the long line of those which established the same doctrine. See, also, *Harrison v. Battle,* 21 N. C., 214; *Alexander v. Cunningham,* 27 N. C., 433; *Parks v. Robinson,* 138 N. C., 269; *Morgan v. Morgan,* 9 Am. and Eng. Anno. Cases, p. 943; *Mansfield v. Shelton,* 67 Conn., 390 (52 Am. St. Rep., 288). Revisal, sec. 3138, manifestly has no application. It appears in our case that the testator intended to pass an estate of less dignity than a fee. That section only establishes a rule between the heir and the devisee in respect to the beneficial interest of the latter. *Alexander v. Cunningham,* 27 N. C., 430.

Herring v. Williams, ante, 1, did not involve the question now presented. The question there was, whether there was a power of appoint-

ment or a power of disposal, while here the question is, the power being conceded, whether it enlarged the life estate into a fee. In the *Herring case* the donee had sold and conveyed the land by deed, or attempted to do so, while in this case she failed althogether to exercise the power. The reversion in the land belongs to the heirs of Thomas Chewning, and not to the heirs of the donee of the power, and the judgment of the court is, therefore correct.

Affirmed.

Cited: Mabry v. Brown, 162 N. C., 222.

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(584)

GATES COUNTY v. A. C. HILL.

(Filed 21 February, 1912.)

1. Evidence, Conflicting—Nonsuit.

A motion to nonsuit upon conflicting and competent evidence will be denied.

2. Instructions—Public Square—Abandonment — Adverse Possession — Evidence.

When a county sues for the possession of lands used by it as a public square, a requested instruction by defendant is properly denied in the absence of evidence of abandonment, that if the proper authorities of a public square willfully abandon the use of any part thereof which is claimed by defendant, and establish a different line, cutting off such abandoned part for twenty-one years or more, it would ripen into a title for defendant.

3. Instructions—Public Square—Adverse Possession—Interpretation of Statutes.

A county having entered into the possession of a square for the public use, before act of 1891, now Revisal, sec. 389, the provisions of that act will not permit the plaintiff to acquire title thereto by adverse possession under a deed purporting to convey a part thereof.

4. Practice—New Trial—Newly Discovered Evidence—Cumulative.

A new trial for newly discovered evidence will not be granted when the evidence is only cumulative.

5. Practice—New Trial—Newly Discovered Evidence—Supreme Court—Discretion.

A motion for a new trial upon newly discovered evidence made in the Supreme Court is addressed to the discretion of the Court, and

in this appeal, the evidence relied on being the relation of the jurors to some of the commissioners of the plaintiff county, the relationship is regarded as too remote for the exercise of this discretion.

APPEAL from *Cline, J.*, at July Term, 1911, of GATES.

This is an action to recover a lot of land, alleged to be a part of the public square of Gates County. There was a verdict in favor of the plaintiff, and the defendant appeals from a judgment rendered thereon.

A. P. Godwin, Ward & Grimes, and W. M. Bond for plaintiff.
L. L. Smith for defendant.

PER CURIAM. The defendant relies on two exceptions in his (585) brief, the first being to the refusal of his motion to nonsuit the plaintiff, and the second to the failure of his Honor to instruct the jury, as requested, that the defendant could rely on adverse possession as a defense.

The controversy between the parties is one of fact, the plaintiff contending that the deed under which it claims covers the *locus in quo* and the defendant contending to the contrary, and as evidence was introduced supporting both contentions, the motion to nonsuit was properly denied.

The prayer for instruction was as follows: "Although the law is that possession of any part of a public square or street which has been dedicated to the public cannot ripen into a title, yet, if the proper authorities of a public square or street shall purposely and willfully abandon the use of any part thereof and establish a different line, cutting off such abandoned part, and there is continuous possession under a deed for such abandoned part for twenty-one years or more, then such possession would ripen into a title and vest the title in the possessor under the deed; and if you find from the preponderance of the testimony that the defendant, and those under whom he claims, have been in possession of the land in controversy, under such circumstances, for more than twenty-one years, then the title vested in the possessor thereof, and cannot be divested, except by twenty years possession adverse to him."

This was properly refused, because there was no evidence that the plaintiff willfully abandoned a part of the public square and established a different line. Also, the first actual occupation by the defendant of the land in controversy was in 1889, two years before the act of 1891, now section 389 of the Revisal, which reads as follows: "No person or corporation shall ever acquire any exclusive right to any part of any public road, street, lane, alley, square, or public way of any kind by

reason of the occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of any encroachment upon or obstruction of or occupancy of any public way it shall not be competent for any court to hold that such action is barred by any statute of limitations."

(586) The defendant also moves in this Court for a new trial, upon the ground of newly discovered evidence and because some of the jurors were related to members of the Board of Commissioners of Gates County.

An examination of the affidavits on file and a comparison of them with the evidence introduced on the trial show that the new evidence is purely cumulative, and when this is true a new trial will not be granted.

The relationship of the jurors, as stated by the defendant, is as follows: One of the jurors, to wit, Job Freeman, is the father-in-law of T. J. Carter, one of the present county commissioners; another, J. E. Harrell, is the stepson of the father of B. D. Lawrence, one of the commissioners in 1891; and another, J. A. Eason, is first cousin to the father of the wife of E. S. A. Ellenor, one of the present county commissioners.

This is a motion addressed to our discretion, and in our opinion the interest and bias of the jurors, if any, is too remote to justify us in disturbing the verdict of the jury.

No error.

Cited: *Kelly v. Power,* 160 N. C., 285.

ANNIE M. EVANS ET AL. v. W. A. FORBES, SUPERINTENDENT.

(Filed 28 February, 1912.)

APPEAL from an order of *O. H. Allen, J.,* heard at chambers 23 January, 1912, from PITT.

W. F. Evans and Harry Skinner for plaintiff.

F. G. James & Son and Albion Dunn for defendant.

PER CURIAM. The subject-matter of this action is the same as in *Tripp v. Commissioners, ante,* 180, and it is governed by the decision in that case.

The judgment dissolving the restraining order is

Affirmed.

(587)

D. L. MINTON v. J. E. HUGHES.

(Filed 28 February, 1912.)

Motions—Judgment Set Aside—Meritorius Defense—Practice.

Upon a motion to set aside a judgment for excusable neglect, a meritorious defense must be shown. Revisal, sec. 513.

APPEAL from *Justice, J.*, at October Term, 1911, of HERTFORD.

A motion to set aside a judgment upon the ground of excusable neglect under section 513 of the Revisal. His Honor declined to set aside the judgment, and the defendant appealed to the Supreme Court.

John E. Vann, Winborn & Winborn for plaintiff.
Winston & Matthews for defendant.

PER CURIAM. The Court is of opinion in this case that it is unnecessary to consider the question of excusable neglect for which his Honor declined to set aside the judgment in the court below. Not only must the defendant show excusable neglect as defined by many decisions of this Court, but he must also show that he has a meritorious defense. *Norton v. McLaurin,* 125 N. C., 189; *Turner v. Machine Co.,* 133 N. C., 384.

Upon consideration of this feature of the case, we are of the opinion that defendant's petition and affidavits show no defense to the action which could avail him in law. *Pharr v. Russell,* 42 N. C., 222.

Affirmed.

Cited: Miller v. Curl, 162 N. C., 4; *Allen v. McPherson,* 168 N. C., 438; *Estes v. Rash,* 170 N. C., 342.

DAVID THOMPSON ET AL. v. APPALACHIAN POWER COMPANY.

(Filed 28 February, 1912.)

Contracts—Specific Performance—Equity.

Specific performance of a contract to convey lands in this case will not be decreed, owing to a doubtful title, the failure to make the *cestuis que trust* parties, and other circumstances appearing therein.

APPEAL from *Long, J.*, at Fall Term, 1911, of POLK.

(588) Civil action in the form of a controversy without action. The plaintiff seeks to compel the defendant to specifically perform a contract for the purchase of a large tract of land, and to pay to the plaintiff the sum of $40,000 purchase money.

The judge below rendered a judgment in favor of the plaintiff, decreeing specific performance of the contract and requiring the payment of the purchase money. The grounds upon which specific performance is resisted by the defendant is that the plaintiffs are unable to make a good and indefeasible title to the property. The defendants appealed.

Smith & Shipman, James H. Merrimon for plaintiff.
Bomar & Osborne and Tillett & Guthrie for defendant.

PER CURIAM. In view of the doubtful character of the title offered by the plaintiff, and further considering the fact that the *cestuis que trust* have not been made parties to this action, the Court is of the opinion that under the circumstances of this case specific performance should not decreed.

The action is dismissed without prejudice.

Dismissed.

J. D. O'NEAL v. HENRY SEIM & CO.

(Filed 6 March 1912.)

Vendor and Vendee—Breach of Contract—Principal and Agent—Notice—Measure of Damages.

Held, in this case, the knowledge of the agent of the defendant of the purposes for which certain glass had been purchased by the plaintiff was sufficient notice to the defendant that plaintiff would sustain damages of the character claimed upon the defendant's breach of his contract of shipment.

APPEAL by plaintiff from *Cline, J.*, at October Term, 1911, of BEAUFORT.

This is an action to recover special damages for breach of contract in the shipment of certain plate-glass.

(589) The plaintiff offered evidence tending to prove a breach of the contract, and that he was damaged thereby, but at the conclusion of the evidence his Honor held that there was no evidence of notice to the defendant of the purpose for which the glass was ordered, or of

the damages claimed, and directed the jury to answer the issue as to damages "Five cents," and the plaintiff excepted. Judgment for plaintiff for five cents and costs, and plaintiff appealed.

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

PER CURIAM. Upon an examination of the record we are of opinion that there is evidence which entitles the plaintiff to have his case considered by a jury.

It is in evidence that W. G. O'Neal, on 18 April, 1908, ordered for the plaintiff, from the defendant, 33 plate-glass mirrors 20x36, A plate, 30 division bars, 1 A plate-glass, 66x78, to be shipped at once, and notified the defendant in the order that the mirrors were for the side walls of a restaurant; that the plaintiff was a contractor in Washington, N. C., and was fitting up the restaurant under contract, and that by reason of the breach of the contract by the defendant he and at least one employee, to whom he paid wages, remained idle fifteen or twenty days.

W. G. O'Neal was a brother of the plaintiff, and there is evidence that he knew of the facts recited, and that he represented the defendant at Washington.

New trial.

METRAH MAKELY v. W. C. MONTGOMERY.

(Filed 6 March, 1912.)

1. Reference—Jury Trial—Evidence.

Under our statute, a jury trial after a reference, and in the absence of new matter, is properly confined, under the issues, to the evidence taken before the referee.

2. Deeds and Conveyances—Trusts and Trustees—Evidence.

The quantum of proof required to establish a trust under the deed in this case, *Held*, sufficient under *Harding v. Long*, 103 N. C., 1, and that line of cases.

3. Partnership Debts—Expenses of Partner—Evidence.

A conversation relied on to permit the defendant partner to charge his living expenses to the partnership as the expenses of the firm, *Held*, too vague and indefinite in this case.

APPEAL from *Cline, J.*, at December Term, 1911, of BEAU- (590) FORT.

Action heard upon the report of referee and such issues submitted to the jury as follows:

Does M. Makely hold the land conveyed by the deed dated 14 May, 1897, from Calhoun Tooley to M. Makely in trust for the firm of Montgomery & Makely? Answer: No.

What amount, if any, does the defendant owe the firm of Montgomery & Makely for cash sales of oysters from 1893 to 1909? Answer: $1,500.

From the judgment rendered, the defendant appealed to the Supreme Court.

Small, MacLean & McMullan for plaintiff.
Rodman & Rodman, E. F. Aydlett for defendant.

PER CURIAM. This is an action brought for the settlement of a copartnership. A compulsory reference is had, exceptions filed to the report of the referee, and the cause tried on issues submitted to the jury.

1. The defendant excepts because his Honor confined the trial upon the issues to the evidence taken before the referee. This was in accordance with the act of 1897, ch. 237. So far as the record discloses, there are no additional matters entering into the controversy upon the amendment to the pleadings, and we think the case falls within the principle laid down in *Moore v. Westbrook,* 156 N. C., 482.

2. As to the quantum of proof required to establish a trust under the first issue, we think the charge of his Honor was substantially correct, and practically followed the principle laid down in *Ely v. Early,* 94 N. C., 1, and *Harding v. Long,* 103 N. C., 1, and many subsequent decisions of this Court.

3. One of the claims of the defendant in the settlement of the copartnership account was that under the terms of the copartnership
(591) he was entitled to be credited with his living expenses as a part of the current expenses of the firm. This claim was allowed him by the referee, but the defendant excepts to this finding with reference to the amount allowed, and demanded a jury trial as to this.

We agree with his Honor that there was no sufficient evidence that the defendant was entitled to have credited to him his living and family expenses as a part of the expenditures of the firm. The language employed in the conversation between plaintiff and defendant in respect to this matter is entirely too indefinite and uncertain to warrant any such conclusion.

We have examined the several assignments of error and the record, and are of opinion that the judgment should be

Affirmed.

L. J. WINSTEAD v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 13 March, 1912.)

Appeal and Error.

Upon the errors assigned in the case, *Held*, no reversible error was committed in the trial court.

APPEAL from *Peebles, J.*, at June Term, 1911, of LENOIR.

Action to recover damages to a lot of tobacco shipped by the plaintiff from Richlands, N. C., to Rocky Mount, N. C. These issues were submitted:

1. Was the plaintiff the owner of the tobacco in controversy, as alleged in the complaint? Answer: Yes.

2. If so, was the said tobacco damaged by the negligence of the defendant, the Goldsboro Lumber Company? Answer: No.

3. If so, was the said tobacco damaged by the negligence of the defendant, Atlantic Coast Line Railroad Company? Answer: No.

4. If so, was the said tobacco damaged by the negligence of the defendant, Norfolk Southern Railway Company? Answer: Yes. (592)

5. If so, what damages, if any, is the plaintiff entitled to recover? Answer: One hundred and twenty dollars, with interest from 9 September, 1908, to 12 June, 1911.

From the judgment rendered, the defendant, the Norfolk Southern Railway Company, appealed.

Loftin & Dawson for plaintiff.
Rouse & Land for defendants.

PER CURIAM. We have examined the fourteen assignments of error in the record of this case, and are of the opinion that his Honor committed no substantial error in submitting the case involved to the jury. We think his Honor followed the well-settled decisions of this Court. We are of opinion that no reversible error has been committed which would warrant us in directing a new trial.

No error.

S. A. HERRING ET AL. v. M. A. WARWICK ET AL.

(Filed 20 March, 1912.)

Appeal and Error—Evidence—Nonsuit—Former Appeal.

This case having been before the Supreme Court and considered upon all the evidence, and a new trial granted in one essential particular because of the influence of one erroneous instruction, and a motion to nonsuit upon the evidence inferentially denied, it is adjudged on the present appeal that his Honor followed the former decision and no error is found.

APPEAL from *G. W. Ward, J.*, at October Term, 1911, of SAMPSON.

The following issues were submitted to the jury:

1. At the sale of the land in question, on 15 February, 1898, at courthouse door in Clinton, was it agreed between John T. Gregory, the mortgagee, and the defendant Warwick that Warwick should (593) bid off the said land, and did he bid off said lands as agent and trustee for said Gregory, as alleged? Answer: Yes.

2. Are the plaintiffs, other than Lonnie Herring, the owners in remainder of said lands, subject to the life estate of said S. A. Herring? Answer: Yes.

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

4. What was the value of the short-straw timber sold off said land by defendant? Answer: $50.

5. What was the value of the long-straw timber cut off said land by defendant? Answer: $46.

6. Outside of the timber, has the defendant committed waste on said land; and if so, what are the damages therefor? Answer: None.

7. What was the value of the tract of land at the time it was bid off by defendant? Answer: $261.

It was admitted, as found by the jury on the former trial, that the defendant Warwick is the owner of the life estate for the life of S. A. Herring in the premises in controversy. His Honor gave judgment for the plaintiff, and in the judgment declared that Warwick was the owner of the life estate aforesaid.

The defendants appealed.

H. A. Grady and Murray Allen for plaintiffs.

Faison & Wright and J. D. Kerr for defendants.

PER CURIAM. This cause was before the Court at Spring Term, 1911, 155 N. C., 346. The facts are all fully stated and the case fully dis-

cussed in the opinion of *Mr. Justice Walker,* rendered for the Court. A new trial was granted because the verdict was rendered in one essential particular under the influence of one erroneous instruction.

In granting the new trial, and considering the case on the former appeal, we necessarily considered all the evidence then produced, and a motion for a judgment of nonsuit was inferentially denied. The evidence in this regard is much stronger than that presented upon the former appeal, and we think his Honor carefully followed the former decision of this Court, and we find in his rulings upon the evidence, and in his charge to the jury, no substantial error which we think would warrant us in ordering another trial. (594)

No error.

W. H. T. CAUDLE ET AL. v. MOLLIE MORRIS ET AL.

(Filed 20 March, 1912.)

1. Appeal and Error—Failure of Judge to Settle Case—Certiorari.

When without laches on the part of appellant the judge has failed to settle his case on appeal, a *certiorari* will issue on his motion.

2. Appeal and Error—Appeal by Both Parties—Record as to Each—Laches.

When both parties to the action appeal, a transcript of the record must be sent up by each, and one party may not avail himself of the diligence of the other in having his record sent up, by docketing the record of that other party as his own.

3. Appeal and Error—Motion to Reinstate—Laches.

When an appeal has been dismissed under Rule 17 in the Supreme Court, the appellant, applying for a reinstatement upon the ground that the trial judge has failed to settle the case, must show that he has had his record proper docketed in this Court, as required by the rules, or his motion will be denied.

APPEAL from *Peebles, J.,* at October Term, 1911, from WAKE.

R. C. Strong for plaintiffs.
Douglass, Lyon & Douglass and R. N. Simms for defendants.

PER CURIAM. Both parties appealed.

In the plaintiffs' appeal the appellant docketed the record proper in apt time and asked for a *certiorari* that the case on appeal may be settled and sent up. It appearing that the judge had failed to settle the case without any laches on the part of the appellant, the *certiorari* will issue.

In the defendants' appeal the plaintiffs docketed in apt time the certificate required under Rule 17 and moved to dismiss defendants' appeal. The motion was granted. The defendants thereupon moved to reinstate. It appears that the defendants had not docketed (595) the record proper, but they ask for a *certiorari* and seek to excuse their failure to comply with the rule by the fact that the plaintiffs had docketed their record proper, but they cannot excuse their own negligence by relying upon the diligence of the plaintiff. In *Jones v. Hoggard,* 107 N. C., 349, it is said: "When both parties appeal, a transcript of the record must be sent up for each. This rule cannot be waived by consent of counsel," citing *Perry v. Adams,* 96 N. C., 347, which cites *Devereux v. Burgwin,* 33 N. C., 490; *Morrison v. Cornelius,* 63 N. C., 346. *Jones v. Hoggard* has been cited and approved in *S. v. Bost,* 125 N. C., 711; *Mills v. Guaranty Co.,* 136 N. C., 256; *Bank v. Bobbitt,* 108 N. C., 535, and in many other cases.

If opposite counsel by consent cannot waive the record when both sides appeal, certainly the Court cannot dispense with it when the opposite counsel are here relying upon the failure of the defendants to file their record. As this Court has often held, an appeal is not a matter of absolute right, but the appellant must comply with the statutes and rules of Court as to the time and manner of taking and perfecting his appeal. Just as the right of action is not an absolute one, but a plaintiff must comply with the regulations of orderly procedure by issuing his summons in the statutory time and having it served and filing his complaint in the time and manner prescribed and observing in other respects the requirements as to procedure.

The rule of procedure is well settled that when the appeal is not docketed at or before the time prescribed in Rule 5 the appellant must docket all of the record proper, or so much thereof as he can obtain, with an affidavit as to why the entire record cannot be docketed, and move at that time for a *certiorari* for the "case on appeal," if without his fault the judge has failed to settle the case, or for such other parts of the record as are lacking. If he fails to do so, the appellee has the right to docket the certificate prescribed by Rule 17 and have the appeal dismissed. *Burwell v. Hughes,* 120 N. C., 277, and cases there cited, and *Pittman v. Kimberly,* 92 N. C., 562, and the numerous cases citing those two cases which are to be found in the Anno. Ed. In *Burwell's case, supra,* the Court says: "There are *some* matters at least which should be deemed settled, and this is one of them." Defendants' (596) motion to reinstate is denied. *Walsh v. Burleson,* 154 N. C., 174.

Motion denied.

Cited: Pope v. Lumber Co., 162 N. C., 209.

L. T. BYRD v. J. A. SEXTON.

(Filed 20 March, 1912.)

Appeal and Error—Criticism of Counsel—Expression of Opinion.

It being admitted by the parties to this appeal that the trial judge criticised counsel in language tantamount to an expression of opinion, in violation of the statute, a new trial is ordered.

APPEAL from *Peebles, J.*, at November Term, 1911, of HARNETT.

Certain issues were submitted to the jury, who returned a verdict in favor of the defendant.

R. L. Godwin, E. F. Young, and N. A. Townsend for plaintiff.
D. H. McLean & Son and J. C. Clifford for defendant.

PER CURIAM. The third assignment of error of the appellant relates to remarks of the court criticising the counsel, and to language used by the court, which it is claimed is tantamount to an expression of opinion upon the facts, in violation of the statute. Upon the call of this appeal the counsel for the appellee admits to the Court that the assignment of error is well taken, and that language was used tantamount to an expression of opinion, and consents to a

New trial.

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(597)

E. L. HOBBS ET AL. v. GEORGE W. CASHWELL ET AL.

(Filed 13 March 1912.)

Appeal and Error—Exceptions Grouped, etc.—Record—Order of Proceedings.

This appeal is dismissed upon appellee's motion for the failure of appellant to set forth the proceedings in the order they occurred, etc., Rule 20; and his exceptions properly grouped and numbered as required by 27 and 19 (2).

APPEAL from *Peebles, J.*, at May Term, 1911, of SAMPSON.

This case was before this Court at a previous term, and is reported in 152 N. C., page 183. The case was retried at May Term, 1911, of the Superior Court of Sampson County. There was a verdict upon the issues and a judgment for the plaintiffs, from which the defendants appealed.

Faison & Wright for the plaintiffs.
C. M. Faircloth and John D. Kerr, Sr., for the defendants.

PER CURIAM. Plaintiffs move, under Rule 20 of the Supreme Court, to dismiss this appeal upon the grounds that in the record the "proceedings are not set forth in the order of time in which they occurred, and so as to follow each other in the order in which same took place, as required by Rule 19, section 1."

2. For that the appellant has not set out in the case on appeal his exceptions, briefly and clearly stated and numbered, as prescribed by Rules 27 and 19, section 2. *Jones v. R. R.,* 153 N. C., 419; *Davis v. Wall,* 142 N. C., 452.

Upon examination of the record in this case, we are of opinion that under the rules of the Supreme Court the plaintiffs' motion must be allowed. We have, however, examined the record and assignments of error and find no error of sufficient importance to warrant the ordering of another trial.

Appeal dismissed.

Cited: Wheeler v. Cole, 164 N. C., 381; *Carter v. Reaves,* 167 N. C., 133.

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(508)

S. T. HARE ET AL. V. W. H. GRANTHAM.

(Filed 20 March, 1912.)

Appeal and Error—Motions—Pleadings—Allegations Sufficient—Practice.

The case on appeal in this case not having been served in time, is not with the record in this Court and it appearing from an examination of the record proper that the complaint states facts sufficient to constitute a cause of action, the defendant's motion to dismiss the action is disallowed, and plaintiff's motion to affirm the judgment below is allowed.

APPEAL from *Peebles, J.,* at November Term, 1911, of SAMPSON.

Action for the recovery of personal property. From a verdict and judgment in favor of the plaintiff, the defendant appealed.

R. L. Godwin and E. F. Young for plaintiffs.
Douglass & Lyon and J. C. Clifford for defendant.

PER CURIAM. It is admitted that the case on appeal was not served within the time required by law, and therefore has not been sent up to this Court with the record.

The plaintiffs move the Court to affirm the judgment upon the face of the record.

The defendant moves the Court to dismiss the action because on the face of the complaint no cause of action is stated.

The Court, being of opinion that a cause of action is stated in the complaint, and that there is no error apparent upon the face of the record, allows the motion to affirm the judgment of the Superior Court.

Affirmed.

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(599)

STATE v. MARY ANN WILSON.

(Filed 21 February, 1912.)

1. Murder—Threats—Remarks—Evidence.

Evidence of threats by the prisoner being tried for murder, made three days before the homicide, and of the remarks that brought them forth which are connected with the threats, are competent.

2. Murder—Character Witnesses — Particular Traits — Cross-examination—Rights of Witness.

It is competent on cross-examination of a witness for a female defendant being tried for murder, who has testified to her good character, to ask the witness as to the general reputation of the prisoner in regard to a particular trait of character, and the witness, himself, may say in what respects the character of the prisoner is good or bad, so as to give the truth of the matter in justice to himself.

3. Murder—Character Witnesses—General Character—Chastity.

It is competent for a character witness to be asked on cross-examination the general character for chastity of a female prisoner on trial for murder but not as to specific acts of unchastity.

4. Same—Harmless Error.

Questions asked a character witness for the female prisoner on trial for murder as to her general character for chastity, which appears to have been unprejudicial, will not be held for reversible error.

5. Expert Evidence—Knowledge of Witness.

Where there is evidence that the deceased whom the defendant is on trial for unlawfully killing, had heart trouble, and the witness is an expert physician and had observed and testified to the shock which was alleged to have produced the death, it is competent to ask him, "If a person was suffering from heart trouble would the chance of a fatal result by reason of such disease be increased or diminished from a shock such as you saw the deceased was suffering from when you visited him?"

6. Murder — Evidence — Testimony Taken by Magistrate — Identification — Competency.

Testimony of the deceased taken down by a magistrate before his death when the prisoner was being tried only for an assault, signed by

the deceased and after his death handed by this magistrate to another conducting the preliminary trial for murder, with direction that he hand it to the clerk of the Superior Court, is competent evidence upon the trial for murder in the Superior Court when identified by the magistrate who transcribed it, and is a sufficient compliance with Revisal, sec. 3205.

7. Appeal and Error—Objections and Exceptions—Improper Remarks—Practice—Waiver.

Exceptions to improper remarks of counsel in their argument to the jury when taken for the first time and permitted by the trial judge in stating the case on appeal, will not be considered on appeal, for such exceptions must be taken at the time, or they will be deemed as waived.

8. Same—Prejudicial—Harmless Error.

When, on a trial for murder, an attorney for the State bases a part of his argument on matters not in evidence, saying that the prisoner's character was such that people were afraid to testify against her, *Held*, that error, if any committed, and in the absence of objection at the time, is rendered harmless by an instruction that there was no evidence upon which the argument could be made, and that the jury should not consider it.

9. Appeal and Error—Assignments—Brief.

Assignments of error not appearing in appellant's brief are considered on appeal as abandoned. 140 N. C., Rule 34.

(600) APPEAL by defendant from *Cline, J.*, at Fall Term, 1911, of CAMDEN.

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

Attorney-General Bickett and Assistant Attorney-General T. H. Calvert for the State.

W. M. Bond and E. F. Aydlett for defendant.

CLARK, C. J. The prisoner was convicted of murder in the second degree. It was in evidence that about three days before the homicide a remark was made to the prisoner, in response to which she made threats. The evidence of such threats was competent. *S. v. McKay,* 150 N. C., 813; *S. v. Stratford,* 149 N. C., 483. Evidence of the remark made to the prisoner which brought out the threat was admissible so far as it was connected with the threat. *S. v. Williams,* 68 N. C., 60.

(601) Two witnesses for the prisoner testified that her reputation was good or very good. On cross-examination they were allowed to testify as to the general reputation of the prisoner as to a particular

trait of character. In *S. v. Hairston,* 121 N. C., 582, the Court said: "A party *introducing a witness* as to character can only prove the general character of the person asked about. The witness, of his own motion, may say in what respect it is good or bad. He may have to do this in justice to himself—in other words, to tell the truth. As for instance, if the party spoken of had a general bad character for other things, the witness could not truthfully say it was bad, nor that it was good, without qualification; or the *opposite party may, on cross-examination,* test the witness by asking him as to what it is bad for, what it is good for," etc. That bad repute as to chastity may be shown, but not specific acts of unchastity. *S. v. Efler,* 85 N. C., 585.

In the present case the witness Morris was asked on cross-examination, "Is it not a fact that you heard people say she was a prostitute?" to which he replied, "Have heard talk of it, but her character is about as good as the average negro." The other witness, having said her character was good, was asked on cross-examination, "Have you not heard it frequently said that she was a common woman and a prostitute?" to which he replied, "Have heard it, but not frequently; heard it some few times." We do not think these exceptions can be sustained. The answers were not prejudicial, and indeed were not excepted to. These questions come fairly within the rule in *S. v. Hairston, supra,* which allows a cross-examination as to reputation of a particular trait, but not as to reputation of particular acts, which the State did not ask and which the replies do not give. If the reply could be held technically improper, we cannot see that it was prejudicial, or could have affected the verdict, and in such cases the tendency of all courts is against giving a new trial. It should reasonably appear that an error, if any, would have reasonably affected the result.

Dr. Sawyer, a witness of the State, was asked the following: "If a person were suffering from heart trouble, would the chance of a fatal result by reason of such disease be increased or diminished from a shock such as you saw Jim Morrisette was suffering from when you visited him?" The question objected to was based upon condi- (602) tions of heart trouble about which the prisoner and her witnesses had testified and the shock which the witness himself had observed and testified to. It does not assume facts not in evidence, which is the ground of the appellant's exception.

The prisoner was first arrested on the charge of an assault, and was tried before the death of the deceased. The justice of the peace reduced the testimony of the deceased at such trial to writing and it was signed by the deceased. It was in evidence that this paper was delivered to the other justice of the peace on the preliminary trial before

him of the prisoner for murder, with direction to deliver to the clerk of the Superior Court, and on the trial in the Superior Court the paper was identified by J. E. Cook, the justice of the peace, who took down the evidence on the first trial. This was a sufficient compliance with Revisal, 3205. *S. v. Wilson,* 24 Kansas, 189; *Hart v. State,* 15 Texas App., 202.

Assistant counsel for the State in his argument commented upon the character of the prisoner, saying that she was a bad woman and that people were afraid to testify against her. Upon objection by the prisoner, the court told counsel he could only argue the testimony to the jury, and that he recalled no evidence about people being afraid to testify against her and withdrew the remark from the jury and directed them not to consider such statement. It appears that no exception was noted at the time, but the court permitted an exception to be made in stating the case. This was too late. An exception not taken at the time is waived and the judge should not permit it to be made afterwards in settling the case. 2 Cyc., 714.

Besides, the objectionable remark of counsel was cured by the ruling of the court and the instruction to the jury to disregard it. *S. v. Peterson,* 149 N. C., 533; 4 A. and E. Enc., 450.

The other assignments of error do not appear in the brief of counsel for the prisoner and are held to be abandoned. Rule 34, 140 N. C.

No error.

Cited: *S. v. Melton,* 166 N. C., 443; *S. v. Cathey,* 170 N. C., 796.

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(603)

STATE v. G. W. WILKINS.

(Filed 6 March, 1912.)

1. Murder—Circumstantial Evidence—Husband's Previous Conduct.

Where there is circumstantial evidence tending to connect the defendant with the commission of the crime and to show some preparation on his part to murder his wife, it is competent, as tending to show identification of the husband as the murderer and of his malice towards his wife, that they did not get on well together, and had quarreled shortly before the homicide was committed, when he drove her from his home, threatened to cut her with his knife and attempted to draw his pistol on her.

2. Murder—Motive—Evidence.

Motive for committing a homicide is not required to be proved in order to convict, when it is not of the essence of the crime charged, but it may be shown to identify the prisoner as the perpetrator of the crime, and to establish malice, deliberation, and premeditation.

APPEAL from *Ferguson, J.*, at November Term, 1911, of NASH.

The prisoner was indicted in the court below for the murder of his wife, and was convicted of murder in the first degree. The evidence tended to show the following facts:

The prisoner and deceased, who was his wife, lived about one mile from the town of Spring Hope in Nash County. For some time prior to the homicide there had been misunderstandings and quarrels between defendant and his wife, and about two weeks before the homicide the defendant drove his wife from their home, to the house of her mother, about twenty-five or thirty yards away. He then tried to drive her back, and upon her refusal to go, defendant struck the deceased and she returned the blow. On the same day defendant had a knife out and threatened to cut the clothes off the woman. He also made an attempt to draw a pistol, when a bystander caught him and took the pistol away from him.

About two days before the homicide the defendant said to a witness, Bunn, that his (defendant's) wife thought she was fooling him, dealing with other men, but, God damn her, he would kill her and be hung for it. It further appears that the deceased and the defendant quarreled about another woman by the name of Lewis, and the defendant told deceased that she could get out, that he was going (604) to bring another lady in there.

On the morning of the homicide defendant said to a witness, one Bettie Wiggins, that he had something to tell her, that he was not going to tell it then, but when he told it, it would be in red letters. On the same morning the defendant stated to another witness, Nellie Wiggins, that the deceased would not be with him but two days more; that she had other men and he was going to kill her; that he would rather kill her than to have her live with other men.

On the morning of the homicide deceased and defendant were both seen at their home about 11 o'clock. The woman was doing some washing and the man was cleaning his gun. About 11 o'clock his gun was heard to fire, and shortly thereafter the defendant remarked to a witness, Sessoms, who lived near, that his gun shot all right—right to the spot. An hour or two later this same witness heard the gun fire again, but paid no special attention to it.

During the same morning, a witness, Mamie Wiggins, saw the defendant and deceased at their home together. In the presence of the defendant, deceased said she was going to the cotton patch, but that it would be 12 o'clock before she could go, as she had to iron a shirt. About 3 o'clock p. m. the witness came back from the cotton patch, and defendant met her at his front gate, and asked her if she had seen Ida, his wife. Witness answered that she had not, and defendant said, "Yes, you have, because she put on some more clothes and went to the cotton patch."

About 4 o'clock in the afternoon defendant left his home and went to the town of Spring Hope. About night the mother of the deceased came home from the cotton patch, and neither the defendant nor the deceased could be found at their home. The mother made inquiry for her daughter, but nobody knew anything about her. The next morning search for the missing woman was renewed. A pile of "strips," presumably tobacco strips, was seen in the yard, which had not been there before. Under these strips was some fresh dirt with blood on it. Inside the house was found an empty shell, on the floor, a shotgun (605) with the barrel full of dirt and the overalls of the defendant with spots on them that looked like blood. Fresh dirt was noticed under the crib. The floor of the crib was torn up by the searchers, and there, about ten inches under the ground, was the dead body of Ida Wilkins. There was an ugly gunshot wound in her neck, made by small shot at close range.

The prisoner was arrested in Spring Hope on the day after the homicide, and after he was put in jail, he said that his wife had gone down to her father's. Thereafter, upon being told that he had killed his wife, he said that he was cleaning his gun and did not know his finger was on the trigger, when the gun went off and killed her. He said that she had laid out in the yard for about an hour, and then he buried her. That he started uptown to tell about it, but he was so frightened that he could not. The defendant offered no evidence.

There is a single exception to the testimony.

The solicitor asked Rhoda Ann Westray, mother of the deceased, how her daughter and her husband got along together. She answered, "Well, they did not live good together." Q. "State what you have seen transpiring between them in the way of quarreling." The prisoner objected to the question; the objection was overruled, and he excepted. The witness then proceeded to state that they quarreled, and related the quarrel that took place two Sundays before the homicide, when defendant drove deceased from his home, threatened to use the knife, and attempted to draw a pistol.

The prisoner asked the court to give instructions to the jury upon the different degrees of homicide, calling their attention to the essential elements of each offense and with special reference to the bearing of the evidence upon them, but it is not necessary to set them out.

The jury convicted of murder in the first degree, and from judgment entered upon the verdict the prisoner appealed, after having duly excepted to the rulings of the court.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

F. S. Spruill for defendant.

WALKER, J. There is but one exception in this case that calls (606) for any discussion, as we will presently show. The prisoner objected to the testimony of the witness, Rhoda Ann Westray, the mother of the deceased, as to whether the prisoner and his wife had lived together peaceably and as to any quarrels between them that she had seen. She answered that they did not live "good together," and that they had quarreled two Sundays before the homicide was committed, when the prisoner drove his wife from his home, threatening to cut her with his knife and attempting to draw his pistol. Except the admission of the defendant, which was made in contradiction of a previous statement by him as to the manner of the killing, there was no direct or positive proof of his guilt, but the evidence was circumstantial, there being no eye-witness to the tragedy. The circumstances tending to show that the prisoner had killed his wife were very strong, apart from his admission of the fact, and the State was compelled to rely upon the circumstances to show that he had murdered her deliberately and with premeditation. In this state of the proof, we fail to see why it was not competent and relevant to prove the relations between the parties, and especially that they had quarreled, the husband appearing to be the aggressor, and that he had even gone so far as to threaten her life, and had attempted to use his knife and draw his pistol. These facts, especially in connection with proof of the other circumstances, tended to show his malice towards her, and to assign a motive for the killing. But we think it has been expressly decided by this Court that such evidence is competent and is also relevant to the issue.

In *S. v. Rash,* 34 N. C., 382, similar evidence was offered against the defendant in that case, that is, to show ill-treatment of his wife by him, the charge being that he had murdered her. It was held that the evidence was competent, not only to identify the husband as the slayer of his wife, but to show his malice towards her. *Judge Nash,*

delivering the opinion of the Court, said: "The first inquiry would be, who could be the perpetrator? and the mind would naturally turn upon the person who, either from interest or malice, might desire her death. Interest, in this case, could not exist, and malice alone could lead to the deed. Ordinarily, the eye of suspicion cannot turn upon the husband as the murderer of his wife, and when charged upon him, in (607) the absence of positive proof, strong and convincing evidence—evidence that leaves no doubt in the mind that he had toward her that *mala mens* which alone could lead him to perpetrate the crime—is always material. How else could this be done than by showing his acts toward her, the manner in which he treated her, and the declarations of his malignity?"

He then proceeds to show that no stronger proof of malice could be offered than the husband's brutal treatment of his wife and his suspicion that she had been unfaithful to him, his conduct evincing "a settled state of feeling inimical to her." Underhill on Cr. Evidence, secs. 323, 327; *Sidberry v. State,* 133 Ind., 677. In the case last cited it was held that where an indictment charges the defendant with the murder of his wife, testimony as to relations existing between them, previous to the homicide, and as to his treatment of her, is competent. It is not necessary to show a motive for committing the crime, when motive is not of its essence, but it is relevant to prove a motive as a circumstance to identify the prisoner as the perpetrator of the crime, and to establish malice, deliberation, and premeditation. *S. v. Adams,* 138 N. C., 688. This exception cannot be sustained.

The other exception taken to the refusal of the court to give the instructions requested by the prisoner are equally untenable. A perusal of the charge of the court will disclose that the learned judge who presided at the trial gave full, clear, and accurate instructions with reference to every question contained in the prayers of the prisoner, and not only responded to them directly, but he presented the case to the jury in every possible phase, and was exceedingly fair and favorable to the prisoner in what he said. He might have charged more strongly against him and yet have been well within the law.

No error.

(608)

STATE v. BRAD BAGLEY.

(Filed 6 March, 1912.)

1. Murder—Evidence—Dying Declarations.

Declarations of the deceased are admissible in evidence on trial of the prisoner charged with his murder when from the circumstances and surroundings and from information given him by the attending physician it appeared that the deceased made the declarations in anticipation of his death.

2. Same—Identification.

With evidence tending to show that deceased died from the effect of being shot by the prisoner from behind, on the street of a town about 9 o'clock at night, and that his attending physician informed him that his death was near, and that if he had any message he wanted to leave, it were best that he do so: *Held*, competent as dying declarations, made a short time before his death, that it was the prisoner who had shot him; that he saw his outline very distinctly as he ran down the street, and he was certain that the prisoner was the one.

3. Murder—Verdict—Findings—Practice—Interpretation of Statutes.

It is required by our statute that a jury should render their verdict in a trial for murder so as to show, if murder was their verdict, whether it was in the first or second degree. Revisal, sec. 3271.

4. Same—Directions—Reconsideration—Recording.

A verdict rendered in open court is not complete until accepted by the court for record, and it is the duty of the trial judge to prevent the recording of a doubtful or insufficient finding; and in this case it is *Held*, that his Honor, on seeing that the degree of murder was not expressed in the verdict, correctly told the jury to reconsider their finding, for the purpose of specifying the crime, and upon response being made by them of murder in the first degree, the verdict was properly recorded accordingly.

APPEAL from *Cooke, J.*, at September Term, 1911, of MARTIN.

The prisoner was convicted of murder in the first degree, and from the sentence of death appeals to the Supreme Court.

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

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Winston & Matthews for the prisoner.

BROWN, J. The prisoner was convicted of the murder of one (609) William R. White, who died on the night of 15 August, 1911.

The evidence tends to prove that while passing a gate on one of the

public streets of the town of Williamston, about 9 o'clock p. m., the deceased was shot from behind, and died the same night. There is evidence of circumstances tending to prove that the prisoner waylaid and shot the deceased.

But it is contended by the learned counsel for the prisoner that the evidence is insufficient to convict, if the dying declarations of the deceased are excluded. Many exceptions of the prisoner relate to the competency of these declarations.

Dying declarations are admissible in cases of homicide when they appear to have been made by the deceased in present anticipation of death. It is not always necessary that the deceased should declare himself, that he believes he is about to pass away, but all the circumstances and surroundings in which he is placed should indicate that he is fully under the influence of the solemnity of such a belief.

The evidence in this case shows that the doctor, who was present with the deceased when he expired, told him that he was in a critical condition and was likely to die, and that if there was any message he wanted to leave, he had better do so.

The doctor informed him distinctly that he could not live, and it was then that he said that it was the prisoner who shot him; that he saw his outline very distinctly as he ran down the street, and he was certain it was the prisoner.

The witness says that the deceased's mind was perfectly clear as long as he had sense to talk; that he made the same statement to different persons as they would come in the room, and that he repeated it only fifteen minutes before he died. Other testimony corroborates this evidence.

We think the evidence indicates clearly that the deceased fully realized not only that his death was sure, but that it was also near, and that the court properly admitted his declaration. *S. v. Quick,* 150 (610) N. C., 820; Wigmore on Evidence, sec. 1430 *et seq.*

We have examined carefully all the exceptions in the case, and are unable to find anything whatever that will warrant a new trial. The last exception which was taken to the manner of receiving the verdict is untenable. When the jury came in with their verdict, in reply to the clerk they responded "Guilty." His Honor told the jury to reconsider their response, and specify the crime of which they found the prisoner guilty. The jurors stated they found the prisoner guilty of murder in the first degree. This was in accordance with the statute, Revisal, 3271, which requires the jury to determine in their verdict whether the crime is murder in the first or second degree.

In *S. v. Godwin,* 138 N. C., 583, the principle is recognized and

enunciated that before a verdict returned into open court by a jury is complete, it must be accepted by the court for record.

It is the duty of the judge to look after the form and substance of a verdict so as to prevent a doubtful or insufficient finding from passing into the records of the court, and to accomplish such ends it is the duty of the court to see that the jury may amend their verdict in form so as to meet the requirement of the law. *S. v. McKay,* 150 N. C., 813.

No error.

Cited: S. v. Watkins, 159 N. C., 483; *S. v. Laughter, ib.,* 490; *S. v. Shouse,* 106 N. C., 307.

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(611)

STATE v. NORMAN WILLIAMS.

(Filed 6 March, 1912.)

1. Taxation—Uniformity—Constitutional Law—Interpretation.

While the taxing of trades is not expressly included in the rule of uniformity declared by our Constitution, Art. V, sec. 3, the courts, by interpretation, will subject it to the same rule, in this respect, which is prescribed for the subjects therein enumerated; for a different rule would be inconsistent with natural justice and with the intent as gathered from the section referred to.

2. Same—Different Classes of Taxation.

In laying a tax, the different subjects thereof may be reasonably, though not arbitrarily, classified, and a different rule of taxation prescribed for each class, provided the rule is uniform in its application to the class for which it is made. Constitution, Art V, sec. 3.

3. Same—Cities and Towns—Discrimination.

Constitutional and legislative authority conferred upon a municipality to tax does not enable it to create a privilege for the purpose of taxing it, nor to discriminate between persons exercising the same privilege, by imposing a tax upon one of a class, at a higher rate, in a different mode or upon other principles than one applied to the exercise of the same privilege by others of the same class.

4. Taxation—Cities and Towns — Municipal Powers — Legislation — Powers Conferred—Constitutional Law.

The legislative power conferred upon a municipality to tax cannot be construed to extend further than its charter permits, and any attempt to impose burdens upon some of a class from which others of the same class are exempted is void as being beyond the granted powers and as an exercise of partial legislation.

5. Taxation—Cities and Towns—Legislature — Police Powers — Reasonableness—Constitutional Law.

Ordinances passed by a municipality in the exercise of the police power or for the purpose of revenue, and intended to regulate or control the sale of articles in a town or city, or in other matters, must be reasonable, and are subject to the determination of the courts as to what are reasonable regulations within the powers granted by the Legislature.

6. Taxation—Cities and Towns — Municipal Powers — Discrimination — Restraint of Trade—Constitutional Law.

A town ordinance required every person, firm, or corporation in the State, soliciting or taking orders for goods at retail, to be delivered in the town by non resident merchants, firms, or corporations resident in the State, to pay a certain tax: *Held*, the ordinance was discriminative, in restraint of trade, and unconstitutional, and defendant could not be held for a criminal violation thereof.

APPEAL from *Carter, J.*, at October Term, 1911, of CARTERET.

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

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

No counsel for defendant.

(612) WALKER, J. The defendant was convicted in the Mayor's Court of Morehead City for the violation of an ordinance of the town which required "every person, firm, or corporation in the State, soliciting or taking orders for goods at retail, to be delivered in the town by nonresident merchants, firms, or corporations resident in the State, to pay a tax of $10 per day or $30 per year." Defendant appealed to the Superior Court, in which a special verdict was returned by the jury finding that the defendant represented one A. A. Joseph, a merchant tailor or clothier of Goldsboro, N. C., and solicited and received orders in said town of Morehead City for tailor-made clothes, to be delivered to customers there, without having paid the tax imposed by the ordinance. Upon this finding the court held the ordinance to be invalid, directed a verdict to be entered accordingly, and discharged defendant; and the State appealed.

The Constitution, Art. V, sec. 3, authorizes the Legislature to tax trades, professions, franchises, and incomes, provided that no income shall be taxed when the property from which it is derived is taxed. In accordance with this article, the Legislature, by Private Laws 1905, ch. 254, sec. 12, provided that the Commissioners of Morehead City should have the power to levy and collect a fair and reasonable special or license tax, and among others, on the following subjects: "Itinerant merchants, peddlers, and transient dealers, drummers or commercial

travelers, and every agency for the sale of merchandise not manufactured in the town, and all other subjects taxed by the State." The ordinance in question was enacted under authority supposed to have been given in the passage we have taken from the amended charter of the town, and we are to say whether it is valid or not.

The Constitution (Art. V, sec. 3) provides that "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise, and also all real and personal property, according to its true value in money," and there is conferred in the same section the power to tax trades, professions, and so forth, as above set out.

This Court has held that the rule of uniformity applies to (613) the latter provision as much as to the former, although there are no express words to that effect in the section, it being considered that a tax not uniform, as properly understood, though levied on trades, professions, or privileges, would be so inconsistent with natural justice, and with the intent so apparent in the section we have quoted, that its collection would be restrained as unconstitutional. *Gatlin v. Tarboro,* 78 N. C., 119; *Worth v. R. R.,* 89 N. C., 291. And this may be taken as the settled construction of the section.

It may also be considered as settled that, in laying the tax, the different subjects may be reasonably, though not arbitrarily, classified, and a different rule of taxation prescribed for each class, provided the rule is uniform in its application to the class for which it was made. *R. R. Tax Cases,* 92 U. S., 575; *R. R. v. Worth, supra.* As stated in those cases, the result must be to prevent discrimination among the individuals or subjects of any one class, based upon special privileges, immunities, or exemptions allowed to one and not to the others. If an ordinance, therefore, is not founded upon this fair and just basis, it will be deemed unreasonable and violative of the fundamental principle of taxation.

Constitutional and legislative authority conferred upon a municipality to tax does not enable it to create a privilege for the purpose of taxing it, or to discriminate between persons exercising the same privilege, by imposing a tax upon one of a class at a higher rate, in a different mode, or upon other principles than one applied to the exercise of the same privilege by others of the same class. The power to tax extends no further than is permitted by its charter, and any attempt to impose burdens upon some of a class from which others are exempted would be void, as being beyond the granted powers of the municipality, and as an exercise of partial legislation. *Nashville v. Althrop,* 45 Tenn., 554; Cooley's Const. Lim., 390.

The defendant can be held liable to taxation as a merchant, under the general laws of the State or of the municipality, in the same manner and to the same extent as all other merchants of the same class exercising these privileges within the corporation, but not otherwise, or farther than they.

When the by-law of a municipal corporation, enacted under
(614) a general grant of power or by virtue of its incidental authority, is partial, unreasonable, or oppressive, it will be declared void, as an unwarranted exercise of its taxing power. *Simrall v. Covington,* 90 Ky., 444. "Municipal by-laws must also be reasonable. Whenever they appear not to be so, the Court must, as a matter of law, declare them void. . . . So a by-law, to be reasonable, should be in harmony with the general principles of the common law." Cooley on Const. Lim., 200, 202. "As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if 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. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation." 1 Dillon Mun. Corp., sec. 322. As said in *Simrall v. Covington, supra:* "The above views are enforced in *Mobile v. Yuille,* 3 Ala., 137; *Robinson v. Franklin,* 1 Hump., 156; *Anderson v. Wellington,* 40 Kansas, 173, and many other cases that might be cited. All recognize the rule, which is fundamental, that the by-laws of a municipality, whether they purport to regulate callings or otherwise, must, as indeed must every law, preserve equality of right. Those exercising the same privilege must be treated alike. The door must be closed to none by discrimination, if we would avoid monopoly and wrong. This principle is as necessary to sound legislation as the circulation of the blood is to the human system, or the flow of tide-water to the ocean. It has produced a line of decisions which are universally regarded as sound by the courts of the country. Thus, in *Ex parte Frank,* 52 Cal., 606, an ordinance of a city, passed under a general charter power, exacting a license for selling goods, and fixing one rate for selling goods at the time within the city and another and much larger for those without, was held invalid, as unjust, partial, and oppressive. In *Mayor, etc., of Nashville v. Athrop,* 45 Tenn., 554, an ordinance discriminating between merchants and other dealers residing within and
those without the limits of the city, and prescribing a special
(615) rate of taxation for the latter, was declared to be beyond the limit of constitutional legislation. In this State we have no

constitutional provision as to taxation *eo nomine,* but it is the settled constitutional rule, declared by oft-repeated decisions of this Court, that every tax must be certain, universal, and, so far as practicable, equal and uniform. Burdens cannot constitutionally be imposed upon particular individuals, while others of the same class or locality who have rendered no public service are exempt."

Simrall v. Covington, supra, is directly in point, as will appear from this extract: "The ordinance now in question not only discriminates between residents of the city of Covington and those residing outside of it, whether within or without the State, but it places a burden upon some within the city, while others of its residents engaged in a like business are exempt. It is, therefore, unreasonable, partial legislation. To be reasonable, a municipal by-law should be equal in its operation. *Tugman v. Chicago,* 78 Ill., 405; *Barling v. West,* 29 Wis., 307. This one being clearly an infringement of individual right, partial and unreasonable in its character, cannot be sustained." This doctrine appears to have been adopted by practically all the courts and is clearly founded in reason and justice.

Some courts hold that such an ordinance is invalid because it authorizes the taking of one citizen's property for the benefit of the public, and, worse still, for private use or advantage, without just compensation. *St. Charles v. Nolle,* 51 Mo., 122. But a sufficient reason, under our Constitution, is that the discrimination in favor of the resident of the town and against the nonresident violates the rule of uniformity. It has been held that such distinctions between the inhabitants of the State, based upon no other ground than the place of actual residence, are in restraint of trade, invidious, unjust, and illegal. *Muhlenbrinck v. Long Branch,* 13 Vroom, 364.

Ordinances passed in the exercise of the police power or for the purpose of revenue, and intended to regulate or control the sale of articles in a town or city, or in other matters, must, of course, be reasonable, and it belongs to the courts to determine what are reasonable regulations within the power granted by charter. *Kipp v. Paterson,* 2 Dutcher, 298; *Morgan v. Orange,* 50 N. J., 389. In the (616) case last cited, it was held that an ordinance imposing a larger license fee on a nonresident than on a resident was illegal, as being discriminating and, therefore, unreasonable. Other decisions to be examined, and which seem to be directly in point, are: *Atlanta v. Jacobs,* 125 Ga., 523; *Ex parte Frank,* 52 Cal., 606; *Saginaw v. Circuit Judge,* 106 Mich., 32; *Clements v. Casper,* 4 Wyo., 494; *Pacific Junction v. Dyer,* 64 Iowa, 38; *Shamokin v. Flannigan,* 156 Pa. St., 43; *Indianapolis v. Bieler,* 138 Ind., 30; *Grafty v. Rushville,* 107 Ind. 502;

Fecheimer v. Louisville, 84 Ky., 306. "The corporation is not endowed with power to pass ordinances in restraint of trade. *Kipp v. Paterson, supra; Dunham v. Rochester,* 5 Co., 462. The control it may exercise over business and trade is such only as belongs to the necessities and demands of local government, such as have relation to the general prosperity of the citizen, the public health, order and morals of the community. It cannot, outside of these considerations, enter into the arena of business competition, to advance a favored class and retard others. All citizens in pursuit of legitimate, honest occupations, stand equal before the law, and a police power entrusted to a corporation is unreasonably exercised in making invidious distinctions between citizens endowed with equal rights. It is incompetent for this board of commissioners, entrusted as it is with the rule in local municipal affairs, to erect walls of exclusion against citizens without its limits, or obstruct free commerce and trade between them and its own inhabitants." *Huhlenbrinck v. Commissioners,* 42 N. J. L., 364.

It seems to us that the ordinance in question is aimed at nonresidents, and there is room for the reasonable suspicion that it was designed principally for the benefit of residents in erecting a barrier against the introduction of foreign trade, for their protection. It is, therefore, open to the just criticism that it is discriminative, in restraint of trade, and not authorized by the terms of the Constitution, which were intended to secure equality in such matters. *Saginaw v. Circuit Judge, supra.* "Municipalities are not in any sense close corporations. They are not vested with rights of local legislation in order that they may arrogate to their own inhabitants additional rights and (617) privileges to those enjoyed by other citizens of the State or Nation. Neither may rights be denied to its citizens and still allowed to be exercised by nonresidents who may come within the corporate limits. Discrimination *against* residents is equally odious as discrimination in their favor." Horr and Bemis on Mun. Police Ordinances, sec. 137.

We conclude, therefore, that the ordinance of Morehead City, under which the defendant was charged criminally before the justice, is invalid, in that "it spends its whole force on nonresidents and spares residents entirely." The Superior Court properly directed that a verdict of not guilty be entered upon the findings of the jury. The defendant was entitled to his discharge.

No error.

Cited: Mercantile Co. v. Mount Olive, 161 N. C., 125.

STATE v. LONNIE MILLICAN ET AL.

(Filed 20 March, 1912.)

1. Malicious Burning—Severance—Discretion—Appeal and Error.

The refusal of the trial judge to order a severance of the trial under an indictment against several defendants for unlawfully burning a house is not reviewable on appeal except in case of gross abuse of discretion.

2. Malicious Burning—Other Fires—Evidence.

Evidence that after the defendants were imprisoned for unlawfully burning a house, other fires occurred in the town, is incompetent; and it would still have been incompetent had the evidence tended to prove the other fires incendiary, as it would have introduced other and different issues having no tendency to prove the guilt or innocence of those on trial.

3. Same—Ill-will—Motive—Contentions—Instructions.

When there is evidence that the defendants had ill-will towards the people of a town wherein they are accused of unlawfully setting fire to a house, with evidence tending to prove the fact of their guilt, it is competent for the trial judge to state to the jury that the State contended that the defendants had manifested ill-will towards the people of the town, and that this conduct, if found to exist, could be considered by them; and in this case an instruction was not to defendant's prejudice as charging that the jury could consider evidence of other fires occurring there.

4. Malicious Burning—Incarceration—Evidence.

The defendants being tried for unlawfully burning a house, evidence *held incompetent as to the length of time they* had been in jail, it not being contended by them that they were in jail at the time the offense was charged against them.

5. Malicious Burning—Former Trial—Inconsistent Charges—Evidence.

When it is competent to prove that the State took a different position, at a former trial of the defendants for unlawfully burning a house, from that taken at the trial appealed from, it may not be proven by a witness who says he was not present when the case had formerly been tried.

6. Malicious Burning—Ill-will—Motive—Evidence—Harmless Error.

Answers of the prisoner, on his trial for unlawfully burning a house, given in response to questions asked by the State for purposes of impeachment, to the effect that he had been wrongfully accused of taking pistols from houses when he was helping to save property, etc.: *Held*, in this case, to be unprejudicial, and necessary in contradiction of the testimony of a State's witness that the prisoner said, on the occasion referred to, that he wanted to see another fire in that town, as long as "the white people were so smart."

7. Malicious Burning — Instructions — Verdict—Interpretation—"Wanton"—Appeal and Error.

The verdict of the jury, as well as the charge of the court, must be construed with reference to the evidence introduced on the trial, and when it appears, when so construed, that the prisoners, tried for unlawfully burning a house, must necessarily have deliberately committed the act which had been determined upon by them all, one of them starting the fire and the others watching out for him or otherwise assisting, it was not error, under a charge otherwise correct, that his Honor failed to define the word "wantonly" used in the statute as a part of the description of the offense, it appearing that the act was of necessity wantonly and maliciously done.

(618) APPEAL from *Allen, J.*, at January Term, 1912, of LENOIR.

The defendants were indicted at May Term, 1911, of the Superior Court of Lenoir County, under section 3338 of the Revisal, for burning a warehouse in LaGrange.

They were tried on the indictment at October term of said (619) court, and upon failure of the jury to agree, a juror was withdrawn and a new trial ordered. They were tried a second time at January Term, 1912, of said court, and convicted.

The judge presiding sentenced each of the defendants to a term of thirty years at hard labor in the State's Prison, and they appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Y. T. Ormond, G. V. Cowper, and F. I. Sutton for defendants.

ALLEN, J. If we were permitted to examine the evidence for the purpose of determining the guilt or innocence of the defendants, we would have grave doubts as to the propriety of sustaining the verdict of the jury.

The State had to rely upon a witness, who claimed to be an accomplice, whose evidence is unsatisfactory and has very little corroboration.

This witness gives the following account of the burning:

"Sunday, before the fire, I came downtown, and when I got there, there was Lonnie Millican, Jim Britt, and Nick Joyner on the platform talking—the depot platform. I walked up there and asked them to let met get in what they were talking about, and Lonnie said: 'All right, if you can keep a secret.' He said the white folks didn't like them and he was going to get even. I asked how he was going to get even, and he said he was going to burn the town. I said I would watch. I cannot tell what time it was. I don't know exactly. Nobody but these three boys when I got there. When I said I would watch, Lonnie and Jim went on, and then Nick and I went on. Just went down to

Wooten's alley, Lonnie and Jim first, and then me and Nick. Lonnie told me where to stand when we got there. Nick goes on between Mr. Barwick's and the bank. I stood at the alley towards Front Street, Nick was between Barwick's and the hotel there, Lonnie and Jim went back behind Mr. McDonald's warehouse, as far as I could see them. We went in the alleyway. They told me they were going to burn the town, that the white folks didn't like them. I told them I would watch. After they went, I saw Jim raking up trash. I could not see exactly, on account of Lonnie's overcoat; I could not half see for his overcoat. Don't know where he put the trash. They came back and then went behind Mr. Sim Wooten's store. I (620) went out on Front Street then. I could not tell how close they were to warehouse. I don't know how close—pretty close to it. I heard people holler 'fire' when I went on Front Street. Nick and I went about the same time and heard them then. When I got back, Mr. McDonald's building was burning and Mr. Barwick's had caught. Had gone about half a block before alarm of fire. No, sir; it wasn't dark when I went back behind the warehouse and was watching. You could see anybody behind there."

In addition to his confession that he was an accomplice, he was further discredited by his admission that he was indicted, and employed a lawyer to defend him, telling him that he was not connected with the fire, and the fact that he had been taken out of prison several times and examined by officers of the law, and was finally liberated without a trial.

If this statement is true, the defendants, without previous conference with him, told him at once, upon his approaching them, of their purpose to burn the town, and he, without motive, agreed to watch, and all of them went immediately, before it was dark, and set fire to a warehouse, which was overlooked by a hotel and in a populous community.

In addition to this, at least one of the defendants offered evidence of an *alibi,* which, if believed, was complete.

We have given a brief statement of the evidence, in order that the bearing of the exceptions relied on by the defendants may be understood, as our duty is limited to the consideration of the alleged errors in law, and in cases like this we have no power to review the verdict of the jury.

The first exception is to the refusal of his Honor to order a severance.

As was said in *S. v. Oxendine,* 107 N. C., 783, and in *S. v. Carrawan,* 142 N. C., 576: "The refusal of the court to grant a severance is not reviewable, except in case of gross abuse, and no such abuse appears in this case," and, therefore, the exception cannot be sustained.

His Honor excluded evidence to prove that, after the impris-
(621) onment of the defendants, there were other fires at LaGrange, and this is the basis of the second, third, fifth, sixth, and fourteenth exceptions.

The fact that there were other fires at LaGrange, standing alone, could have no probative force, and, if there were such fires, there was no effort to prove that they were not accidental, and were incendiary.

If, however, such evidence had been offered, it would have been incompetent, as it would introduce other and different issues and would have no tendency to prove the guilt or innocence of the defendants.

If the defendants could offer evidence that, after their imprisonment, there were other fires at LaGrange that were incendiary, the State must be permitted to contradict, and if the defendants establish their contention, it would prove nothing, except that there were others than the defendants who would commit crime, which would not exculpate them.

The case of *S. v. Smarr,* 121 N. C., 669, seems to be in point against the defendants, in which it was held that on the trial of one for burglary it is not competent for him to show that other burglaries were committed in the same neighborhood about the same time, and it has been held uniformly in this State that evidence much stronger than that offered by the defendants of a kindred nature, which would prove that another committed the crime charged, is not competent unless it is of such character as to exclude the guilt of the accused. *S. v. Davis,* 77 N. C., 483; *S. v. England,* 78 N. C., 554; *S. v. Baxter,* 82 N. C., 604; *S. v. Beverly,* 88 N. C., 633; *S. v. Lambert,* 93 N. C., 623.

The defendants further contend that although his Honor excluded evidence as to other fires, he called them to the attention of the jury, and told the jury to consider them, by stating that the contention of the State was that the defendant Millican had shown ill-will towards the people there, "manifested after this fire and at other times when there had been a fire at LaGrange," and that from all these facts and circumstances the State contended that the defendants were guilty.

This is, in our opinion, a misconception of the charge. His
(622) Honor did not instruct the jurors that they could consider evidence of other fires, but that the State contended that the defendant Millican had manifested ill-will towards the people of LaGrange, and that this conduct of the defendant, if found to exist, could be considered, which was not erroneous.

The exclusion of the evidence as to the length of time the defendants had been in prison, the subject of the fourth exception, was proper, there being no contention that they were confined at the time of the burning; and the twelfth exception is equally untenable, because, if

competent to prove that the State took a position at the former trial inconsistent with that contended for in this, the witness, by whom it was attempted to be proven, said he did not remember hearing anything at the former trial, and, therefore, could not know what the contention of the State was.

The seventh, eighth, ninth, tenth, and eleventh exceptions are to impeaching questions asked one of the defendants, Millican, which he answered in the negative, and to the following conversation detailed by him: "I was talking to two colored men from here, Will Philips and Tom Mayor. They were asking about going up to a lady's house, and I said I didn't have time to go, but I would go later if they would wait. They said they couldn't, and I said, well, I couldn't go then. They asked why they had we boys up concerning pistols. I told him that when there was a fire I helped carry out stuff, and after everything was over they were claiming that some pistols were lost and laid it on three or four of us around there. One of them said, 'When I am home, I don't go to any fires,' and I said, 'Hereafter nobody need say anything to me about helping.' Mr. Rouse said something about snatching me down. He said, 'I will have you fixed to-night.' One of the boys said, 'You had better go on,' and I went on off."

We fail to see in this anything prejudicial to the defendant, and in view of the evidence of Rouse, a witness for the State, that the defendant said, on the occasion referred to by him, that he wanted to see another fire in LaGrange, as long as the white people were so smart, it was necessary and helpful for him to give his version of the occurrence.

The other exceptions are to the refusal to give certain prayers (623) for instructions, and to parts of the charge as given, all of which we have carefully examined.

The prayers were, in substance, incorporated in the charge, which was fair and comprehensive and in accordance with precedent.

The one principally relied on is the failure to define the word "wantonly," used in the statute, under which the defendants are indicted, as a part of the description of the offense, the defendants contending, under the authority of *S. v. Massey,* 97 N. C., 465; *S. v. Morgan,* 98 N. C., 641, and other cases, that it was necessary to allege in the indictment that the burning was done "wantonly," and that this allegation would not be supplied by the use of the words "maliciously and feloniously," and if necessary to be alleged it must be proven, and that it was the duty of his Honor to so instruct the jury.

The objection is not to the indictment, which conforms to all the requirements of the law, but to the failure to charge.

No request was made by the defendants for his Honor to define "wantonly," and we refer to this, not for the purpose of putting our ruling on the ground of failure to make the request, but to show that it was not regarded as material, in view of the evidence.

There were only two facts in dispute before the jury: (1) Was the fire the work of an incendiary, or was it accidental? (2) If the work of an incendiary, did the defendants set out the fire?

There was no suggestion in the evidence, nor do counsel contend here, that the fire may have been caused by the defendants accidentally, and under the charge of the court the jury had to find, in order to convict the defendants, that they agreed with Dempsey Wood, colored, to burn the warehouse, and that they at once carried out the agreement, and deliberately set the building on fire, and if so, the act was of necessity wanton and malicious, and it could do no good to so describe it. In other words, his Honor would have been justified in charging the jury that, if they were satisfied that the defendants agreed to burn the warehouse, and that pursuant to that agreement they deliberately burned it, the act was wanton and malicious, and this is the only view pre-
(624) sented to the jury upon which they could convict, as appears from the charge to the jury:

"When the State prefers a charge against its citizens, it devolves upon the State to satisfy the jury from the evidence, beyond a reasonable doubt, of the guilt of the defendants. . . . It devolves upon the State to satisfy you fully that the property was wrongfully, willfully, and maliciously set afire by some person or persons, and, further, to satisfy you fully from the evidence that the parties now on trial—one, or all three, or two—were the parties who set the building on fire. If you should find from the evidence beyond a reasonable doubt that the three defendants conspired and agreed together that they would set fire to and burn the house, and that the witness Dempsey Wood entered into the conspiracy and agreed to watch, and in furtherance of that agreement and conspiracy one or more of them set fire to the house, the others being present, encouraging and aiding him in doing so—and it makes no kind of difference which one did the act of setting fire to the house—all would be equally guilty. If you should find from the evidence beyond a reasonable doubt that either one set fire to the house, the others being present, aiding and assisting, either by actually doing something toward that end or watching for the protection of those doing it, they would all be guilty. . . . If any one shows that he was not there at the time of the fire, or shows such proof as shall cause you to have some doubt, return a verdict of not guilty as to such one. If all three show that, then return a verdict of not guilty as to all three. If upon

all the evidence you are not satisfied beyond a reasonable doubt of the guilt of one, return a verdict of not guilty as to such one, or to two or to all three, if you are not satisfied beyond a reasonable doubt."

The verdict, like the charge, must be construed with reference to the trial. *Cox v. R. R.*, 149 N. C., 86.

Upon a review of the record, confining ourselves to a consideration of the exceptions, we must say there is no error.

No error.

Cited: *S. v. Lane*, 166 N. C., 338; *S. v. Knotts*, 168 N. C., 184; *S. v. White*, 171 N. C., 787; *S. v. Wiggins, ib.*, 816.

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(625)

STATE v. WILLIAM HINTON, ALIAS "SON" HINTON.

(Filed 20 March, 1912.)

1. Motions—Request for Bill of Particulars—Discretion of Courts.

A motion for a bill of particulars in a criminal action is addressed to the discretion of the court, and is not reviewable unless this discretion is grossly abused by him, which does not appear in this case, there being nothing of record to show that the prisoner required any information not appearing upon the indictment which was necessary to his defense.

2. Motions—Quash—In Arrest of Judgment—Indictment.

Motions to quash and in arrest of judgment rest upon the same ground, the insufficiency of the warrant, and in determining them the affidavit and order of arrest must be considered together.

3. Same—Statutory Form—Sufficiency.

When the warrant and order of arrest for resisting and obstructing certain officers in the performance of their duties, construed together, substantially follow the statute, motions to quash and in arrest of judgment should be denied.

APPEAL from *Bragaw, J.*, at January Term, 1912, of WAKE.

The defendant was tried before the Police Justice of the City of Raleigh, on the following warrant:

"J. P. Stell, Chief of Police of the City of Raleigh, being duly sworn, says that he is informed and believes that, on or about 4 December, 1911, in the city of Raleigh, and in Raleigh Township, Wake County, William Hinton, *alias* 'Son' Hinton, did unlawfully and will-

fully resist, delay, and obstruct J. H. Wyatt and G. C. Dillehay, duly constituted public officers of the police for the city of Raleigh, in discharging and attempting to discharge a duty of their office, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"You are hereby commanded to forwith apprehend the said William Hinton, *alias* 'Son' Hinton, and bring him before his Honor, the Police Justice of the City of Raleigh, to answer the charge set forth in the above affidavit, and to be further dealt with according to law"; and upon conviction he appealed to the Superior Court of Wake County.

When the case was called for trial in the Superior Court, the (626) defendant moved for a bill of particulars, which the court denied, in the exercise of its discretion, and he excepted.

He also moved to quash the warrant, which was denied, and he excepted.

Also he moved in arrest of judgment, after a verdict of guilty was returned, and to the refusal of this motion excepted.

Judgment was rendered upon the verdict, and the defendant appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

W. B. Snow for defendant.

ALLEN, J. The motion for a bill of particulars is addressed to the discretion of the court, and is not reviewable, unless there is a gross abuse of discretion. *S. v. Dewey,* 139 N. C., 556.

In this case there is not only no evidence of the abuse of the discretion vested in the judge, but there is no statement in the record tending to show that the defendant required any information, outside of the indictment, to enable him to make his defense.

There is nothing in *S. v. Corbin,* 157 N. C., 619, which interferes with the discretion of the judge, or is in conflict with the law declared in *S. v. Dewey, supra.*

The question under consideration in the *Corbin case* was a motion in arrest of judgment, the indictment following the words of the statute, and it was said: "If the defendant did not know which stream he was charged with polluting, or the means alleged to have been used, he could have obtained specific information by asking for a bill of particulars under section 3244 of the Revisal," which is no intimation that if the bill of particulars had been asked for it would not have been discretionary with the judge to grant or refuse it.

The motions to quash and in arrest of judgment rest on the same ground, the insufficiency of the warrant, and in determining them the

affidavit and order of arrest must be considered together (*S. v. Yellowday,* 152 N. C., 793), and when so considered, the warrant follows substantially the words of the statute, which is sufficient. *S. v. Harrison,* 145 N. C., 408; *S. v. Leeper,* 146 N. C., 655; *S. v.* (627) *Corbin,* 157 N. C., 619. There is

No error.

STATE v. I. A. HEWETT.

(Filed 27 March, 1912.)

Indictment—Rape—Assault with "Intent"—"Atempt."

A charge in a bill of indictment of an assault with an "attempt" to commit rape necessarily includes the charge of "intent," and when the bill is otherwise sufficient, it is not defective because it omitted to expressly charge the intent.

APPEAL from *Whedbee, J.,* at October Term, 1911, of BRUNSWICK.

Indictment for an assault with intent to commit rape. The defendant was convicted and sentenced. In apt time he moved in arrest of judgment for insufficiency of the bill of indictment, which read as follows:

STATE OF NORTH CAROLINA—BRUNSWICK COUNTY.

In the Superior Court, October Term, A. D. 1911.

The jurors for the State, upon their oaths, present, That I. A. Hewett, late of the county of Brunswick, on the 20th day of July, 1911, with force and arms, at and in the county aforesaid, unlawfully, willfully, and feloniously did assault, beat, and wound one Lundie Bozeman, and her the said Lundie Bozeman did feloniously then and there attempt to ravish and carnally know, forcibly and against her will, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State. SINCLAIR, *Solicitor.*

Motion overruled; defendant appealed.

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

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Cranmer & Davis for defendant.

BROWN, J. The bill is in the usual form, but omits the words (628) "with intent." After charging a felonious assault upon Lundie Bozeman, the bill concludes: "and her the said Lundie Bozeman did

feloniously then and there attempt to ravish and carnally know, forcibly and against her will," etc.

There are two decisions of this Court which sustain the contention of the defendant, *S. v. Martin,* 14 N. C., 329, and *S. v. Goldston,* 103 N. C., 323; but, with perfect deference, we must say we are not impressed with the reasoning upon which they are based, and we are no longer willing to follow them as controlling precedents. No rule of property is involved, but solely a question of criminal pleading. The *Goldston case* followed the precedent of the *Martin case,* and, while not expressly overruled, the authority of both is very much shattered if not practically destroyed by the opinion of the Court in *S. v. Barnes,* 122 N. C., 1034. In that case the bill did not charge any "attempt," and omitted the words "with intent" altogether, but the Court held that the words "with the intent" are not "sacramental," but that words are sufficient if they are tantamount to the charge of a felonious assault with the design or purpose to commit rape. In that case the bill of indictment is in part as follows: "did make an assault and her the said.....then and there forcibly, violently, and against her will, then and there feloniously to abuse, ravish, and carnally know." The Court held that the words were sufficient to charge the intent.

In the bill in this case the felonious assault is specially charged and that this assault was made in an attempt to commit rape.

The basis of the decision in *Martin's case* is that an attempt to do a thing is expressive of the overt act of moving towards its accomplishment, rather than of the purpose or intent itself. We cannot appreciate the distinction. It is too subtile.

We are unable to see how a man can commit a felonious assault upon a female, and attempt to ravish her, without intending it. The words used in the bill, *ex vi termini,* necessarily import an intent
(629) to commit rape, and are amply sufficient to give the defendant full notice of the crime with which he stands charged, and that is the chief purpose of a bill of indictment.

An "attempt," in criminal jurisprudence, is an effort to accomplish a crime, amounting to more than mere preparation or planning for it, and which if not prevented, would have resulted in the full consummation of the act attempted.

Mr. Bishop defines an attempt as "an *intent* to do a particular criminal thing, combined with an act which falls short of the thing intended." 1 Bishop Crim. Law, sec. 728. It is defined by others as an endeavor to commit an offense, carried beyond mere preparation to commit it, but falling short of actual commission." Burrill on Circ. Ev., 365; Burrill Law Dict., 175; Bouvier's Law Dict., 205.

In *Regina v. Collins,* L. & C., 471, 9 Cox C. C., 497, it is defined "as that which, if not prevented, would have resulted in the full consummation of the act attempted." *Rex v. Higgins,* 2 East, 20; Robinson's Elementary Law, sec. 472.

Thus we see that practically all definitions of an attempt to commit a crime, when applied to the particular crime of rape, necessarily imply and include "an intent" to commit it.

There may be offenses when in their application to them there is a distinction between "attempt" and "intent," but that cannot be true as applied to the crime of rape. There is no such criminal offense as an "attempt to commit rape." It is embraced and covered by the offense of "an assault with intent to commit rape," and punished as such.

As held by the Supreme Court of California, one cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt. *People v. Thomas,* 63 Cal., 482; 3 Am. & Eng., p. 251, note 5. The judgment is

Affirmed.

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(630)

STATE v. JIM GARNER.

(Filed 3 April, 1912.)

1. Quarantine of Cattle—Board of Agriculture—Powers.

The State Board of Agriculture has authority to make and enforce regulations for the quarantine of cattle and to prevent their transportation in view of preventing the spreading of contagious diseases.

2. Quarantine of Cattle—Prohibited Territory—Fence Law, County—"Willfully Permit."

An owner of cattle, in permitting them to run at large in a no-fence county, which results in their straying from a prohibited territory, willfully "allows" them to move across the line when he purposely turns them out and they cross the line; for it is not necessary that he drive them across; it is enough that he permit them such liberty and thereby they are "allowed" by him to move across the line.

WALKER and ALLEN, JJ., dissenting.

APPEAL by defendant from *Cooke, J.,* at December Term, 1911, of MOORE.

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

Attorney-General for the State.

R. L. Burns for defendant.

CLARK, C. J. Indictment under Revisal, 3294, for "allowing" cattle to move from a quarantined area in North Carolina into that portion of the State lying north and west of the quarantine line established by the Board of Agriculture, *i. e.*, from Hoke County into Moore.

The special verdict finds that defendant owned a cow which was infected with the cattle fever tick and permitted her to run at large in Hoke County, from his home, one-quarter of a mile from the county line, and she strayed into Moore County. It further appears that Hoke County is nonstock-law territory, and that there was no fence between Hoke and Moore counties.

It is immaterial that there was no stock-law fence between Hoke and Moore counties and that cattle are allowed to run at large in Hoke County. The defendant is not indicted for violation of (631) any stock law in permitting his cow to run at large. Indeed, his counsel in this Court rested his defense purely upon the ground that it was not shown that the defendant "willfully" violated the regulation of the Board of Agriculture which provides: "No cattle shall be moved or allowed to move from any quarantined area of this or any other State, as defined by the regulations of the United States Department of Agriculture and amendments thereto governing cattle transportation, into that portion of North Carolina lying north and west of the line described in section 2 of these regulations, nor into the counties of Halifax, Edgecombe, Wilson, Nash, Lee, Moore, Richmond, and Scotland, after February, 1911."

The authority of the Board of Agriculture to make and enforce such regulation is fully discussed and determined in *S. v. R. R.*, 141 N. C., 846; *Kimmish v. Ball*, 129 U. S., 217.

When the defendant turned his cow out and permitted her to run at large and as a result she strayed across the line into the forbidden territory, he willfully "allowed" her to move across that line. It is not necessary to show that he drove her across the line, but merely that he permitted her such liberty that thereby she was "allowed" by him to move across the line. The act of turning her out, whereby she was permitted to stray, was done purposely and therefore willfully. The enforcement of these quarantine regulations is a matter of great importance. Both the Federal and State governments are at great expense to have all cattle inspected and the ticks removed, so that from time to time new territory is announced to be free from infection and a new quarantine line is established and proclaimed. All this effort would be in vain and the great expense incurred would be useless unless the regulation against cattle being moved or allowed to move from the

infected territory into the territory that has been freed from infection is strictly enforced.

In this case it is found as a fact that the cow was "infected"; but the defendant's guilt does not depend on that. The regulation provides "no cattle" shall be moved or "allowed to move" from infected territory across the line.

Upon the facts found in the special verdict, it should be entered that the defendant is giulty. (632)

Reversed.

WALKER and ALLEN, JJ., dissenting.

Cited: *Owen v. Williamston,* 171 N. C., 59.

STATE v. SAM BURNO.

(Filed 3 April, 1912.)

1. Cocaine—Unlawful Sale—Evidence.

Upon trial for unlawfully selling cocaine, it is competent, after the one to whom the drug is alleged to have been sold has testified, to impeach her evidence on behalf of the prisoner by showing, by another witness, she had made conflicting statements as to where and from whom she had purchased it.

2. Same—Expert—Satisfactory Opinion.

Upon trial for the unlawful sale of cocaine, the testimony of a witness who has qualified as an expert physician and druggist, that in his opinion a certain drug exhibited to him, and which was identified as that sold, was cocaine, is competent, though he said on cross-examination that he could not tell the difference between cocaine and epsom salts except by actual test, which was not made by him in this instance, but in his opinion the drug exhibited to him was cocaine.

3. Cocaine—Unlawful Sale—Taken from Vendee—Absence of Defendant—Evidence.

Upon a trial for the unlawful sale of cocaine, evidence is competent to show that cocaine was taken off the person to whom it is alleged to have been sold in the absence of the defendant, when sufficiently identified as the article alleged to have been sold on the occasion specified.

APPEAL from *Whedbee, J.,* at January Term, 1912, of RICHMOND.

The defendant was convicted upon the charge of unlawfully selling cocaine to Cora McKeithan, and appealed from the judgment pronounced upon the verdict.

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

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

John P. Cameron and Lorenzo Medlin for defendant.

(633) ALLEN, J. No objection is taken to the bill of indictment, and there is no contention that the evidence was not sufficient to justify the verdict.

All of the evidence introduced at the trial is not sent up as a part of the case on appeal, but it appears that C. B. Wright was the principal witness for the State, and he testified, among other things, as follows: "I saw Burno give the McKeithan woman a package, and saw her give him some money and he gave her back change; I was looking through the window; that after the woman had come from out of the house, I arrested her and found on her person a package of cocaine—the same kind of package I saw Burno deliver to her. I saw him put in small papers, preparing it on a table. She had in the package when arrested the same kind of package which I now hold in my hand, and I took off the table the cloth (exhibiting same) and it has on it the same kind of material which is in these packages. The woman put the change and little papers containing what she got from Burno in a handkerchief, and as soon as she came out I took from her the handkerchief and it contained the money and little paper packages."

This witness was then asked, "Where did she (Cora McKeithan) say she got the package?" and he answered, "She said that she got it upstairs, and then said afterwards she got it from Burno," and the defendant excepted.

This evidence was offered after Cora McKeithan had testified, and while it does not clearly appear from the record, the only reasonable inference is that she was a witness in behalf of the defendant, and the evidence was admitted for the purpose of contradiction, for which it was competent. *S. v. Williams,* 91 N. C., 599; *S. v. Exum,* 138 N. C., 600.

The State introduced Dr. N. C. Hunter, who was admitted to be an expert, and the solicitor exhibited to the witness the package which the witness Wright said that he got from the person of Cora McKeithan, and asked the witness what the package contained, and he answered: "I have no way of making chemical test as to what (634) the package contains, and can only give an opinion, and my opinion is that it is cocaine, after tasting it." He described the

effects of cocaine, and pronounced it cocaine, and said: "In my opinion, it is cocaine."

The defendant excepted.

On cross-examination by defendant he said, without objection: "I cannot tell the difference between cocaine and epsom salts, except by making actual test, but in my opinion, it is cocaine." He had previously described fully the effects of cocaine, and the effect of what he tasted out of one of the little paper packages. He also stated that he was a pharmacist as well as a doctor.

The defendant excepted to this evidence on two grounds:

1. That the court erred in allowing the witness to testify as to an opinion, when his opinion was not fully satisfactory to his mind.

2. That the court erred in allowing the solicitor for the State to exhibit in the presence of the jury the package taken off the McKeithan woman by the witness C. B. Wright, and said to contain cocaine, the package having been taken from the woman in the absence of the defendant, and not having been identified as the package received by the McKeithan woman from the defendant.

We have no means of ascertaining whether the opinion of the doctor was satisfactory to him or not. We only know that he expressed his opinion under oath and did not say it was unsatisfactory, and in answer to the second objection, it is sufficient to say that it was not necessary for the defendant to be present when the package was seized, to make it competent evidence, and the witness Wright said, in answer to a question by the defendant, that he was satisfied that the package he found on Cora McKeithan was the same package he saw the defendant give her.

These are all the exceptions appearing in the record, and upon an examination of them, we find

No error.

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(635)

STATE v. R. F. RICE.

(Filed 10 April, 1912.)

1. Statutes—Cities and Towns—Health Ordinances—Extraterritorial Effect—Constitutional Law.

A legislative act is constitutional and valid which confers the exercise of police powers, for sanitary purposes, etc., upon an incorporated city and town, to be operative by ordinances within the corporate limits and to a distance of one mile in all directions beyond them.

2. Same—Hogs or Pigs.

When by legislative enactment it is provided that all ordinances of a certain city passed "in the exercise of police powers given to it for sanitary purposes, etc., shall apply to territory outside of the city limits within one mile of the same in all directions," the city may pass a valid ordinance making it an offense for "any person, firm, or corporation to keep any hogs or pigs within the corporate limits," or within "one-fourth of a mile" beyond them.

3. Cities and Towns—Health Ordinances—Extraterritorial Effect—Commission Government.

The extraterritorial effect of an ordinance of a city relative to the health of its citizens depends upon the legislative authority conferred, and the validity of such an ordinance is not affected by the fact that the city is under a commission form of government, with the "initiative, referendum, and recall."

4. Cities and Towns—Health Ordinances—Extraterritorial Effect—Legislature—Municipal Discretion—Courts.

From the operation of an ordinance prohibiting the keeping of hogs and pigs within the corporate limits of an incorporated town and beyond to the extent of one-fourth of a mile in all directions, passed under a legislative act conferring upon the town the authority to make sanitary ordinances applicable to the extent of one mile beyond its limits, an appeal should be made either to the proper authorities of the city or to the Legislature, for upon its reasonableness or unreasonable when so authorized by the Legislature the courts are without authority to act.

5. Cities and Towns—Health Ordinances—Hogs or Pigs—Indictment.

When a valid ordinance of a city forbids "keeping any hogs or pigs within the corporate limits or within one-fourth of a mile of said limits," a warrant following the language of the ordinance is sufficient; and the offense is indictable without reference to the number of hogs or pigs, the condition or size of the pens or inclosures where they are kept. The advantages or benefits of sanitary laws discussed by CLARK, C. J.

WALKER and ALLEN, JJ., dissenting.

(636) APPEAL from *Cooke, J.*, at February Term, 1912, of GUILFORD.

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

Attorney-General and A. Wayland Cooke for the State.
Sapp & Williams for defendant.

CLARK, C. J. The defendant, who lives outside the corporate limits of Greensboro, was indicted in the Municipal court of the city of Greensboro for unlawfully and willfully "keeping and running hogs in a lot within one-fourth of a mile of the corporate limits of the city

of Greensboro," in violation of the city ordinance which is set out and which provides: "It shall be unlawful for any person, firm, or corporation to keep any hogs or pigs within the corporate limits of the city of Greensboro or within one-fourth of a mile of said limits."

On appeal from the Municipal court the warrant was quashed, and the State appealed.

The General Assembly provides in the charter of Greensboro, Private Laws 1911, ch. 2, sec. 27, that all ordinances of the city of Greensboro enacted "in the exercise of police powers given to it for sanitary purposes or for the protection of the property of the city, shall apply to the territory outside of said city limits within one mile of same in all directions."

The Legislature has unquestioned authority to confer upon the town authorities jurisdiction for sanitary or police purposes of territory beyond the city limits. 28 Cyc., 704, 20 A. & E. Enc., 1148, and cases there cited. This is sometimes conferred for police protection, but oftener for the preservation of public health. Power is often granted to the town authorities to police the watershed beyond corporate limits so that the city may have pure water. Also to insure cleanliness, to protect the sewerage, and for many like purposes to protect the health of those living within the city. Among the most notable cases are *Van Hook v. Selma,* 70 Ala., 361; *Chicago Packing Co. v. Chicago,* 88 Ill., 221; *Emerich v. Indianapolis,* 18 Ind., 279; *Albia v.* (637) *O'Hara,* 64 Iowa, 297; *S. v. Franklin,* 40 Kansas, 410; *Jordan v. Evansville,* 163 Ind., 512.

There are many other cases to like effect and none to the contrary. Among the late cases are *Gower v. Agee,* 128 Mo. App., 427; *Ex parte Glass,* 49 Tex. Cr., 87. In this last case the Court sustained an ordinance forbidding the keeping of hogs within one mile of the courthouse. The Court held that this was a matter within the discretion of the town commissioners, though, it permitted hogs to be kept at places within town limits beyond that distance from the courthouse. In 2 Abbott Mun. Corp., sec. 562, it is said: "It is of course within the power of the State Legislature to authorize a town to pass ordinances which shall have a restricted effect beyond their limits." In *Chicago Packing Co. v. Chicago, supra,* the Court said: "Persons desiring to engage in particular avocations in or near cities must submit to have their pursuits limited and controlled at least so far as the preservation of health and to a reasonable extent the comfort of the people may require. . . . The lives, the health, and comfort of the people are the highest claim and demand the first and greatest protection. . . . They have the right to be protected against all kinds of business that

endanger life and health and from intolerant nuisances that destroy their comfort. To accomplish this purpose, the power was conferred upon cities and villages to regulate these establishments for the distance of one mile beyond their corporate limits, even if that shall lap over and embrace a portion of territory included in the boundaries of another municipality. Each, to that extent, has the right to protect its inhabitants, and such establishments, located in such territory, are subject to the police power of both corporate bodies." The ordinance there sustained was for the regulation of the great packing houses located outside of Chicago and which had been licensed by a neighboring town.

The argument that the town of Greensboro is governed under the Commission form of government, with "initiative, referendum, and recall," and therefore that its municipal authorities should have no control outside of the city limits, is wanting in application.
(638) The question is not how the city authorities are chosen, but what power the Legislature has conferred upon them over adjacent districts beyond the city limits in which may be set up establishments, business, or other things which would be injurious to the health of its people. There is nothing in our Constitution which restricts the Legislature in the exercise of its police power from conferring upon the municipal authorities of Greensboro such power. Indeed, the Municipal court of Greensboro is given jurisdiction outside the city limits and such jurisdiction has been affirmed at this term in *S. v. Brown,* citing *S. v. Shine,* 149 N. C., 480; *S. v. Baskerville,* 141 N. C., 811, and divers other cases.

The city, therefore, had the same power to pass this ordinance and make it applicable to a district within a quarter of a mile outside the city limits as it had to prohibit "keeping any hogs or pigs within the corporate limits." The question therefore, is whether it could pass such ordinance applicable within the city limits. In *S. v. Hord,* 122 N. C., 1093, the Court held that the town authorities could forbid keeping a hogpen within the city limits. In that case the prohibition was against keeping a hogpen within 100 yards of the residence of another, which was, of course, practically an entire prohibition. In 2 Dillon Mun. Corp. it is said that "The keeping of hogs and swine is a generally recognized subject of regulation of municipal ordinance." In *Darlington v. Ward,* 48 S. C., 570; 38 L. R. A., 326, it is said: "An ordinance cannot be held invalid because it is unreasonable when the power to pass the ordinances on the subject is conferred by a constitutional statute." It is further held: "An ordinance making it unlawful to keep any hogs within the corporate limits of the town cannot be held void." In *Skaggs v. Martinsville,* 140 Ind., 476; 33 L. R. A., 781, the Court

held it would not "inquire as to the reasonableness of an ordinance when the power exists to pass it." The same was held in the late case of *Brunson v. Youmans,* 76 S. C., 128, in which the Court sustained a town ordinance which made it "unlawful to keep any hogs within the town," citing *Darlington v. Ward, supra.* Ordinances to prohibit hogs within a town have also been sustained in *Quincy v. Kennard,* 151 Mass., 563; *Smith v. Collier,* 118 Ga., 417; *Ex parte Glass,* 49 Tex. Cr., 87.

Even if this Court were of opinion that the ordinance is not (639) sound public policy and might work hardship, we could not declare it invalid. The Legislature has conferred jurisdiction upon the town commissioners "to make such rules and regulations, not inconsistent with the Constitution and laws of the State, for the preservation of the health of the inhabitants of the city as to them may seem right." Private Laws 1911, ch. 2, sec. 17. An appeal in such case must be to the lawmaking power. *Red "C" Oil Co. v. Board of Agriculture,* 222 U. S., 380, decided January, 1912. But as a matter of fact, there are some 20,000 people within the limits of the town of Greensboro and they have a right to be protected against such matters as their local Legislature may deem unsanitary. If that body is wrong, it will be influenced by their constituents to repeal or modify the ordinance. But the authority to make the ordinance and to extend its limits not to exceed one mile, beyond the city boundaries has been conferred by the Legislature. Of their own volition the city authorities made the ordinance applicable only to the extent of one-quarter of a mile beyond the city boundaries.

The language of the ordinance forbids "keeping any hogs or pigs within the corporate limits of the city of Greensboro or within one-fourth of a mile of said limits." The warrant charges that the defendant "did unlawfully and willfully keep and run hogs in a lot within one-fourth of a mile of the corporate limits of the city of Greensboro." It therefore comes within the terms of the ordinance. It does not appear what size the lot was, nor is it material. The ordinance prohibits "keeping hogs" within the limits named. In *Darlington v. Ward,* 48 S. C., 570, there was a single hog kept within a two-acre lot. The Court held that the question was not whether the keeping of that particular hog was injurious to the health of the town, but whether the town had authority to prohibit the "keeping of hogs" within the limits prescribed and whether the defendant had violated that ordinance. The Court said that the nature and condition of the premises were immaterial and that "the power of the town council to preserve the public health cannot be measured by the size of Ward's lot" nor by the cleanly condition in which he kept his premises. The Court further said: "Courts cannot

run a race of opinion upon points of right, reason, and expediency
(640) aganist the lawmaking power. No act of the Legislature can be declared void or unconstitutional unless it conflicts with some provision of the Constitution. Nor can any ordinance of any municipal corporation within the power conferred by the Legislature, and not in conflict with the laws and Constitution of the State, be impeached in a court for unreasonableness. A critical examination of cases holding police regulations void, because unreasonable, will disclose that the attempted police regulations violated some constitutional guaranty. The right asserted by some courts to declare municipal ordinances invalid because unreasonable is limited to ordinances not passed under the implied or incidental powers of the municipality."

The greatest advance of the age probably is towards the preservation of the public health and in measures for the prevention of disease. The Legislature conferred power upon the municipal authorities of Greensboro to adopt sanitary regulations. In passing this ordinance they acted within this authority, and doubtless upon the advice of the sanitary board.

The necessity and the benefit of sanitation cannot be better shown than by a statement which recently appeared in a Government publication that in Cuba, a tropical country, under the impetus given by United States supervision, there is an expenditure now of 46 cents *per capita* for better sanitation and an annual mortality of 15 per 1,000 of the population, while in North Carolina, in naturally a healthy climate, there is an expenditure of only 1 cent per capita and a mortality of 18.3 per thousand of population, or 22 per cent greater. In view of such fact, the courts will be slow to interfere with sanitary regulations which have been adopted by city authorities, presumably in accordance with the wishes of the most intelligent and advanced portion of its population, even if we possessed the power to interfere. It is not our province to review the action of boards of sanitation, within the limits of their powers. The judgment quashing the warrant is Reversed.

WALKER and ALLEN, JJ., dissenting.

Cited: *S. v. Bass,* 171 N. C., 784, 785.

(641)

STATE v. JESSE A. PRICE AND ROBERT E. PRICE.

(Filed 10 April, 1912.)

1. Murder—Threats—Evidence—Practice.

On a trial for homicide a question as to how many times the deceased had threatened to take the life of the prisoner was properly excluded, as in this case the prisoner had not brought the inquiry as to threats within the exception to the general rule at the time the question was asked, and the evidence was not again tendered by the prisoner after the facts and nature of the case had been sufficiently shown to have made evidence of threats competent; and, further, there was no evidence that the threats had been communicated to the prisoner. *S. v. Exum*, 138 N. C., 600, cited and applied.

2. Murder—Leading Questions—Appeal and Error.

Two brothers being tried for homicide, a question on direct examination of one of them, asking "if he went to his brother's house to make peace," was properly excluded as leading, if otherwise competent.

3. Murder—Evidence—Witnesses—Conflicting Statements—Impeachment.

On trial for a homicide there was evidence by a witness for the defendants tending to show that they had had a quarrel with the deceased a few days before his death. Evidence tending to show that the witness had made conflicting statements is held competent for the purpose of contradiction.

4. Murder—Evidence Sufficient—Unlawful Act—Joint Participation.

Evidence is sufficient for a conviction of murder in the second degree which tends to show that one of the defendants was seen with the other, both firing in rapid succession upon the deceased with a shotgun and pistols, as he was going from them in company with the State's witness, who left the deceased at a cotton patch, where he was soon thereafter found dead from a wound inflicted by a shotgun, it being some proof of a joint participation in the felonious assault, especially when considered with the other evidence in the case.

5. Same—Original Motive.

When there is sufficient evidence to convict a defendant of murder, as an accomplice of the other defendant, in making a felonious assault upon the deceased, and in aiding and abetting in the unlawful act which resulted in death, his motive for going to the house of his codefendant immediately before committing the unlawful act is immaterial, as it does not tend to excuse the crime or even to mitigate it.

6. Murder—Instructions—Requests, Substantially Given.

On a trial for murder it is not error for the trial judge to give in his own language the prisoner's requested instruction, to which he is entitled, if by the language used the force of the instruction is not weakened, or its meaning materially altered.

7. Same—Charge, How Construed.

Upon this trial for murder the judge charged the jury that the prisoners must have killed the deceased in their necessary self-defense: *Held*, no error, for in construing the charge as a whole, it appears that he substantially charged, in language that could not well have been misunderstood, that if they had a reasonable apprehension, under the circumstances surrounding them, that they were about to suffer death or serious bodily harm, their act in slaying the deceased was excusable in law, and they should acquit the prisoners.

8. Murder — Instructions — Manslaughter — Evidence—Requests for Instructions—Appeal and Error.

When upon a trial for murder, self-defense alone is relied on, and conviction of murder in the second degree is only sought, and there is no evidence of manslaughter, it is not error for the trial judge to fail to instruct the jury upon the principles of law applicable to a conviction for that offense, especially, as in this case, when the defendants have not offered prayers for special instruction thereon.

(642) APPEAL by defendants from *Ferguson, J.*, at January Term, 1911, of ANSON.

The defendants, Jesse A. Price and Robert E. Price, were indicted in the court below for the murder of Lester Rushing. The evidence is voluminous and there are many exceptions.

Thomas Rushing, a witness for the State, testified: That he and his brother Lester went to Lester's house about dark, for the purpose of getting feed for Lester's mule. Lester Rushing kept his mule in Jesse Price's barn. The barn was east of Jesse's house about 20 yards, and was situated about north of Lester's house. While he and the deceased were in the latter's house, some one shot five times at Jesse's house. Sounded like pistol shots. They stayed in Lester's house about five minutes, and walked up to Jesse's barn with the mule and feed.

(643) After feeding the mule, they left, going towards Lester's house, when Jesse shot both of them in the back, and one shot struck the deceased in the right side of his head. He saw the defendant Jesse shoot. Jesse and Robert, the defendants, went to shooting pistols. Jesse Price shot a gun. He (the witness) was not armed, but his brother had a pistol on his person. Lester did not shoot and did not pull out his pistol. When he was shot, Lester ran a few steps and fell. He was shortly carried to his house, and died three or four hours afterwards. He went to Lester's house, and saw a pistol lying on the table. He then went about 60 yards to where Jesse and Robert were, and shot at Jesse one time. He went back and got a gun and started again. When he heard Lester groaning in the field, he laid the gun down in Lester's door. Lester Rushing was keeping a bachelor's house; witness

lived with his mother, some distance from Lester's house; he knew that Lester and Jesse Price had had a little trouble before this; that the feeling of his brother Lester towards Jesse Price had existed about three weeks. His brother Lester went to Monroe Saturday evening, and returned Monday evening with his Winchester rifle. He loaned Lester his buggy to go to Monroe; Lester did not have a Winchester rifle before he went, but he had one when he got back. He went over to his brother Willie's to get Lester's shotgun. Lester had a double-barrel shotgun there that night, and two pistols and a Winchester rifle. Both pistols were Lester's. Witness testified that he did not know whether Lester had any firearms before he went to Monroe or not. When witness met the Timmon boys and Richardson, immediately after the shooting, he had the shotgun in his hand. When Jesse Price fired, the shot killed Lester and also hit him. He supposed that Jesse was using a breech-loader with a No. 1 shot. He and his brother were hit in the back, and one shot struck his brother in the right side of his head. Some of the shots are in the witness yet—three or four shots in his back now. He exhibited his coat and showed where the shot holes were in the coat and in his brother's suspenders. He also exhibited his brother's shirt, and showed where the shot had entered, stating that they were shot in the back, and there were holes in the back of the shirt. He also stated that they were walking down the path when they were (644) shot, his brother being on his side, and that he did not see either of the defendants before the gun was fired. There were thirteen shot holes in his brother's coat. Both Jesse and Robert were shooting pistols, and they shot three times after he did. Jesse and Robert were standing together at the corner of the wagon and they both fired from that place, that is, standing behind the wagon, or at the corner of the wagon. Robert did not tell him not to come and raise any fuss.

Dr. J. B. Eubanks testified: That he examined the body of the deceased; he found thirteen bruised spots, which appeared to be shot holes, on the right side of the backbone, and one in the right side of the head. The range of the shots was at an angle. Two shots were taken out from under the skin; they went straight towards the backbone. The range of the shot in the temple was inward and outward. Found only one shot in the temple. The shot in the back seemed to be rather a glancing shot; the shot that entered the temple was the one that caused death. It was a small shot. He undertook to probe the shot holes, and found that they were only bruises. Only two shots penetrated the skin. They went in about one-eighth of an inch, and he pushed them out; they were very small shot, and would have to hit some vital part in order to hurt. In order to satisfy himself that the shot

did not penetrate the skin, he cut out pieces of the bruised skin and washed it, and found no holes in the skin at all.

J. W. Terrell, Jr., testified: He was at Jesse Price's house in August; Jesse told him he had to get his brother Zeke's Winchester rifle to practice shooting, as he expected trouble with Lester Rushing that fall; he told his father about this when he came home.

J. W. Terrell, Sr., testified: That the young man came home one evening and talked a little while, and said: "Pa, let me see you a little bit." He then went out in the yard and the son said: "Pa, I expect Jesse Price and Lester Rushing will have trouble." That Jesse had told him he and Lester would have trouble, and he was going to get his brother Zeke's rifle and practice up.

Cletes Martin testified: That Robert Price came to his house on 12 October, and said that Zeke Price said to let him have his rifle;
(645) that Jesse had some 32-caliber cartridges, but that the rifle carried No. 38 cartridges.

James Martin testified: That Jesse Price sent a box of No. 32 cartridges by him to Marshville to be exchanged for No. 38 cartridges, but that he could not secure the 38 cartridges, and returned the 32 cartridges to the merchant and carried Jesse Price 85 cents.

This closed the State's testimony in chief.

Jesse A. Price testified in his own behalf as follows: That the deceased was living and farming with him during the year 1910; deceased traded on halves and then got dissatisfied, and said he wanted a mule of his own. He went to Marshville and got one, and the witness rented him his land. He never had any trouble with the deceased until three weeks before the homicide; they were entirely friendly up to that time. At this time they had a dispute over a sack of flour and some molasses; the deceased wanted to sell him his crop, but witness could not give him what he asked for it; he told him that he was not able to buy it. The deceased said: "I want you to come down at 12 o'clock, and we will count everything I owe you." He was afraid, from the way the deceased had been talking, that he would fuss with him, and he sent his brother Buck down to go over the account, and told Buck not to have any dispute with him. He asked Lester Rushing the next day if he thought he would charge the sack of flour to him wrongfully. The deceased did not answer yes or no. The defendant tried to explain to him where he got the flour and molasses. Deceased then remembered the molasses, but denied the flour. Defendant insisted that he got the flour, when deceased drew a pair of knucks and followed the defendant to his house, cursing him and calling him a son of a bitch. He followed him to his door with his knucks, when defendant went into

his house and got his gun. Deceased then left, threatening to kill defendant. Defendant tried to make friends with him, and told deceased he would drop everything and never mention the sack of flour again. The deceased, after the dispute at the defendant's door, went over to his mother's and returned with a pistol. On Monday night previous to the homicide deceased tried to burn the home (646) of the defendant. The witness was lying in his room. He heard a match strike under this room; the light blazed up and could be seen through the cracks of his log house. Defendant ran out and saw Lester Rushing. The witness shot twice, and Lester ran down to his house and through his door. The deceased had set fire to some cotton and fodder under the room in which the cotton was stored. On the day of the homicide he had been moving Willie Simpson. He left home early that morning, and returned home about dusk that evening; found no one at home but his wife and children. He had had no dinner; he put up his mule and went in and asked for supper at once. He was eating supper, and heard some one shooting outdoors. He called his wife and asked who was shooting out about Lester's house. She never answered. He got up and went to see what was the matter and what had become of his wife. He saw his wife and children going down the hill and Tom and Lester coming up towards the barn. He picked up his gun before he stepped out of the door. When Tom and Lester reached the place where the road forks, one end going to the barn and the other end to Jesse's house, they turned up the path into Jesse's yard. They had a gun with them. Defendant told them not to come up there raising any fuss. Robert Price came up about that time and said: "Boys, this won't do." Lester and Tom did not say anything; Lester pulled out his pistol and fired at the defendant. Tom was carrying a gun. Defendant was standing at the corner of his porch. When Lester fired, defendant shot up over them. Deceased and Tom kept coming towards the defendant, continuing to shoot. Defendant thought they were going to kill him, and ran around the house. Defendant fired as he ran. He ran around the house and through his kitchen door on the back side. The door was latched and he broke the door open to get in. After he went in the house, he thought he heard Tom Rushing and the deceased in the yard. His mother ran over there and came to the front door. He whispered and told her that the deceased and Tom were trying to kill him. When she left, he ran out of the dining-room into the edge of the woods and ran over to his mother's house. His mother came very soon and told him that he had shot Lester. (647) He told her that he was sorry that he had shot him, but it looked like he was forced to do it; that they ran on him. Defendant then went

immediately to Mr. Morgan, a justice of the peace, and surrendered. This defendant further testified that, before the day of the homicide, he had been told by several persons, whose names he gave, that Lester Rushing had threatened to kill him, and when he returned to his house on the evening of the homicide his wife told him that Lester had a Winchester rifle and was drunk; that she was alarmed and asked his brother Robert to come to their home and stay with them. There was evidence implicating Robert Price, and also evidence tending to show that he took no part in the affray, but had merely gone to his brother's house to prevent a difficulty, and as a peacemaker, and that he ran when the first shot was fired and did not return.

We have stated substantially so much of the evidence as is necessary to an understanding of the exceptions, following as nearly as possible the version of the defendants' counsel, as found in their brief. There was much testimony introduced by the State and the prisoners, tending to sustain their respective contentions. The defendants were convicted of murder in the second degree, and appealed from the judgment which was rendered upon the verdict.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Adams, Armfield & Adams, McNeely & Brooks, Lockhart & Dunlap, and Robinson & Caudle for defendants.

WALKER, J. We will consider the exceptions in the order of their statement in the record. The defendants proposed to ask the witness Thomas Rushing how many times the deceased had threatened to take the life of Jesse Price in his presence. The rule in regard to the admissibility of previous threats is stated in *S. v. Turpin,* 77 N. C., 473, and more recently in *S. v. Exum,* 138 N. C., 600, and *S. v. Baldwin,* 155 N. C., 494. The general rule is that proof of the character and habits of the deceased, and of his disposition towards the pris-
(648) oner, is not relevant to the issue in trials for homicide, but there are certain well-settled and well-defined exceptions to this rule of exclusion, which are fully stated in the cases we have cited. At the time the question was asked in this case nothing had developed to bring the proposed evidence within any one of the exceptions, and, we may add, it did not appear that the threats had been communicated to the prisoner. The question was, therefore, properly excluded, under *S. v. Exum, supra,* as the proof was not again tendered by the prisoner after the facts and nature of the case had been sufficiently shown to have made it competent.

The prisoner, Robert Price, was asked by his counsel if he went to his brother's house to make peace. Assuming that the question was otherwise competent, under *S. v. Hall,* 132 N. C., 1095, and *S. v. White,* 138 N. C., 704, it was leading, and properly excluded for that reason; but the witness had already testified that he went to the house, as a peacemaker, to prevent any difficulty between his brother and Lester Rushing.

Buck Price, brother of the prisoners, had testified as to a prior meeting between Lester Rushing and Jesse Price, when they quarreled about their settlement, and Lester Rushing cursed his brother and threatened to kill him. The State introduced a witness, John Smith, to contradict him, and was allowed to do so over the prisoner's objection. We do not see why this ruling was not a proper one. If it was material to know what had occurred at their meeting a few days before the homicide was committed, it was certainly relevant to show that the witness Buck Price had given two conflicting versions of the matter. This exception does not seem to be relied on by the prisoners' counsel in their brief, *S. v. Register,* 133 N. C., 747, but we have considered it, nevertheless.

The prisoner, Robert Price, requested the court to charge the jury to return a verdict of acquittal as to him, there being no evidence of his guilt; but we are unable, after a careful examination of the case, to say that there is no evidence of his participation in the affray which led to the death of Lester Rushing. The witness Thomas Rushing testified: "I did not see either of the defendants before we were shot. I did not hear them say anything at the time we were shot. I heard them shoot at Jesse's house before we went. I saw the (649) defendant Jesse shoot. I do not know how many shots he made. They shot so fast I could not count them. I didn't hear but one shot with the gun. Both went to shooting pistols, Robert and Jesse Price. I saw them both. They were standing right by the side of the wagon, between me and Lester. The wagon was sitting a little to the right of the house, between the barn and house. When they shot at us, I turned my head to see who it was. I came right down the road where Lester was. I left my brother in the cotton patch. He died at his house about three hours after he was shot. (Points out Jesse's and Robert's shots.) I could not tell how many times they shot at us. I have an idea that some eight or ten shots were fired. I did not pronounce but one to be a gunshot; the others pistol shots. Robert and Jesse Price both were shooting pistols, standing behind the wagon. Jesse shot the gun. I only shot one time after defendants shot at us. They were standing at the same place in front of the wagon when I

shot. They shot three times after I did. After I went to Lester's house, they fled."

It was not necessary to his conviction that the prisoner, Robert Price, should have had any previous understanding with his brother that they should together attack the Rushings, or that Robert Price should take part in the affray. If he actually engaged in the assault upon them, or was present aiding and abetting his brother in his unlawful acts, it would be sufficient to sustain a verdict against him, although his original motive in going to Jesse's house may have been a good one. He must be judged by what he did, and not merely by what he intended to do. There was, at least, some evidence of his guilt. It was for the jury to weigh it and find therefrom the fact of guilt or innocence. The facts in this case are not like those in *S. v. Tachanatah,* 64 N. C., 614, and *S. v. Howard,* 112 N. C., 859. If it be true that the deceased and his brother were walking away from the prisoners, and the latter fired at them, and the shot struck them in the back, we do not see why this is not some proof of a joint participation in the felonious assault,

especially when considered in connection with the other evidence
(650) in the case. The court charged fully and correctly on this phase of the case.

The prisoners requested the court to submit certain special instructions to the jury, and the charge of the court will show that they were substantially given, and in some instances most favorably to them. The jury were fully cautioned as to how they should examine and weigh testimony of interested witnesses, and no objection to the charge, in this respect, is well founded.

The prisoners requested the court to charge the jury that, in considering the plea of self-defense, they should be guided by the facts and circumstances as they appeared to them at the time of the homicide, and if a man of ordinary firmness would reasonably have apprehended, under such circumstances, that he was about to suffer death or serious bodily harm, they should acquit the prisoner. A careful review of the charge satisfies us that the court fully responded to this request, and instructed the jury substantially in accordance with its terms. It is not required that the very language of a prayer should be used in giving the instructions asked for, but it is sufficient for the court to instruct the jury substantially as requested, in its own words—provided, if the party is entitled to the instruction, its force is not weakened or its meaning materially altered by any change in the language. It is true, the court told the jury that the prisoners must have killed in their necessary self-defense, but he explained to the jury what was meant by this expression in other parts of the charge, and substantially instructed

the jury, in language that could not well have been misunderstood, that if they had a reasonable apprehension, under the circumstances surrounding them, that they were about to suffer death or serious bodily harm, their act in slaying the deceased was excusable in law, and they should acquit the prisoners. The charge must be read and construed as a whole. *S. v. Exum, supra; Kornegay v. R. R.*, 154 N. C., 389; *S. v. Lewis, ibid.*, 632. When thus considered, it was a full and clear exposition of the law as applicable to the facts. This case bears no resemblance to *S. v. Barrett,* 132 N. C., 1005, and *S. v. Clark,* 134 N. C., 699.

The prisoners further excepted to the charge because the court (651) failed to charge fully and explicitly upon manslaughter. The prisoners requested no instruction as to manslaughter, and we do not think the evidence warranted the submission of this question to the jury. If the prisoners' version of the facts was the correct one, they were not guilty, as they manifestly acted in self-defense, and the jury were so instructed; but if the State's contention was accepted by the jury (and it must have been), then they were guilty, at least, of murder in the second degree. The solicitor did not ask for a conviction of murder in the first degree, so that murder in the second degree was the highest grade of homicide for which they were being tried. As we have said, there is no suggestion of manslaughter in any of the prayers tendered in behalf of the prisoners, but without exception they conclude with the request for an instruction to the jury directing them to return a verdict of not guilty. The case was tried upon the theory of self-defense, and all the evidence tended to show that the prisoners were either guilty of murder or that the homicide was excusable. The court instructed the jury that if they found the facts as the prisoners claimed them to be, they should acquit the defendants. If the jury found the prisoners guilty, they should not return a verdict for manslaughter, without evidence to support it, merely because of an aversion to convict of the higher felony. Verdicts must be based upon the evidence, and not inspired solely by merciful considerations or feelings of sympathy. Jurors are not to be moved by motives of clemency, however commendable they may be, but should decide always according to the facts and the law. There was no view of the facts which called for an instruction as to manslaughter, and in this respect the case is not unlike *S. v. White,* 138 N. C., 704.

If the State's evidence is true, the deceased was shot in the back while he was walking away from the prisoners, unconscious of their presence, and when they were in no danger, real or apparent; while, if the prisoners' evidence be true, Robert Price fled immediately, and Jesse Price

also retreated, and fired the fatal shot while doing so. There is no element of manslaughter in these facts. The jury convicted the prisoners of murder in the second degree, we presume, because of the physical facts or natural evidence in the case, the testimony of Thomas Rush-
(652) ing and the clothes which were exhibited showing that the Rushings had been shot in the back by some one in their rear, for doing which not even the violent threats of Lester Rushing excused them. Threats of the deceased and fear on the part of Jesse Price induced thereby did not, of themselves, justify the killing. There must have been some act of violence or some other circumstance to rebut the implied malice of the law and excuse or mitigate the offense.

Our consideration of the case has led us to the conclusion that no error was committed at the trial.

No error.

Cited: *S. v. Tate,* 161 N. C., 285; *S. v. Vann,* 162 N. C., 541; *S. v. Blackwell, ib.,* 682; *S. v. Ray,* 166 N. C., 434; *S. v. Powell,* 168 N. C., 142.

STATE v. JOHN R. HARDY.

(Filed 13 March, 1912.)

Highways—Cartways—Road Supervisors—Obedience to Valid Orders—Indictment.

Held in this case, irregularities in certain proceedings by road supervisors to lay off a cartway over certain lands, under which the defendant assumed to act officially in removing a part of a fence where the proposed cartway was to be, does not subject the defendant to an indictment for obeying the order of the supervisors, which, it is further held, they had jurisdiction to make.

APPEAL from *Peebles, J.,* at November Term, 1911, of DUPLIN.

Indictment charging defendant with unlawfully and willfully removing a part of a fence surrounding a certain cultivated field.

Upon a special verdict his Honor adjudged defendant not guilty and State appealed.

"The defendant was indicted upon the bill hereto attached. We find that the defendant tore away the fence of prosecutrix and prosecutor on the road and on the woods side of the field of the prosecutrix within two years before the finding of this bill; that said fence surrounded

a cultivated field, and that the tearing away of said fence was (653) an injury to said fence. We further find that the defendant proceeded to commit said acts and did commit said acts under and by virtue of certain proceedings marked Exhibit A, and made a part of this verdict, and that said Exhibit A is the record of proceedings which were begun and prosecuted for the opening of a cartway, and said cartway purports to be laid off where said defendant cut said fence. We find that judgment was rendered at February Term, 1911, dismissing prosecutor's appeal from said proceedings (said judgment marked B and made a part of this verdict). That the cutting of said fence was after the rendition of said final judgment. If the court is of opinion that on these findings defendant is guilty, we find him guilty; otherwise, we find him not guilty."

The court being of the opinion that the defendant is not guilty, so adjudged.

Attorney-General Bickett, Assistant Attorney-General Calvert, and H. D. Williams for the State.

Stevens, Beasley & Weeks for defendant.

PER CURIAM. We agree with the judge below that the board of supervisors has jurisdiction to lay out cartways such as appears to have been done in this case. *Cook v. Vickers,* 141 N. C., 103; *Barbee v. Griffin, ante,* 348.

There are irregularities in the proceedings, but they are not wholly void on their face so as to subject defendant to indictment for obeying the order directed to him, and commanding him to open the cartway.

We concur with his Honor that defendant upon the special verdict and exhibits called for in it is not guilty.

Affirmed.

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(654)

STATE v. JOHN DUNN.

(Filed 3 April, 1912.)

Intoxicating Liquors—Possession—Evidence—Unlawful Sales.

In this case, the possession of a certain quantity of intoxicating liquors by the defendant, as being *prima facie* evidence of unlawful sales by him, upheld. *S. v. Dowdy,* 145 N. C., 432; *S. v. McIntyre,* 139 N. C., 601, cited and applied.

APPEAL by defendant from *Carter, J.,* at November Term, 1911, of CUMBERLAND.

STATE *v.* DUNN.

The defendant was convicted upon an indictment charging him with selling intoxicating liquors to persons unknown, and appealed from the judgment pronounced on the verdict.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

E. G. Davis for defendant.

PER CURIAM. We have examined all of the exceptions of the defendant, and find no error which entitles the defendant to a new trial.

Many of the objections to evidence were entered as a matter of precaution, and in the earnest effort of counsel to protect the rights of the defendant, but they present no new questions requiring discussion.

The indictment is fully sustained in *S. v. Dowdy,* 145 N. C., 432, and his Honor followed *S. v. McIntyre,* 139 N. C., 601, as to the effect of the statute, applicable to Cumberland County, making the possession of a certain quantity of intoxicating liquors *prima facie* evidence of guilt.

No error.

Cited: *S. v. Watkins,* 164 N. C., 427; *S. v. Wilkerson, ib.,* 442.

APPENDIX

PRESENTATION OF PORTRAIT

OF

CHIEF JUSTICE JAMES EDWARD SHEPHERD

In the matter of the presentation of the portrait of former CHIEF JUSTICE JAMES EDWARD SHEPHERD, deceased, by Charles Brantley Aycock.

Former Governor Aycock said:

May it please your Honors: The gracious privilege of presenting to this Court, to be hung upon its walls, the portrait of Chief Justice James Edward Shepherd has been bestowed upon me by the particular kindness of his relatives. In making the presentation it is in accordance with custom, and even without precedent entirely fit, that some account should be taken of the life of the man whose likeness we are to see. Blackstone gives as his ideal of a citizen one who "lives honestly, hurts nobody, and renders to every man his due." Tested by this definition, Chief Justice Shepherd was indeed an ideal man. He possessed every one of the elements laid down by the great law writer to constitute such a character.

Judge Shepherd was born 22 July, 1845, at Mintonville in Nansemond County, Virginia, near Suffolk, the home of his maternal ancestors, and died 7 February, 1910. His father was Thomas Shepherd, whose grandfather was a member of the Virginia Convention when the Constitution of the United States was adopted, and was a prominent man in that State. Judge Shepherd's mother, Ann Eliza Browne, was descended from Dr. Albridgton Browne, a retired English Navy surgeon, who settled on the Nottoway River, Virginia. She died when he was only two years of age, and his father died ten years later, after which he lived with his older brother, who fell at Sharpsburg, leading his company. His family being of large means before the war, he had all the material advantages to make a happy childhood. In 1859 they moved to Hertford County, N. C., and it was at the Murfreesboro Academy that he received most of his schooling. When the Civil War came on, and his brother had joined the army, James E. Shepherd, though only about fifteen years of age, determined to serve the cause of the South, and attached himself to the Sixteenth Virginia Regiment which was then stationed at Norfolk, but being too small to carry a musket, he was made a "marker" for the regiment, and after some months, on account of his youth, he obtained his discharge to take up the study of telegraphy at Blackwater, Va., and having learned this art, he was again assigned to duty in the army as telegraph operator under General Jones, in West Virginia, and afterwards at the headquarters of Gen. John C. Breckenridge. His services throughout the war were prompt, faithful, and efficient. There he learned, as can be learned nowhere else, the deep reality of life.

The end of the war found him stationed at Wilson, N. C., where, on account of the loss of his estate through the war and the death of his brother,

he was left entirely dependent upon his own exertions. He thereupon secured the position of telegraph operator and supported himself and his younger sister, reading law at the same time. Mr. Henry Blount in his lecture, "Beyond the Alps Lies Italy," describes him at this time in his little office poring over his Blackstone until the late hours of night with a zeal that promised much for his future. He craved learning and sought it with diligence, not only in order that his own powers might be developed to a fuller service, but as well from the pure love of learning itself. He completed the study of the law at the University of North Carolina and was admitted to the bar in 1868, and opened an office in Wilson. In 1871 he formed a partnership with Major Thomas Sparrow of Washington, N. C., and moved to that town. In the same year he married Miss Elizabeth Brown, daughter of Mr. S. T. Brown, and sister of Associate Justice George H. Brown of the Supreme Court. Judge Shepherd at once entered upon a growing practice, which soon became lucrative. He was active, diligent, painstaking and thorough. He was enthusiastic as well. Knowing that the law was a jealous mistress, he did not neglect her, but he found time to pay some attention to politics. For a number of years he was chairman of the Democratic Executive Committee. This position extended his acquaintance and familiarized him with people—their methods of thought, their ambitions, their passions, their affections, their hatreds. In 1875 he was elected to the Constitutional Convention from the counties of Beaufort and Pamlico. He was the youngest member of the convention, but young as he was, he served on two of the most important committees, one the judiciary committee. It is to him more than to any other that we owe the change in the system of county government by which the eastern counties with large negro populations were freed from their political control. In 1876 he was elected chairman of the Beaufort County Inferior Court, over which he presided with signal ability, dispatching business with the promptness and accuracy of the best trained Superior Court judge. In 1882, upon the resignation of Hon. Mills L. Eure, Governor Jarvis, whose home was in that section and who knew Judge Shepherd well both as a man and lawyer, appointed him judge of the Superior Court, and he served as a Superior Court judge from then until January, 1889, when he became an Associate Justice of the Supreme Court. Upon the death of Chief Justice Merrimon, in 1892, Associate Justice Shepherd was appointed by Governor Thomas M. Holt Chief Justice and was unanimously nominated in 1894 by the Democratic State Convention to succeed himself. But 1894 was, from our standpoint, a cataclysmic year, and he, together with all his ticket, was defeated, except Mr. Justice Clark, who had no opposition.

Judge Shepherd was for a number of years a lecturer at the University Law School, and when Judge Manning died was offered the position of dean of that school, but declined.

After leaving the bench, he returned to the practice, being associated at first with the late Charles M. Busbee and afterwards with his son, S. Brown Shepherd. Both firms did an excellent practice, and at the time of his death Judge Shepherd was receiving an income as a practicing lawyer surpassed by few lawyers of the State. At one time he was offered a partnership with Judge Seymour D. Thompson of St. Louis, but declined because he loved North Carolina and her people too well to leave them.

These are things which the entire public know or may well know about Judge Shepherd. There are things about him which are only known to those who were intimate with him, who loved him, and who followed his career with affectionate interest. The death of his son, James E. Shepherd, Jr., while

just entering upon manhood, was a blow to him so deep and profound that he never entirely recovered from it. Life from thence forward never had so rosy a hue as before. His relations to his family were perfect. He was a most dutiful and devoted husband, attentive to his wife in small things and forgetful of her in nothing that could contribute to her comfort or happiness. With his boys he was something of an older boy than they, but not too much older to be entirely companionable. He thought their thoughts and sympathized with their ambitions and their different points of view. He knew that they did not have his experience, but he had all of their experience and more, and he went back to live with them from their own standpoint. Judge Shepherd was a simple man and sensitive. He was anxious always to be on equality with those with whom he associated, but his mind ran so much upon the deeper things that most of them knew so little about that his conversation adjusted itself to ordinary commonplaces with difficulty. I quote from the tribute of Mr. Robert L. Gray, which expresses my own conviction better than I can do it myself. "On the personal side," says Mr. Gray, "Judge Shepherd was one of those men of whom it is said, 'He is as pure as a woman.' His integrity, his sense of honor, the natural dignity of an unassuming virtue, clothed him with a certain ingenuousness that inspired while it caused a smile. He walked unspotted, to a large extent oblivious of the smut about him; yet, with it all, so companionable, so approachable, and so generous of himself and his talents that even the years he carried so lightly were easily forgotten in his presence."

Wanting in the opportunities of early education on account of the war, when a time of leisure came and Judge Shepherd had the means to supply himself with books, he surrounded himself with the best thought of the world and diligently read the great classics; and those which he could not read in the original, he enjoyed through the translations: I remember one occasion at a supper given by the late Capt. Swift Galloway, at Snow Hill, Judge Shepherd opened himself to us and talked with a freedom and richness and fullness about history and literature that I shall never forget. His familiarity with Roman and Grecian history and literature as exhibited that night was a delight to me as well as to our cultured host and all the guests. Judge Shepherd's life was full of work and as complete with service as it was with work. He labored not for himself alone, but was thoughtful and considerate not only of his family, but of all his friends. He never forgot a kindness or a favor. He carried in his mind and heart every student who read law under him, and regarded him as a personal friend, and the students, for whose walk in life he had held the light, during all his life looked to him for advice and guidance, and whenever they could be of service to him, gladly rendered it. His friends were all of those who knew him well, and his few enemies only those who, not knowing him, misconceived his motives and his actions. He was keenly sensitive to criticism and was a great sufferer from unjust attack, but neither criticism nor false accusation could ever make him veer from the course which his own judgment and conscience pointed out as the right path to follow. He might suffer, but he would not change.

But the matter of more concern in this forum is Judge Shepherd's career upon the bench. I first knew him as a Superior Court judge, and I want to say with distinctness and emphasis that I have rarely if ever seen a better trial judge. He was patient to hear, diligent to investigate, fearless in decision. He dispatched business rapidly, without hurry and without ostentation. He was courteous to everybody, but exacting in prompt obedience to

every ruling of the court. When a case was tried before him by good lawyers on each side, it was thoroughly well tried. He was gentle toward all lawyers, but he was particularly gracious to young lawyers and patient with those who did not know. He suffered no byplay between counsel on opposing sides, and thereby preserved pleasant relations between the members of the bar and maintained the dignity and order of the court. When a case was appealed, his notes were full and his memory accurate and his heart unafraid. He therefore made up his cases with absolute accuracy and impartiality. He brought to this Court not only the learning of the years of patient toil at the bar, but the experience of a long service in the courts below. While he was companionable and loved men, it is not too much to say that he was more at home with books. Study was his way of taking a rest. He was never quite so easy as when investigating a difficult and abstruse question of law. He belonged to the class of conservative judges. He thought it was the duty of a judge to determine what is the law, not what the law ought to be. He thoroughly believed that under our Government there were three coördinate departments, the executive, the legislative, and the judicial, and it was ever his purpose to keep them separate. He believed that changes in the law should be made by the Legislature, and not by the interpretation of the courts. He had a profound conviction that the great judges of the past were patriotic men, earnestly striving to find out what the law was and seeking to apply it to the conflicting contentions of men in a fair and equitable spirit, and he therefore believed that what they had written about the law was of eminent value to the judges of the present day, if not indeed absolutely controlling, unless changed by legislative enactment. He thoroughly knew the law applicable to real estate and regarded it as the utmost importance to the conservation of the rights of property and the consequent welfare of that important part of the people who exhibit in the fullest the Anglo-Saxon love of the land, that there should be no variableness nor shadow of turning on the part of the courts in reference to real estate rights.

But above and beyond all, he was a great equity lawyer; and when one has said this he has said much, for to be a great equity lawyer involves not only much learning and culture of mind, but great qualities of heart as well; it is equivalent to saying that he was a virtuous and upright man; that he was clean-minded; that he was fair in his dealings with men; that he not only knew right and wrong in the abstract, but in the daily practices among men; that he realized obligations and duties; that he contemplated the beauty of trust and confidence and deprecated its abuse; that he was familiar with the sermon on the Mount and believed it to be the best exposition extant of the duty of man. When he came to deal with matters of the appellate court, it is apparent from what I have said heretofore that he dealt only after the most patient investigation. He examined all the authorities whenever it was possible for him to do so. If they appeared to be in conflict, he studied them with diligence and intensity and frequently was enabled thereby to show that they were not in actual but only in apparent antagonism. If the authorities were actually in conflict, he never sought to smooth the matter over, but adopted what appeared to him to be the more reasonable view and aligned his court with that side. It is needful that I add, Judge Shepherd was not a slave to precedent. If the precedent was ill-considered and unsupported by reason, or if the conditions which gave rise to the precedent had so changed as to render it inapplicable to the present controversy, he did not hesitate to mark out the way for the future and be-

come himself a maker of precedent. He was a conservative on the bench, not because he was wanting in progressive ideas off the bench, but by reason of the fact that he believed that the interpretation of the law should be fixed. He was thoroughly in accord with all real improvements in the law, but he felt that this improvement should come through the Legislature, and not through the courts. It is manifest that his conviction was that with a fixed and certain determination of the meaning of law all people would in the course of time come to a knowledge of their rights under the law and fewer of them would violate it and there would be less litigation. If out of this fixed and certain and determined nature of the law there were particular cases of hardship, he held that these very hardships not only saved many other people from violation of the law, but would in themselves lead to legislative intervention and change of the law. I do not hesitate to express my personal conviction that it would be an evil day for any State if there were not at all times on the highest Court in the State some man of the type of Chief Justice Shepherd.

Judge Shepherd was a great jurist. He had a large influence over the mind of the lawyers of the State. He kept them stable and firm for the interpretation and enforcement of the law as it is, but left them entirely free to work with all their might for such changes as may be necessary to improve the conditions of men and to overturn the evils inflicted by the law as it is. As an equity judge, he recognized the expansiveness of this branch of jurisprudence and sought in every way to make it come up to the requirements of present-day conditions. Wherever the jurisdiction of equity could be invoked, the enlarged and generous view of life, which to my mind is the finest product of this priod of the world's history, found expression in his opinions. Senator John W. Daniel might well have been talking about him when he said: "What is that great system of equity jurisprudence which we see advancing its lines and enlarging its jurisdiction from generation to generation, marching on and on, planing away the sharp angles and rough edges of the common law, supplementing its deficiencies, softening its rigors, forerunning its purpose, and garnering its fruits? What is it but the expansion of the public conscience and the reaching forth of its hands to refine the standards of right and to perfect the remedies for the prevention and rectification of wrongs?"

Chief Justice Shepherd was a just man and upright, clean of life and pure of heart. He was brave in war, fearless in peace. The only consequence to himself which he apprehended out of any decision about any case was the suffering which he would undergo if he decided it wrong. He never approached the decision of any case with apprehension as to its possible effect upon himself as a man. Hon. W. D. Pruden, one of the State's greatest and best men, recently wrote:

"Judge Shepherd's ability and thoroughness as a lawyer is recognized by the entire bar of North Carolina. For many years before he went upon the bench and after his retirement as Chief Justice, he and I were close to each other. As a practitioner, he was always scrupulously candid, fair, and honorable, and his learning as a lawyer and as a judge are exemplified in hundreds of opinions running through the North Carolina Reports from the time he went upon the bench until his death. They were uniformly clear, cogent, and strong. So many of them showed his great learning and logical analysis, that I hesitate to discuss any particular opinion written by him.

"Great as he was as a lawyer, strong and true as a man, and patriotic and loyal as a North Carolinian, I prefer to think of him as a friend. In this respect he could not have been excelled. I knew him in all of the vicissitudes of life, in prosperity and in adversity, in joy and in sorrow, in buoyant hopefulness and in depression; but none of these conditions affected his friendship. He was always affectionate, true, and generous, and those to whom he gave his friendship knew that they could rely upon him whatever the situation. Among the things that I value in my past life, there are few which give me more pleasure than the close friendship which without variableness or shadow of turning always existed between us."

In his life and relations to others he was unselfish to the last degree, and none but those who were most closely associated with him knew of the generous and noble acts done without ostentation and with great delicacy. The pleasure in giving appeared to be all his own. He was a member of and vestryman in the Church of the Good Shepherd in Raleigh, and was, indeed a Christian.

He was my friend, and I loved him. He is dead, and I mourn him. His works live, and I rejoice in them. I present this semblance of him to this Court to be hung upon its walls in order that the youth of coming generations may be reminded that deficiencies of early education may be supplied by diligent application in manhood, and that obstacles in youth can be overcome by industry and economy, and that obscurity may be transformed into fame by a broad culture of both head and heart when such culture is carried on with faith in God and fear of no man.

I close with the appreciation of him written by his daughter-in-law:

He slept—and came the Infinite Prospective,
Of all Life's tangled meshes wrought aright;
Of Equity and Justice wherein "a little child shall lead them,"
"The Still Small Voice" quelling the voice of might.
He slept—and as by habit long directed
His soul slipped out into the goal he loved,
So, simply, with a good life's quiet dignity,
He entered the courts of God.

ACCEPTANCE OF PORTRAIT BY CHIEF JUSTICE CLARK

We have listened with great interest to the admirable speech of Governor Aycock in presenting the portrait of Judge Shepherd. Nothing can be added to what he has so well and so justly said.

To Judge Shepherd, honors came early, like flowers—

> "That come ere the swallow dares
> And take the winds of March with beauty."

Before he was quite thirty he was a member of the Constitutional Convention of 1875. In 1882 he became a judge of the Superior Court, and in 1889 took his seat as an Associate Justice of this Court, where he served for four years, when he became Chief Justice by appointment of Governor Holt, a position which he filled for two years. He was nominated for the position and failed of election, not through any fault of his, but because of the change in the political complexion of the State at that time.

It is not necessary to bear testimony to Judge Shepherd's fidelity and ability, for the proof of it has been written by his own hand in the fourteen volumes of our Reports—102 to 115 N. C.—which contain his opinions. His uniform courtesy to his brethren on the bench, to the profession, and indeed to all men, was a part of his nature. Had circumstances permitted him to remain longer upon the bench he would have rendered added service to his State and the profession; but it may well be doubted if he could have added to the reputation which he achieved in the six years during which he occupied a seat on this bench.

The Court accepts his portrait with great pleasure, and the marshal will hang it in its appropriate place on the walls of this chamber.

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13. *Same—Nonsuit—Suit in Forma Pauperis.*—When an appeal is taken by defendant from an overruling of its motion to nonsuit upon the evidence, the evidence should be sent up in a narrative form, and the requirement that all the evidence should be sent up on appeals of this character, though the action is *in forma pauperis,* does not excuse the appellant in sending up the transcribed stenographer's notes in a voluminous record. The object of an opinion by the Supreme Court discussed by CLARK, C. J. *Ibid.*

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24. *Same—Prejudicial—Harmless Error.*—When, on a trial for murder, an attorney for the State bases a part of his argument on matters not in evidence, saying that the prisoner's character was such that people were afraid to testify against her, *Held*, that error, if any committed, and in the absence of objection at the time, is rendered harmless by an instruction that there was no evidence upon which the argument could be made, and that the jury should not consider it. *Ibid.*

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3. *Same.*—A debtor who has entered into an agreement to take up a note with security in the hands of his creditor with money advanced for the purpose, and have the securities assigned as collateral to a note given for the money thus advanced, does not defeat the right of the one advancing the money to be subrogated to the rights of the holder of the first note in the securities, by having them assigned to himself, contrary to the agreement, and in the absence of intervening equities, especially, as in this case, when the debtor at once placed the securities in the hands of the creditor advancing the money for the purposes agreed upon. *Ibid.*

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7. *Clerks of Courts—Executors and Administrators—Nonresidents—Bills and Notes — Mortgages — Defenses.* — The defendant having bought certain property from the plaintiff, as executor, gave his note for a part of the purchase price, and secured it by a mortgage on the property. In an action by the executor upon the note and mortgage, *Held*, the defense is not open that the executor, though duly qualified, was a nonresident, or that, not having given the bond as required by the statute, he could not maintain an action in our courts,

BILLS AND NOTES—*Continued.*

neither the title nor possession of the purchaser having been disturbed or in any way questioned. *Batchelor v. Overton*, 395.

8. *Principal and Agent—Parties—"Real Party in Interest"—Bills and Notes—Rentals.*—An agent for the collection of rents is not the "real party in interest," within the meaning of Revisal, sec. 400, so as to maintain an action in his name for the benefit of his principal; but when he has taken a rental note with the consent of his principal, made payable to himself as agent, he may, under Revisal, sec. 404, maintain an action for its collection in his own name. *Martin v. Marks*, 436.

9. *Principal and Agent—Bills and Notes—Production of Note—Evidence, Prima Facie—Issues—Interpretation of Statutes.*—In an action by an agent upon a note made payable to himself as such for the benefit of his principal, the doctrine that the production of the paper is *prima facie* evidence of ownership has no application, the question being whether he has shown title sufficient to enable him to sue as agent. Revisal, sec. 404. *Ibid.*

10. *Bills and Notes—Indorsee in Due Course—Vendor and Vendee—Principal and Agent—Evidence.*—The holder of a negotiable instrument, indorsed for value and before maturity, etc., by the vendor of machinery, who retained a lien on the goods sold under a conditional sale, is not affected by subsequent payments made to the vendor, which were not entered on the note and of which he had no notice; and, on the facts presented, there was no evidence upon which the vendor's agency to accept the payments in behalf of the indorsee could properly be submitted to the jury. *Vance v. Bryan*, 502.

11. *Principal and Surety—Parol Evidence—Equity—Bills and Notes—Subrogation—Exoneration.*—As between the signers of a note, it may be shown by parol evidence that some of them were sureties, for the purposes of enforcing exoneration, subrogation, or any other equitable right which will not injuriously affect the payee who loaned his money without knowledge of the relation, though upon the face of the paper they appear to have all signed as principals. *Williams v. Lewis*, 571.

BONDS. See Executors and Administrators.

BRIEF. See Appeal and Error.

BURNT RECORDS. See Evidence.

CARRIERS OF GOODS.

1. *Railroads — Live Stock — Unreasonable Delay—Negligence—Evidence.* In action for damages to cattle shipped under a live-stock bill of lading, alleged to have been caused by defendant railroad while in course of transportation, evidence is competent which tends to show that another shipment was made over the same road to the same destination and over practically the same route and distance, in a shorter period of time, with delivery of cattle in good condition, and is sufficient to be submitted to the jury under the issue as to defendant's negligence. *Southerland v. R. R.*, 327.

CARRIERS OF GOODS—*Continued.*

2. *Railroads—Live-stock Bill of Lading—Notice of Damages—Substantial Compliance.* — The acceptance of a car-load of cattle, damaged in transportation, under protest made to one who customarily acted for the defendant railroad in delivering them at destination, is a sufficient compliance with a stipulation in a live-stock bill of lading that written notice of the damage must be given before removal of the cattle in order to recover. *Ibid.*

3. *Same — Principal and Agent — Evidence.*—Evidence tending to show that a certain person customarily acting for a railroad company in delivering car-load shipments of cattle at a stock yard is sufficient upon the agency of that person to receive notice there of a damaged car-load shipment and to permit recovery under a live-stock bill of lading requiring that notice of the damages be given before the removal of the cattle. *Ibid.*

4. *Railroads — Live Stock — Transportation—Negligence—Evidence.*—In this case, a charge *Held* correct, that the time a certain car of cattle was loaded and the time delivered at destination was some evidence of negligence, under the surrounding circumstances, damages to cattle in transportation being the subject of the action. *Ibid.*

CARRIERS OF PASSENGERS.

1. *Carriers of Passengers—Mixed Trains—Risks Assumed—Duty of Carriers—Negligence.*—While a passenger on a train carrying passengers and freight assumes the usual risks incident to traveling on such trains, the employees of a railroad having such trains in charge are held to the highest degree of care of which they are susceptible, for his safety and protection, and he was a right to assume that the train will be run accordingly. *Kearney v. R. R.*, 521.

2. *Carriers of Passengers—Stations—Stopping of Trains—Invitation to Alight.*—When a railroad train stops at its usual place at its station for passengers to leave the train, it is evidence of an invitation to the passengers thereon to alight. *Ibid.*

3. *Same — Reasonable Time — Starting of Train — Negligence.*—When a railroad train carrying passengers reaches its usual stopping place at its station for the passengers to alight and leave, it is the duty of its employees in charge to exercise the highest degree of care practicable in affording them sufficient time for the purpose; and it is actionable negligence for them to suddenly start the train to the injury of a passenger then alighting. *Ibid.*

4. *Carriers of Passengers—Stations—Place to Alight—Degrees of Safety —Custom—Duty of Carrier.*—When it is customary for passengers to alight from either side of a train at its regular stopping place at a station, and one side is more dangerous than the other, it is the duty of the carrier to have an employee present to warn the passengers in alighting at the more dangerous place. *Ibid.*

5. *Carriers of Passengers—Alighting from Trains—Reasonable Time— Duty of Passenger—Negligence—Proximate Cause.*—A passenger, in failing to leave a train which has stopped at its customary destination at a railway station, with reasonable promptness, and to exercise the care of a reasonable person in doing so, is negligent in his

CARRIERS OF PASSENGERS.—*Continued.*

duty to the carrier, and may not recover damages for an injury thereby proximately caused. *Ibid.*

6. *Carriers of Passengers—Stations—Safe Place to Alight—Degrees of Safety—Custom—Duty of Carrier—Nonsuit—Evidence.*—When there is evidence tending to show that the plaintiff, a passenger on a mixed train which had stopped at its usual place for the passengers to get off, where they were in the habit of alighting on each side of the coach, but one side was more dangerous for the purpose than the other, got off on the more dangerous side and that no employee of the defendant railroad company was there to advise or assist him, or place the step used for the purpose; that while he was getting off with reasonable promptness he was injured by a sudden and unexpected movement of the train, a judgment of nonsuit should be denied, as it is sufficient to take the issue of negligence to the jury. *Ibid.*

7. *Carriers of Passengers—Alighting from Trains—Manner of Alighting Contributory Negligence—Questions for Jury.*—When there is evidence of negligence on the defendant carrier's part, in causing an injury to the plaintiff, a passenger on its train, by the sudden and unexpected movement of the train as he was alighting therefrom, it will not be held contributory negligence, as a question of law, that he, a man 69 years of age, let himself go to the ground gradually and slowly, on the side opposite to the station, where passengers customarily got off without objection from the carrier, especially as he had a right to assume that the defendant would not be negligent. *Ibid.*

8. *Carriers of Passengers—Alighting from Trains—Contributory Negligence—Negligence—Proximate Cause.*—The negligence of the plaintiff, a passenger on defendant's train, in alighting at the usual place at defendant's depot, will not be held contributory when the real or proximate cause of the injury complained of was the sudden and unexpected movement of the train. *Ibid.*

9. *Same—Starting of Trains—Negligence.*—When, in alighting from defendant's train at a station, the plaintiff has negligently put himself into a position which would not have directly produced the injury, and the injury would not have occurred except for the defendant's negligent act in suddenly starting the train, the situation of the plaintiff, at the time of his injury, is a mere condition, and not the direct or contributing cause thereof. *Ibid.*

10. *Carriers of Passengers—Riding on Platform—Stopping of Trains—Alighting—Interpretation of Statutes.*—Revisal, sec. 2628, relieving the carrier from liability for injuries to passengers, under certain conditions, while riding on the platform while the train is in motion, etc., is for the protection of passengers and should be reasonably construed, and has no application when the injury complained of has been received as the passenger was alighting at a regular station after the train had stopped for that purpose, though he may have ridden in violation of the statute before the train had stopped. *Ibid.*

11. *Same—Instructions—Construed as a Whole.*—In an action against a carrier of passengers for damages for a personal injury received by

CARRIERS OF PASSENGERS.—*Continued.*

a passenger, there was evidence tending to show that the plaintiff had ridden on the platform of the car to his destination, and was injured after the train had stopped at the station while alighting in the customary manner. There was evidence *per contra.* Among other things, the judge charged the jury that the plaintiff "would be entitled to recover" if they found that the train stopped at the usual place for the purpose, and, before the plaintiff had reasonable time to alight, it moved forward and inflicted the injury. In this case *Held*, the charge, construed with the other portions showed no reversible error. *Ibid.*

12. *Carriers of Passengers—Stations—Safety of Passengers—Flag Stations —Duty of Carriers.*—A common carrier is not held to the same high degree of care to provide safe means of access to and from its stations for the use of passengers, at a flag station where the passengers alight at a crossing, and where the law does not require them to keep a depot or platform as it is at a depot in cities and towns. *Fulghum v. R. R.*, 555.

13. *Carriers of Passengers — Flag Stations — Safe Egress — Contributory Negligence—Evidence.*—Where a passenger has safely alighted in broad daylight at a flag station of the carrier, and is injured by stepping upon a cross-tie left there for the purpose of repairing the track, lying lengthwise on a slanting ditch along the roadbed, which had plainly become slippery with rain and mud, and it appears from her own testimony that she could have safely stepped over the cross-tie or have gone around it, her contributory negligense in thus acting will bar her recovery. *Hinshaw's case*, 118 N. C., 1052, cited and distinguished. *Ibid.*

CARTWAYS. See Easements; Roads and Highways.

CASE. See Appeal and Error.

CATTLE. See Quarantine.

CERTIORARI. See Appeal and Error.

CITIES AND TOWNS. See Schools and School Districts; Master and Servant.

1. *Taxation—Fertilizers—Inspection—Tonnage Tax—Cities and Towns—License Tax—Interpretation of Statutes.*—The tonnage tax for purposes of inspection levied by the State under our statute does not forbid a county, city or town from levying a license tax upon fertilizer stored therein for purposes of distribution by a manufacturer or dealer, the language of the statute forbidding "any other tax to be levied," etc., referring to any other tonnage tax. *Guano Co. v. New Bern*, 354.

2. *Same — Ordinance.* — A city ordinance requiring the payment of a license tax from fertilizer agents or dealers, etc., carrying on their business within the city, is authorized by Revisal, sec. 2934. *Ibid.*

3. *Same—Storage for Distribution.*—A manufacturer of fertilizers maintaining its sales department in another State from which sales are exclusively made for fertilizer stored for distribution only, in a city

CITIES AND TOWNS—*Continued.*

in this State, is liable under an ordinance of the city levying a tax upon callings and professions, naming among others "fertilizer manufacturers' agents or dealers," the tax being for the protection afforded by the city in the exercise of such occupation, and the profits derived therefrom. *Ibid.*

4. *Constitutional Law—Class Legislation—Cities and Towns—Discrimination.*—Constitutional and legislative authority conferred upon a municipality to tax does not enable it to create a privilege for the purpose of taxing it, nor to discriminate between persons exercising the same privilege, by imposing a tax upon one of a class, at a higher rate, in a different mode or upon other principles than one applied to the exercise of the same privilege by others of the same class. *S. v. Williams*, 610.

5. *Taxation—Cities and Towns—Municipal Powers—Legislation—Powers Conferred — Constitutional Law.* — The legislative power conferred upon a municipality to tax cannot be construed to extend further than its charter permits, and any attempt to impose burdens upon some of a class from which others of the same class are exempted is void as being beyond the granted powers and as an exercise of partial legislation. *Ibid.*

6. *Taxation—Cities and Towns—Legislature—Police Powers—Reasonableness—Constitutional Law.*—Ordinances passed by a municipality in the exercise of the police power or for the purpose of revenue, and intended to regulate or control the sale of articles in a town or city, or in other matters, must be reasonable, and are subject to the determination of the courts as to what are reasonable regulations within the powers granted by the Legislature. *Ibid.*

7. *Taxation — Cities and Towns — Municipal Powers — Discrimination—Restraint of Trade—Constitutional Law.*—A town ordinance required every person, firm, or corporation in the State, soliciting or taking orders for goods at retail, to be delivered in the town by nonresident merchants, firms, or corporations resident in the State, to pay a certain tax: *Held*, the ordinance was discriminative, in restraint of trade, and unconstitutional, and defendant could not be held for a criminal violation thereof. *Ibid.*

CLAIM AND DELIVERY.

1. *Claim and Delivery—Defendant's Measure of Damages—Pleadings—Interpretation of Statutes.*—Where, under claim and delivery proceedings, the plaintiff comes into the possession of the property, the subject of the proceedings, and judgment is given for the defendant, Revisal, sec. 570, limits the defendant's recovery to the return of the property or the value thereof, in case a return cannot be had, and damages for same; and defendant's counterclaim asking for no more is superfluous pleading. *Ludwick v. Penny*, 104.

2. *Same—Malicious Prosecution—Judgment—Res Adjudicata.*—When a recovery is had only for the damages allowed to the defendant in claim and delivery proceedings for the wrongful seizure of his property used in his business, as allowed by Revisal, sec. 570, and in that action no further damage has been set up by way of counterclaim

CLAIM AND DELIVERY—*Continued.*

than those given by the statute, the doctrine of *res adjudicata* does not apply in an independent action brought by the defendant in the former action to recover of the plaintiff therein damages for breaking up and destroying his business by unlawfully and maliciously prosecuting the action of claim and delivery. *Ibid.*

3. *Same—Counterclaim.*—When the defendant in claim and delivery proceedings has recovered judgment against the plaintiff for the damages allowed for the wrongful seizure allowed by Revisal, sec. 570, and has set up therein a counterclaim for only the damages allowed by the statute, the damages for "unlawfully, willfully, wrongfully, wantonly, recklessly, and maliciously" suing out the process are not included in the determination of the action, and *res adjudicata* cannot be pleaded in an independent action subsequently brought by the defendant for their recovery. *Ibid.*

4. *Same.*—The fundamental reasons for the application of the doctrine of *res adjudicata* are that there should be an end of litigation and that no one should be vexed twice for the same cause; therefore, when the defendant in claim and delivery proceedings has recovered of the plaintiff therein such damages for his wrongful seizure of defendant's property as allowed by Revisal, sec. 570, and he has claimed no more, he may, by an independent action, sue for such damages to his business as may have been caused by the malicious prosecution of the plaintiff's action, for such was not the subject of recovery in the claim and delivery proceedings, and the doctrine of *res adjudicata has no application. Ibid.*

5. *Same—Practice.*—A suit for maliciously prosecuting a proceeding in claim and delivery for the purpose of breaking up the business of another will not lie before the termination of the claim and delivery proceedings, and the defendant in such proceedings cannot therefore set up a counterclaim in that action for the damages he may have sustained in his business. *Ibid.*

6. *Claim and Delivery—Title—Interpleader—Burden of Proof.*—In claim and delivery, an interpleader claiming title to the property as the vendee of defendant has the burden of proving the title in his vendor. *Roberts v. Hudson*, 210.

COCAINE.

1. *Cocaine—Unlawful Sale—Evidence.*—Upon trial for unlawfully selling cocaine, it is competent, after the one to whom the drug is alleged to have been sold has testified, to impeach her evidence on behalf of the prisoner by showing, by another witness, she had made conflicting statements as to where and from whom she had purchased it. *S. v. Burno*, 632.

2. *Same—Expert—Satisfactory Opinion.*—Upon trial for the unlawful sale of cocaine, the testimony of a witness who has qualified as an expert physician and druggist, that in his opinion a certain drug exhibited to him, and which was identified as that sold, was cocaine, is competent, though he said on cross-examination that he could not tell the difference between cocaine and epsom salts except by actual test, which was not made by him in this instance, but in his opinion the drug exhibited to him was cocaine. *Ibid.*

COCAINE—*Continued.*

3. *Cocaine—Unlawful Sale—Taken from Vendee—Absence of Defendant —Evidence.*—Upon a trial for the unlawful sale of cocaine, evidence is competent to show that cocaine was taken off the person to whom it is alleged to have been sold, in the absence of the defendant, when sufficiently identified as the article alleged to have been sold on the occasion specified. *Ibid.*

CONDEMNATION. See Easements; Eminent Domain.

CONDITIONS PRECEDENT. See Deeds and Conveyances.

CONSIDERATION. See Burden of Proof; Deeds and Conveyances; Contracts.

CONSTITUTION OF NORTH CAROLINA.

Article III, section 16. It is not required that the Secretary of State sign a grant to State's land in any particular position thereon. *Richards v. Lumber Co.*, 54.

Article V, section 3. Payment of fertilizer inspection tax does not relieve payment of property tax. *Guano Co. v. Biddell*, 212.

Article V, section 3. Taxing of trades must be uniform, and may be done by classification, when not arbitrary. *S. v. Williams*, 610.

Article VII, section 7. Assessment in stock-law territory for fencing purposes not required to be submitted to the vote of the people. *Tripp v. Commissioners*, 180.

Article X, section 5. The husband must be owner of lands at the time of his death, leaving widow but no chidren, to leave her the homestead free from his debts. *Thomas v. Bunch*, 175.

Article XIV, section 7. Added duties to existing offices not forbidden. *McCullers v. Commissioners*, 75.

Article XIV, section 7. The acceptance of the second office vacates the first *eo instanti*, and a taxpayer may bring *quo warranto*, but upon leave of Attorney-General. *Midgett v. Gray*, 133.

CONSTITUTIONAL LAW.

1. *Legislative Powers—School Districts—Bond Issues—Interpretation of Statutes—Constitutional Law.*—In interpreting a statute with reference to its constitutionality, all doubts should be resolved in favor of its validity, and the courts will assume that the Legislature acted with integrity and with an honest purpose to observe the restrictions and limitations imposed by the Constitution. *Williams v. Bradford*, 36.

2. *Same—Racial Discrimination—Unconstitutional Act—Rights of Purchaser.*—An act of the Legislature which provides for the erection of a schoolhouse in a certain school district from the proceeds of a bond issue to be voted upon therein, "for the whites" in that district, violates the plain mandate of the Constitution, Art. IX, sec. 2, that "there shall be no discrimination in favor of, or to the prejudice of, either race," leaving nothing for interpretation, and a purchaser of these bonds, though issued according to all other legal requirements, may refuse to accept them on the ground of their being invalid. *Lowery v. School Trustees*, 140 N. C., 39; *Bonitz v. School Trustees*, 154 N. C., 379, where discretion was conferred upon the local board

CONSTITUTIONAL LAW—*Continued.*

of administration to apportion the funds raised by the sale of the bonds without racial discrimination, cited and distinguished. *Ibid.*

3. *Added Duties—Two Offices—Constitutional Law.*—Section 9, chapter 62, Public Laws of 1911, constituting the county board of health of the chairman of the board of county commissioners, the mayor of the county town, etc., the county superintendent of schools, and two physicians to be selected by these two officials, is not repugnant to Article XIV, sec. 7, of the State Constitution, which forbids the holding of two offices by one man at the same time, but simply adds further duties to the offices already created, which expires with the term of office of each. *McCullers v. Commissioners*, 75.

4. *Same—Officers ex Officio—Terms of Office.*—The provisions of section 9, chapter 62, Public Laws of 1911, that "the term of office of the members of the county board of health shall terminate" at certain specified times, does not relate to the terms of the *ex officio* officers, but to the term of office of the physicians appointed by them, the terms of the *ex officio* members expiring on the dates already prescribed for their respective offices. *Ibid.*

5. *Quo Warranto—Officers—Two Offices—Qualified in Second Office—Effect—Constitutional Law.*—When a person holding an office or place of trust accepts and qualifies for a second office, within the meaning of our Constitution, Art. XIV, sec. 7, the first office *ipso facto* becomes vacated. *Midgett v. Gray*, 133.

6. *Railroads — Tramways — Rights of Way—Private Use—Constitutional Law.*—Upon the principle that private property can only be taken for a public use, an act of the Legislature is unconstitutional which attempts to give the power of eminent domain, and the right to condemn property, to private lumber railroads. *Lumber Co. v. Cedar Works*, 161.

7. *Estates—Remainderman—Widow—Dower—Homestead—Seizin of Husband—Constitutional Law.*—When the life estate is outstanding at the time of his death, the widow of the remainderman is not entitled to dower or homestead in the lands, as he was not seized thereof and the husband must be the owner of the homestead at the time of his death, leaving a widow but no children, for the exemption of the lands from his debts inures to her benefit. Const., Art. X, sec. 5. *Thomas v. Bunch*, 175.

8. *Stock Laws — Assessments—Vote of People—Constitutional Law.*—Laying an assessment for building a stock-law fence in territory where the law is effective is not taxation requiring its submission to a vote of the people of the district, especially where the money for the purpose is in hand from other lawful sources and, in this case, being for the future repair of the line in common with other fencing required, an assessment may be laid under chapter 386, Laws 1901. *Tripp v. Commissioners*, 180.

9. *Taxation—Inspection Tax—Constitutional Law.*—The levy of the inspection tax under Revisal, sec. 3955, is constitutional and valid. *Guano Co. v. Biddle*, 212.

CONSTITUTIONAL LAW—*Continued.*

10. *Same—Interstate Commerce.*—While the State may not levy an *ad valorem* or other tax on personal property in transit in the course of interstate commerce, the principle does not apply when the property (fertilizers in this case) is stored within the State by a nonresident for the purposes of sale and distribution. *Ibid.*

11. *Eminent Domain—Electric Companies—Condemnation—Constitutional Law.*—The provisions of sections 1571-1577, empowering electric power or lighting companies, etc., to condemn lands for the erection of poles, establishment of offices, and other appropriate purposes, are constitutional and valid. *Wissler v. Power Co.*, 465.

12. *Taxation—Bond Issues—Vote of People—Constitutional Law—Legislative Control.*—The general rule that a proposition to authorize or validate a municipal indebtedness should be single, not embodying two or more distinct and unrelated propositions, is not, in North Carolina, regulated by our Constitution, and the method of voting on a proposition of municipal indebtedness, under all ordinary conditions, is for the Legislature. *Winston v. Bank*, 512.

13. *Same—Interpretation of Statutes.*—Where a popular vote is required to authorize a municipal indebtedness, the voter should be afforded an opportunity to cast his ballot for a single proposition, and an act of the Legislature will not be construed as authorizing an election in contravention of this principle unless such purpose is expressed in clear and unmistakable terms. *Ibid.*

14. *Same—Ordinance.*—Among other things, the Legislature provides that the city of Winston, for the issuance of bonds for several unrelated classes of municipal indebtedness, shall first pass "an ordinance specifying the purpose of the debt and the amount thereof," with the general provision, "with such regulations and rules governing such voting as the board of aldermen may prescribe"; *Held*, the statutory provision first mentioned did not authorize the submission by the board of aldermen of the various distinct and unrelated propositions to the voters in a single ballot, and that this position was not affected by the general statutory provision, for that was only intended to refer to the time and place of voting, and other mere formal regulations concerning the election. *Ibid.*

15. *Taxation—Different Classes of Taxation.*—In laying a tax, the different subjects thereof may be reasonably, though not arbitrarily, classified, and a different rule of taxation prescribed for each class, provided the rule is uniform in its application to the class for which it is made. Constitution, Art. V, sec. 3. *S. v. Williams*, 610.

16. *Same—Cities and Towns—Discrimination.*—Constitutional and legislative authority conferred upon a municipality to tax does not enenable it to create a privilege for the purpose of taxing it, nor to discriminate between persons exercising the same privilege, by imposing a tax upon one of a class, at a higher rate, in a different mode or upon other principles than one applied to the exercise of the same privilege by others of the same class. *Ibid.*

CONSTRUCTION. See Wills; Husband and Wife.

CONTEMPT.

1. *Injunction—Trespass—Contempt of Court.*—A party going upon lands claimed by plaintiff, described in the complaint by metes and bounds, after an injunction had been issued thereon, and cutting timber in violation of the order granted, commits a contempt of court. *Weston v. Lumber Co.*, 270.

2. *Injunction—Contempt of Court—Duty of Party Enjoined.*—An injunction of the courts must be obeyed implicitly, according to its spirit and in good faith; and the party enjoined must do nothing, directly or indirectly, that will render the order ineffectual, either in whole or in part. *Ibid.*

3. *Injunction — How Considered — Contempt of Court.*—In deciding whether there has been an actual breach of an injunction, it is important to consider the objects for which relief was granted, as well as the circumstances attending it, and the violation of the spirit of an order or writ, even though its strict letter may not have been disregarded, is disobedience of the mandate of the court. *Ibid.*

4. *Injunction—Contempt—Motive.*—A party having been enjoined from cutting timber on lands the title to which was in dispute, cannot justify his disobedience to the order upon the ground of a proper motive; for the motive, whether good or bad, is not material. *Ibid.*

5. *Injunction—Trespass—Location—Specific Findings.*—A party who has violated the mandate of an injunction by cutting timber upon the lands described, cannot complain that the findings of the lower court imposing the punishment were not more specific or more in accordance with the probative force and full significance of the evidence, when they are favorable to him. *Ibid.*

6. *Injunction—Contempt of Court——Advice of Counsel—Punishment.*—The defense in a proceeding for contempt of court in the violation of the mandate of an injunction, that the party enjoined acted under the advice of counsel, will not avail the respondent, and it will only be considered by the judge in imposing the punishment for the disobedience of the order. *Ibid.*

CONTRACTS. See Insurance.

1. *Contracts—Vendor and Vendee—Acceptance—Evidence.*—In an action for the contract price of lumber sold and delivered by the plaintiff to the defendant, there was evidence tending to show that the defendant had accepted the lumber through its agent: *Held*, under the evidence in this case, with a proper charge from the court, the verdict of the jury finding for the plaintiff, and that there was an acceptance of the lumber by the defendant, without misrepresentation by the plaintiff, was without error. *Fisher v. Lumber Co.*, 61.

2. *Same—Incorporeal Hereditaments.*—When by parol agreement one owner of lands has built a party wall one-half upon his own land and the other half upon that of an adjoining owner, and the latter had agreed to pay for one-half of the wall when he should use it, equity, to give effect to the agreement, will regard the agreement as creating an incorporeal hereditament (in the form of an easement) out of the unconveyed estate, rendering it appurtenant to the one conveyed, and binding upon the title of subsequent assignees with notice. *Reid v. King*, 85.

CONTRACTS—*Continued.*

3. *Contracts—Option—Definition—Propositions — Acceptance.*—An option is a right acquired by contract to accept or reject a present offer to sell. It remains only a proposition until its acceptance identical with the offer. *Clark v. Lumber Co.*, 139.

4. *Contracts—Options—Vendor and Vendee—Principal and Agent—Misrepresentations — Damages — Evidence.* — An agent for the sale of lands brought his action against the owner for damages alleged to have been sustained by him from the owner's misrepresentation of title, and the consequent loss of the sale to a purchaser whom he had procured under an option: *Held*, (1) he could not recover the expenses he had incurred prior to the date of the option; (2) it was necessary for the agent to show he relied on the alleged misrepresentation of title by the owner; (3) that under an agreement that the acceptance was subject to an investigation of title it is necessary that the title be found acceptable and clear by the attorney selected; (4) there must be evidence of the value or amount of the work claimed by the agent as damages; (5) there must be evidence to show the connection between the representations alleged to have been made by the owner and the damages claimed on that account. *Ibid.*

5. *Contracts, Written—Telegrams—Questions of Law.*—A telegram and its reply expressing the agreement of the parties is a contract in writing the meaning of which is for the court to determine. *Jennette v. Hay Co.*, 156.

6. *Same—Vendor and Vendee—Terms of Sale—Interpretation.*—In reply to defendant's letter offering corn at a certain price, without stipulation as to time of delivery, plaintiff telegraphed: "Letter 23. Book 400 cracked corn. Shipment thirty days, if possible. Answer immediately by wire"; to which defendant replied: "Booked cracked corn": *Held*, under the contract, the defendant was obliged to sell to plaintiff cracked corn in the quantity and at the price named if ordered within thirty days, and not thereafter. *Ibid.*

7. *Contracts—Vendor and Vendee—Measure of Damages—Vendee's Duty.* The plaintiff having purchased a number of sacks of cracked corn of the defendant, received shipments with knowledge that the sacks were not tagged as required by the Department of Agriculture and that it did not come up to the grade purchased, and sold a number of the sacks to a purchaser who kept them two weeks, when they were seized by the said department. The defendant theretofore sent the necessary tags for the sacks to the plaintiff, who refused to have anything further to do with the shipment, and the corn became worthless in the hands of the department: *Held*, it was the duty of the plaintiff to do what he reasonably could to lessen his loss, and the measure of his damages was the difference in value of the corn as it actually was and which it should have been under his contract, and such other expenses as were actually incurred by him in handling it. *Ibid.*

8. *Contracts, Parol—Personal Property—Reservation of Title—Vendor and Vendee—Purchaser.*—The only evidence of a parol contract, sued on, being that plaintiff permitted the defendant to cut cross-

CONTRACTS—*Continued.*

ties on his land at a certain price each, and allowed the defendant to haul them for convenience of shipping to a railroad, reserving the title in himself until the ties were paid for, the title to the ties does not vest until the payment for them has been made, and a purchaser thereof from the defendant cannot acquire any title, as his vendor had no title to convey. *Roberts v. Hudson*, 210.

9. *Vendor and Vendee—Fertilizer—Deficient in Quality—Measure of Damages—Interpretation of Statutes.*—When it is ascertained by analysis of the Department of Agriculture that fertilizer sold by a manufacturer was deficient in quality, the damages sustained is the difference in the price of the fertilizer actually sold and what it should have been. Revisal, sec. 3949. *Fertilizer Works v. McLawhorn*, 274.

10. *Vendor and Vendee—Fertilizer—Deficient in Quality—Duty of Vendee—Measure of Damages.*—After a user of fertilizer has been informed by the Department of Agriculture that the fertilizer furnished by the manufacturer is deficient in quality, it is his duty to buy fertilizing material or ingredients to make good the deficiency, and, upon his failing to do so, an abatement in the price by reason of the deficiency is his measure of damages. *Ibid.*

11. *Contracts—Options—Description—Parol Evidence—Deeds and Conveyances.*—Defendants gave plaintiffs an option on lands known as the M. place, the same on which Mrs. M. "resides at the present time," giving the adjoining owners by name, containing 1,500 acres, more or less, lying "on the waters of Mill Creek, near the waters of Hood Creek," with further specification that it "is all of the lands owned by Mrs. M." and certain others, "in the county of Brunswick, State of North Carolina." When the purchase money was tendered, the defendants offered a deed leaving out the further specification that it was all the lands owned by Mrs. M. and certain others in Brunswick County, and it was *Held*, (1) the words of the further specification were merely words of description without obligation on defendant's part to convey such land if outside of the boundaries specified in the option; (2) parol evidence was competent to show what lands were embraced within the description in the option of the M. place on which Mrs. M. resided at that time, upon plaintiff's contention that the option called for 66 acres more than the deed conveyed. *Gaylord v. McCoy*, 325.

12. *Contracts—Wagering—Cotton Futures—Lex Loci Contractus—Interpretation of Statutes.*—An action upon a wagering or "future contract" in cotton cannot be maintained in this State, though entered into in another State where it is lawful. Revisal, secs. 1869, 3823, 3824. *Burrus v. Witcover*, 384.

13. *Equity—Mistake of Law—Contracts—Intent of Parties.*—Equity will correct a mistake in law in the drawing of a written contract, when it is made to appear that the contract as therein expressed does not carry out the actual agreement which both of the parties had made, and which it was their mutual intent to express by the writing. *Pelletier v. Cooperage Co.*, 403.

CONTRACTS—*Continued.*

14. *Bills and Notes—Contracts—Parol Evidence—Consideration—Credits —Rentals.*—In an action to recover upon a note given for rent, the defendant offered evidence tending to show by parol a separate and distinct contract made at the signing of the note, whereby he was only obligated to pay it if he continued to reside in the house for the period of time covered by the note, which was uncertain, owing to his occupation or business; and that accordingly he surrendered the possession before the said period, which the plaintiff received and rented to other parties: *Held*, competent (*a*) as a parol agreement, which was a part of the rental contract; (*b*) if believed, it proved a total want of consideration for the note sued on; (*c*) if it did not avoid the payment of the note, it was competent to show that the defendant was entitled to have the rents subsequently received by the plaintiff credited thereon. *Martin v. Mack*, 436.

15. *Contracts—Voidable—Insane Persons—Defenses.*—Executed contracts of an insane person, before office found, *i. e.* when such condition has not been formally ascertained and declared, are not void, but voidable, usually at his election or of the person appointed to act in his behalf, unless it is made to appear that the party contracting with him has acted without knowledge of the insanity or notice of such facts in reference thereto as would put a reasonably prudent man upon inquiry; and that no unfair advantage was taken, and that the consideration passed cannot be restored or adequate compensation made therefor. *Ipock v. R. R.*, 445.

16. *Same—Burden of Proof.*—While one who seeks to avoid a contract on the ground of insanity has the burden of proving his position, when it is established that the contract has been made with a person mentally incapable of making a contract, the burden is so far shifted that the agreement will be set aside unless the same party brings himself within the requirements necessary to uphold it as a binding one. *Ibid.*

17. *Contracts—Vendor and Vendee—Retaining Title—Misappropriation of Funds.*—By a contract for the sale of fertilizer which generally provides that the fertilizer, with notes, liens, bills of sale, etc., arising from sales, etc., thereof, shall be kept separate for the use and benefit of the vendor, subject to his order, the fertilizer, etc., remain the property of the vendor, converting his vendee into a trustee of the notes, etc., taken for its sale to others, who holds them for the benefit of the owner of the fertilizer, together with money derived from the sales, or collections on the notes given therefor. *Chemical Co. v. Floyd*, 455.

18. *Same—Corporations—Officers—Principal and Agent—Parties.*—When a corporation has entered into a contract for the sale of fertilizers under which the proceeds of sales, moneys collected on notes, etc., are to be the property of the one furnishing the fertilizer, an action against certain of its officers brought by the owner of the fertilizers and notes, alleging in the complaint that the defendants, with knowledge of the facts, misapplied and misappropriated the moneys derived from the sales or collections on notes given therefor, sets

CONTRACTS—*Continued.*

forth a good cause of action and is not demurrable; and when alleging a joint wrong, it is not a misjoinder of parties. *Ibid.*

19. *Contracts—Specific Performance—Equity.*—Specific performance of a contract to convey lands in this case will not be decreed, owing to a doubtful title, the failure to make the *cestuis que trust* parties, and other circumstances appearing therein. *Thompson v. Power Co.*, 587.

CONTRIBUTORY NEGLIGENCE. See Railroads, Master and Servant.

CORPORATIONS. See Principal and Agent; Eminent Domain.

1. *Debtor and Creditor—Insolvent Corporations—Receivers—Collaterals—Application of Dividends—Credits—Bills and Notes.*—A creditor of an insolvent corporation holding its notes with collaterals is entitled to a dividend, which the court has ordered the receivers to pay to its creditors, on the amount the debtor is due on the note, without deduction for credits received from the collaterals; and should there be any collaterals or proceeds thereof after the note has been paid in full, they should be turned over to the receivers. *Bank v. Flippen*, 334.

2. *Corporations—Pleadings—Corporate Existence — Evidence.*—While ordinarily the right to question the exercise of corporate powers is with the State, and cannot be raised collaterally, a denial in the answer of plaintiff's corporate existence requires proof on plaintiff's part that it is a corporation. *Daniels v. R. R.*, 418.

COST. See Appeal and Error; Attorney and Client.

COST, RETAXING. See Motion.

COUNTERCLAIM. See Judgments; Claim and Delivery.

"COUNTERSIGN." See Words and Phrases.

COUNTIES.

1. *Counties—Navigable Streams—Drawbridges — Discretionary Powers.* It is the duty of county commissioners to provide drawbridges where they may be necessary for the convenient passage of vessels (Revisal, sec. 1318, 8), and they have authority to erect bridges and provide for draws in them (Revisal, sec. 2698), and it is within the discretion of the commissioners as to whether the draws in the bridges should turn both ways. *Lenoir v. Crabtree*, 357.

2. *Counties—Navigable Streams—Drawbridges—Obstructions—Easement—User—Limitation of Actions.*—A right to maintain a building on a navigable stream which obstructs the operation of a draw in a county bridge cannot be acquired by adverse user, and the operation of the statute of limitations in this regard is expressly forbidden by statute. Revisal, 389. *Ibid.*

3. *Counties—Navigable Streams—Drawbridges—Obstructions — Location—High and Low Water—Easements—Public Rights.*—The erection of a bridge with a draw, across a navigable stream, of the most modern construction, the draw opening both ways, is an incident to

COUNTIES—*Continued.*

navigation, which cannot be defeated by the erection of a building or other obstruction on a strip of land between high and low water mark, so near as to interfere with the operation of the draw; and the occupant can acquire no easement in lands of this character superior to the rights of the public. *Ibid.*

4. *Injunctions—Counties — Drawbridges — Obstructions — Discretionary Powers—Evidence.*—In proceedings for a mandatory injunction by a county to remove an obstruction to the operation of a drawbridge, any consideration of influence brought to bear upon the commissioners by an opposite shore owner cannot be entertained, when the commissioners in erecting the bridge were in the exercise of their valid discretionary powers. *Ibid.*

5. *Counties—Quasi-corporations—Injunctions — Parties.*—A county is a "body politic and corporate" (Revisal, 1309), and may "sue and be sued in the name of the county" (Revisal, 1310), and it is not required, in an action for a mandatory injunction to have an obstruction removed to the operation of a draw in a bridge over a navigable stream, that the suit should be in the name of the county commissioners. *Ibid.*

COURTS. See Sales; Contempt.

1. *Same—Motion to Remand—Practice.*—When a petition for the removal of a cause from the State to the Federal court, properly verified and accompanied by a proper and sufficient bond, has been filed in the State court in apt time, in an action brought against a nonresident corporation and its resident manager alleging a joint wrong, and the petition contains allegations of fraudulent joinder, together with full and direct statement of the facts and circumstances sufficient, if true, to demonstrate that there has been such fraudulent joinder of the resident defendant, the jurisdiction of the State court is at an end and the order should be made removing the cause, leaving the remedy for the opposing party in the Federal court upon motion to remand the cause or other proper procedure therein. *Rea v. Mirror Co.*, 24.

2. *Courts—Form of Action—Equity—Pleadings.*—Actions at law and suits in equity being adjudicated and determined under our statute by the same tribunal, equities will be administered therein where they sufficiently arise upon the allegations of the pleadings, without regard to the form or manner in which they are alleged. *Reid v. King*, 85.

3. *Nonsuit in Part—Discretion of Supreme Court.*—While this appeal is held to be fragmentary and is dismissed, as it is from a nonsuit respecting only a part of the land in controversy, the court notwithstanding in its discretion passed upon and approved the ruling below as to the nonsuit. *Shields v. Freeman*, 123.

4. *Tenants in Common—Partition—Pleadings—Amendments—Discretion —Appeal and Error.*—It is within the discretion of the trial judge to permit answers to be filed in proceedings for partitioning lands which had been stricken out by the clerk, and his action therein is not reviewable on appeal. *Gregory v. Pinnix*, 147.

COURTS—*Continued.*

5. *Cities and Towns—School Committees—Discretionary Powers—Power of Courts—Abuse of Discretion.*—The courts may not interfere with discretionary powers conferred on school committees in their administration of school affairs, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of the discretion conferred. *Newton v. School Committee,* 186.

6. *Same—Evidence.*—In this proceeding involving the right of the school committee of the city of Charlotte to select and build upon a certain site selected for public school purposes, it is held, upon the affidavits tending to show the site complained of was properly selected, that the court cannot inquire into the discretion of the committee in selecting it, there being no sufficient evidence that this discretion was unreasonably or arbitrarily exercised. *Ibid.*

7. *Practice—New Trial—Newly Discovered Evidence—Supreme Court—Discretion.*—A motion for a new trial upon newly discovered evidence made in the Supreme Court is addressed to the discretion of the Court, and in this appeal, the evidence relied on being the relation of the jurors to some of the commissioners of the plaintiff county, the relationship is regarded as too remote for the exercise of this discretion. *Gates County v. Hill,* 584.

8. *Malicious Burning—Severance—Discretion—Appeal and Error.*—The refusal of the trial judge to order a severance of the trial under an indictment against several defendants for unlawfully burning a house is not reviewable on appeal except in case of gross abuse of discretion. *S. v. Millican,* 617.

9. *Motions—Request for Bill of Particulars—Discretion of Courts.*—A motion for a bill of particulars in a criminal action is addressed to the discretion of the court, and is not reviewable unless this discretion is grossly abused by him, which does not appear in this case, there being nothing of record to show that the prisoner required any information not appearing upon the indictment which was necessary to his defense. *S. v. Hinton,* 625.

10. *Same Statutory Form—Sufficiency.*—When the warrant and order of arrest for resisting and obstructing certain officers in the performance of their duties, construed together substantially follow the statute, motions to quash and in arrest of judgment should be denied. *Ibid.*

DAMAGES. See Measure of Damages; Injunctions; Evidence; Fraud and Mistake.

1. *Railroads—Damages by Fire—Intervening Negligence—Second Fire—Proximate Cause.*—When damages are claimed by the owner of lands adjoining the right of way of a railroad company, as caused by a spark from the negligent operation of defendant's locomotive or the use of a defective spark arrester, the doctrine of proximate cause as laid down in *Doggett v. R. R.,* 78 N. C., 311, has no application, when it appears that plaintiff's employee had extinguished the fire, and thereafter the damage complained of was caused by sparks from the locomotive setting out another fire. *Joyner v. Crisp,* 199.

DAMAGES—*Continued.*

2. *Trespass—Possession—Pleadings—Damages—Freehold.*—In an action for damages for trespass on lands possession must be alleged and shown; but when the damages claimed are to the freehold, the land itself, the plaintiff must show his title at the time of the injury complained of. *Daniels v. R. R.*, 418.

3. *Same—Deeds and Conveyances.*—Damages for cutting timber under the size, and not of the kind conveyed to the defendant in a timber deed, and those caused by his negligently setting fire thereto, are not recoverable by the plaintiff if they accrue subsequently to his conveying the freehold, or the land itself; but it is otherwise as to any he may have sustained prior to that time, for such damages are personal to the owner of the property and do not pass to his grantee of the land. *Ibid.*

4. *Damages — Several Plaintiffs — Apportionment — Rights of Defendant.* It being established in this case that one of the parties plaintiff may recover damages to the freehold of the defendant for trespass before the execution of his deed to the other plaintiff, it is *held*, the defendant had no voice in the apportionment of the damages between the plaintiffs. *Ibid.*

5. *Damages — Fright — Profane Language — Instructions — Appeal and Error.*—In this action for damages alleged to have been caused to *feme* plaintiff, among other things, by fright from profane language used by defendant in an "angry and mad manner," plaintiff's request for special instructions was properly refused, as from her own testimony it appears that she was not frightened by the defendant's manner and language. *Thomas v. Ashcraft*, 496.

DEED OF SEPARATION. See Husband and Wife.

DEEDS AND CONVEYANCES. See Parties.

1. *Wills—Construction — Estates — Power of Disposition — Reference — Deeds and Conveyances.*—A deed made by the devisee to a life estate, with power of disposition, must refer to the power contained in the will to convey the fee, and in the absence of such reference only the life estate is conveyed. *Herring v. Williams*, 1.

2. *Judicial Sales—Courts—Death of Commissioner—Deeds and Conveyances—Custodia Legis—Motion in Cause—Procedure.*—When a commissioner appointed by the court to sell land has done so in accordance with the order, and has since died without making a deed thereof to the purchaser at the sale who has paid the purchase money, the lands remain *in custodia legis*, and the remedy of an assignee of the purchaser in possession under the sale is by motion in the original cause for the appointment of a commissioner to complete the transaction by making a proper deed. *Campbell v. Farley*, 42.

3. *Deeds and Conveyances—Husband and Wife—Fraud Upon Creditors—Evidence.*—In an action to set aside a conveyance from the husband to his wife, alleged by his creditors to be fraudulent, there was evidence tending to show that the husband's creditors were pressing him, and one of them had secured a judgment against him for

DEEDS AND CONVEYANCES—*Continued.*

$5,000, after which the husband conveyed all of his real estate to his wife, and on the same day executed a bill of sale for a stock of goods and all his property to another person; the wife had no property except that which her husband had previously given to her, and when she took the deed to the property knew of the note on which the judgment had been obtained and that it had not been paid, the consideration of the deed to the land was a certificate of stock, a gift theretofore made to her by her husband, without consideration. This evidence was held to be competent to show the fraudulent intent of the husband in making the conveyance of the land to his wife, and that she participated in the fraud or executed the deed with knowldege of it. *Eddleman v. Lentz*, 65.

4. *Fraudulent Conveyance — Consideration — Burden of Proof—Husband and Wife.*—In a creditors' bill to set aside a deed of land from the husband to his wife there was evidence tending to show the intent of the husband to defraud his creditors and that the wife participated in the fraudulent transaction, and there was also evidence to show that she was a purchaser for value. It was held, correct to charge that if the *feme* defendant purchased the property for value from her husband it would shift the burden to the plaintiffs, and require of them to show that there was actual intent on the part of the husband to defraud his creditors, and that the wife either participated therein or took the deed from him with notice of his covinous purpose; and it was held further, that if, before the husband became insolvent, he had, in good faith, transferred to her certain certificates of stock, it was a valid gift and could be considered by the jury in passing upon the question whether she had paid a valuable consideration for the land to her husband, there being evidence that the certificate had afterwards been transferred back to her husband, in consideration of the deed. *Ibid.*

5. *Contracts—Easement—Deeds and Conveyances—Subsequent Purchasers With Notice.*—By parol agreement between the owners of adjoining lots, one of them built a brick building on his own land, one wall of which rested partly on the lands of the other, and one-half the cost of its erection was to be paid by the other party when he should use it: *Held*, the effect of this agreement was to create cross-easements as to each owner, which would bind all persons succeeding to the estates to which the easements are appurtenant, and in equity a purchaser of the estate of the owner so contracting, having notice of the agreement, would take it with the liability to pay one-half the cost of the wall, whenever he availed himself of its benefits. *Reid v. King*, 85.

6. *Tenants in Common—Partition—Void Conveyances—Confirmation.*—A deed made by a commissioner to sell the lands in proceedings for partition among tenants in common is invalid unless the sale has been confirmed by the court, or the parties have otherwise become bound by it. *Patillo v. Lytle*, 92.

7. *Deeds and Conveyances—Corners—Common Reputation—Parol Evidence.*—Parol evidence of declarations as to the placing of the corner of private lands of which the title is in dispute is allowed when

DEEDS AND CONVEYANCES—*Continued.*

made *ante litem motam* by a declarant who was disinterested at the time and dead at the time of the trial; and in such case the lapse of time is not always controlling. *Lamb v. Copeland*, 136.

8. *Same.*—Parol evidence of common reputation as to the placing of a corner on the question of private boundary is also admissible in this State when the same is shown to have existed from a remote period, and direct evidence of its origin is not likely to be procurable. Such reputation must always be shown to have existed *ante litem motam*, and should attach itself to some monument of boundary, or natural object, or be fortified by testimony of occupation and acquiescence tending to give the land some definite and fixed location. *Ibid.*

9. *Same.*—Testimony of a witness that he had made a survey of the lands, the subject of the action, in 1897, and began at a pine stump which by common reputation was a corner of the lands claimed by one of the parties as embraced in his deed: *Held*, incompetent, as there was nothing to show that the common reputation offered had its origin at any former time or at a period so remote that direct evidence as to the placing of this corner in question could not have been procured. *Ibid.*

10. *Same Mutual Recognition—Harmless Error.*—When in an action of trespass involving a disputed title to lands both parties have recognized a certain corner as being correct, error in permitting parol evidence of common reputation as to its location is harmless. *Ibid.*

11. *Deeds and Conveyances—Trespass—Evidence—Chain of Title—Same Description—Instructions—Harmless Error.*—When the plaintiff in an action of trespass has shown no actual occupation of the lands by himself or those under whom he claims, it is immaterial and harmless for the court to confine him to lands contained in the description of his original deed in his chain of title, where the description in all of the mesne conveyances is the same. *Ibid.*

12. *Deeds and Conveyances—Timber—Period to Cut—Interpretation.*—A deed conveying standing timber on the lands described within a time specified conveys only the timber removed by the vendee within that period, and the timber then remaining belongs to the grantor or his assigns. *Rountree v. Cohn-Bock Co.*, 153.

13. *Same—Extension—Notification—Conditions Precedent.*—When, in a deed conveying standing timber upon lands to be cut and moved in a certain period of time, there is a clause extending, upon the payment of a stipulated price, the time for a certain other period, the grantee, claiming the privilege, must notify the grantor of his intention to exercise it before or at the expiration of the time allowed within which the timber should have been removed, and pay or tender the amount named for the right of this extension. *Ibid.*

14. *Same—Additional Provisions.*—The grantee of standing timber failed or omitted to notify the grantor of his intention to take advantage of the extension of time beyond the first period named and to pay or tender the amount specified for the exercise of this privilege, and relied upon a clause in his deed reading that "the said parties of the second part, their heirs and assigns, shall have power and

DEEDS AND CONVEYANCES—*Continued.*

are hereby authorized at any period last aforesaid to enter upon the lands," etc.: *Held*, this clause does not have the effect of waiving any of the conditions necessary to make the extension clause effective, but defines what may be done under it after the conditions are performed. *Ibid.*

15. *Deeds and Conveyances—Construed as a Whole—Formal Parts—Intent.*—In construing a deed the courts attach little importance to the position of its different clauses but look to the whole instrument, without reference to formal divisions, to ascertain and effectuate the intention of the parties as gathered from every part of the deed, if it can be done by any fair and reasonable construction. *Thomas v. Bunch*, 175.

16. *Deeds and Conveyances — Boundaries, Changes — Parol Evidence.* Boundary lines of lands may not be changed by evidence of a parol agreement, except where contemporaneously with the execution of the deed the physical boundaries are actually run for the purpose of making the deed and are thereby given a different placing. *Boddie v. Bond*, 154 N. C., 359, cited and applied. *Boddie v. Bond*, 204.

17. *Same — Estoppel.* — Under ordinary circumstances, parties are not estopped by their parol agreement fixing the boundaries of lands at a place different from that shown in their deeds theretofore executed. *Hanstein v. Ferrell*, 149 N. C., 240, cited and distinguished. *Ibid.*

18. *Same.* — The defendant having bought lands adjoining those of the plaintiff, sought to estop the plaintiff from claiming the division line given in her deed, by her acts and conduct at a subsequent time when the defendant and his vendor sought to agree upon and straighten the line between the two properties: *Held*, as there is no evidence that the plaintiff's acts or conduct induced the defendant to purchase the lands, there can be no estoppel. *Boddie v. Bond*, 154 N. C., 359, cited and applied. *Ibid.*

19. *Deeds and Conveyances—Interpretation—Husband and Wife—Estates in Entireties — Survivorship — Tenants in Common.*—While in a conveyance of lands to husband and wife, jointly, they will take and hold the estate by entireties, the survivor taking the whole, this character of an estate is not created when it appears by construction from the conveyance that it was not so intended, but that the parties were to take and hold their interests as tenants in common. *Highsmith v. Page*, 226.

20. *Deeds and Conveyances—Intrepretation—Intent.*—The court, in construing a conveyance of lands, 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 be found by any reasonable intendment. *Ibid.*

21. *Same—Issues—Cloud on Title.*—A deed of lands to husband and wife conveyed an estate in common and not in entireties. After the death of the wife, the husband, assuming title of the whole by way of survivorship, conveyed it to another. There was evidence tending to

DEEDS AND CONVEYANCES—*Continued.*

show that the lands in controversy should have been conveyed separately to the wife as her part of the land: *Held*, in this case, evidence sufficient for an issue to be submitted to the jury as to the mistake in the deed, and to sustain a suit to remove a cloud upon the title by the heirs at law of the wife. *Ibid.*

22. *Deeds and Conveyances—Clerk's Probate—Requisites—Probate Taken Before Other Officers.*—It is only required for a valid probate that the clerk should certify to the proof of a deed taken before him under the statute, Revisal, sec. 104, and it is only when he passes upon a probate taken before some other officer that he is required to certify to the correctness of the probate and certificate, and order the instrument to be registered (Revisal, sec. 999) according to the form prescribed by Revisal, sec. 1001, or one substantially the same. *Lumber Co. v. Branch*, 251.

23. *Deeds and Conveyances—Dower Excluded—Definite Description—Evidence Sufficient.*—When it appears that the deceased owned but one tract of land, which the administrator sold and conveyed in proceedings to pay his debts, subject to dower, and the deed described the land as that from which the dower tract was taken, the allotment of the dower may be examined to ascertain the land intended to be conveyed; and it therein appearing that both the dower tract and the lands from which it was taken were described by metes and bounds, these descriptions are sufficient to admit of parol identification of the lands thereunder. *Phillips v. Denton*, 299.

24. *Deeds and Conveyances—Interpretation—Intent.*—A deed will be construed so as to effectuate the intent as gathered from the entire instrument when it can be done by any reasonable interpretation. *Acker v. Pridgen*, 337.

25. *Same—Habendum—Remainders.*—A conveyance of land, in the premises, being "unto the party of the second part and to his heirs and assigns," and in the habendum, unto the second party "during the term of his natural life, and after his death" to certain named children of his: *Held*, the failure to mention the children as formal parties does not avoid the limitation to them by way of remainder. *Ibid.*

26. *Same—Rule in Shelley's Case—Heirs of the Body.*—The premises of a deed to lands being to the "party of the second part and to his bodily heirs and assigns," and in the habendum "during the term of his natural life, and after his death" to certain named children: *Held*, the words bodily heirs construed with the words of the habendum to mean children. *Ibid.*

27. *Deeds and Conveyances — Interpretation — Habendum — Strangers — Limitations.*—While a stranger to a deed cannot be introduced in the habendum clause to take in fee, he can take in remainder, when by construction of the entire instrument it appears that the intention of the parties is thus given effect. *Ibid.*

28. *Deeds and Conveyances—Interpretation—Stare Decisis—Limitation—Rule in Shelley's Case.*—The doctrine of *stare decisis* invoked by the defendant cannot be given effect in this case, as she acquired the

DEEDS AND CONVEYANCES—*Continued.*

property by deed from her husband for a nominal consideration, and not being a purchaser for value, could stand in no better attitude than her grantor. *Ibid.*

29. *Deeds and Conveyances — Covenants — Intention — Interpretation.* — Covenants in a deed are construed most strongly against the grantor, and any language evidencing such an intention is sufficient. *Tarault v. Seip*, 363.

30. *Deeds and Conveyances—Timber Deeds—Interpretation—Exclusion of Certain Timber.*—The expression in a deed to timber, that the grantee "shall have the further right to take and use such of the dead down timber, etc., including small gum, etc., as may be necessary for the purpose of constructing and maintaining and operating the said roads and railroads, etc.," is *Held* in this case to exclude the use of cedar, which was growing upon the lands, by the use of the words "including small gum." *Daniels v. R. R.*, 418.

DEMURRER. See Pleadings.

1. *Judgments Non Obstante—Demurrer—Instructions—Practice.*—When in defense of an action to recover rents the defendant denies the plaintiff's allegations and alleges a breach of contract as a bar to the action, the answer raises the general issue, and, before verdict the objecting party should either demur to the evidence, if it is insufficient, or request the judge to direct a verdict in his favor because of its insufficiency. *Baxter v. Irvin*, 277.

2. *Railroads—Rights of Way—Highways—Pleadings—Demurrer.*—The complaint in an action alleging that a railroad company had laid out and used a public road over the plaintiff's lands under the care and in the charge of certain township road commissioners, causing the latter to go upon his lands to the side of the railroad right of way, to plaintiff's damage, without allegation that the railroad company had entered upon his lands or committed any act causing him injury, or any relationship which would cause liability to the railroad for the acts of the commissioners, does not state facts sufficient to constitute a cause of action as against the railroad company, and is demurrable. *Hicks v. R. R.*, 393.

DESCENT AND DISTRIBUTION.

1. *Deeds and Conveyances—Intent—Interpretation—Husband and Wife —Tenants in Common—Descent and Distribution.*—A deed of lands to husband and wife for a consideration the half of which was furnished by the latter from a sale of her own lands, made to the husband and his heirs, and to the wife and her heirs, and to their heirs jointly, with the habendum expressed to the same effect, conveys to them an estate in common and not of entireties, the wife's interest descendible, at her death, to her heirs at law, subject to the curtesy of her surviving husband. *Highsmith v. Page*, 226.

2. *Descent and Distribution — Next of Kin — Mother — Interpretation of Statutes.*—When an intestate leaves no children, but a mother and sisters, his mother is his next of kin and entitled to share equally in his personalty with his widow. Revisal, sec. 133 (3). *Wells v. Wells*, 330.

EASEMENTS. See Statute of Frauds; Railroads; Navigable Streams.

1. *Public Highways — Prescriptive Rights — Easements — Inconsistent Pleadings.*—A claim of a prescriptive right to the use of an old pathway across the respondents' land, or of an easement therein, is inconsistent with the character of proceedings by petition to get a covenient pathway and outlet to a public road across the respondents' lands. Revisal, sec. 2686. *Barber v. Griffin*, 348.

2. *Highways—Cartways — Condemnation — Eminent Domain.*—Cartways are *quasi*-public roads in which the public have a direct, personal interest, and condemnation of private property for such a use is sustained as a valid exercise of the power of eminent domain. *Ibid.*

3. *Condemnation—Easements—Cartways—Situation of Lands—Proposed Buildings—Evidence.*—In proceedings to lay out a cartway over the lands of another whereon there is a right of way of a railroad company, it is competent for the petitioner to show at the trial the exact situation of his lands, the uses to which they were susceptible, and hence, in this case, evidence was properly admitted which tended to show that the petitioner intended to erect a dwelling on his lands east of the railroad, from whence there was no proper outlet; its location; that the timber to be used for the purpose was to be cut from the west side of the railroad, and its location, and the distance between the timber and the proposed dwelling by the crossing in use at the time of filing the petition, and by the proposed new cartway. *Gorham v. R. R.*, 504.

4. *Condemnation — Easements—Cartways—Board of Supervisors—Order —Evidence—Corroboration—Harmless Error.*—At the trial in the Superior Court, on appeal from an order of the board of supervisors allowing a cartway to be established over the lands of another, the order of the board is properly admitted in evidence to show the jury the location of the cartway and in corroboration of the supervisors who have testified; and *Held*, further, the fact that the order had been made would necessarily imply that the cartway located was necessary, just, and reasonable, and its introduction would, in any event, be without prejudice to the respondent. *Ibid.*

5. *Condemnation—Easements — Cartways — Former Requests—Different Locations—Evidence.*—Evidence that a petitioner for a cartway over the lands of another had theretofore requested a cartway at a different location to the one laid off, which was not objected to by the respondent, is incompetent, as it would not be an aid to the jury in determining the matter and would not be a bar to the proceedings. *Ibid.*

6. *Condemnation—Easements—Cartways—Permissive Ways—Evidence— Interpretation of Statutes.*—Under the language and spirit of Revisal, sec. 2686, a petitioner for a cartway over the lands of another becomes entitled thereto by showing that there is no public road leading to his lands; that the proposed cartway is necessary, reasonable, and just; and the existence of a permissive way is evidence for the consideration of the jury, but not fatal to his demand. *Ford v. Manning*, 152 N. C., 151, cited and approved. *Ibid.*

7. *Condemnation—Easements—Cartways—Railroad Crossings—Danger— Questions for Jury.*—The mere fact of danger of crossing a railroad

EASEMENTS—*Continued.*

right of way will not bar the rights of a petitioner for a cartway across one, the danger of crossing at the proposed location being for the consideration of the jury. *Ibid.*

EJECTMENT.

Ejectment—Betterments.—In an action in ejectment, the defendant claiming for improvements put upon the land is entitled to have the betterments, placed by him in good faith and without notice, assessed, not to exceed the amount actually expended by him, with interest thereon, and not to exceed the increased value of the premises at the time of the assessment which has been caused thereby; and if the betterments exceed in value the rental and damages for waste, the rents and profits accruing prior to the three years may be assessed so far as to balance the improvements, but no further. Revisal, secs. 653, 654, 655, 656, 657, 658. *Reid v. Exum*, 84 N. C., 430, cited and distinguished. *Whitfield v. Boyd*, 451.

ELECTRICITY. See Master and Servant; Eminent Domain.

EMINENT DOMAIN. See Easements.

Eminent Domain — Electric Companies — Condemnation — Public Uses—Interpretation of Statutes.—A corporation engaged in manufacturing or producing electricity for the purpose of distribution and sale to its users, and for the operation of railways and other purposes, may exercise the power of eminent domain and condemn lands for the erection of poles, the establishment of offices, and other appropriate purposes, under authority of the Revisal, secs. 1571-1577, upon making a just compensation therefor; and such is not a taking of private property for a private use. *Wissler v. Power Co.*, 465.

ENTRY. See State's Land.

ESTATES.

1. *Estates.*—When it appears that the life tenant in lands has failed or refused to pay the taxes and assessments levied upon the lands, it is not required that the remainderman wait until there is a sale and accumulation of costs and expenses before he exercises the right of paying the taxes and assessments, it being otherwise inevitable that the lands will be sold, and, under such circumstances, he may intervene and pay the taxes before the land is exposed to sale. *Ibid.*

2. *Estates of Inheritance—Legitimacy—Evidence of Marriage—Reputation.*—In an action brought by the children of the deceased against those in possession of lands by conveyances from his brothers and sisters, alleged to be his heirs at law, involving title to the *locus in quo* by descent, it was contended that plaintiffs were illegitimate and not entitled to the inheritance: *Held*, evidence of the general reputation of the marriage of the ancestor, that he and the mother of the plaintiffs recognized each other as man and wife and so lived together, was competent. *Forbes v. Burgess*, 131.

3. *Estates of Inheritance—Legitimacy—Evidence of Marriage—Indictment.*—A bill of indictment against the ancestor and the mother of the plaintiffs for illegal cohabitation is not admissible as evi-

ESTATES—*Continued.*

dence for defendant upon the question of the legitimacy of the children in their action as heirs at law, to recover lands descended, unless the whole record is introduced, so as to show the final disposition of the case; but, if error, it was harmless, as it was shown in this case that the indictment had been dismissed. *Ibid.*

4. *Estates of Inheritance—Legitimacy—Second Marriage—Living Husband—Presumptions—Burden of Proof—Instructions.*—In an action involving the title to lands descended, the rights of the plaintiffs were made to depend upon their legitimacy, upon the question as to whether there had been a lawful ceremony of marriage between the ancestor and their mother, upon which the evidence was conflicting; the judge charged, in substance, that if the jury found as a fact from the evidence that the marriage was lawful, the burden shifted to the defendants to prove by the preponderance of the evidence that the first husband was living at the time of her second marriage, and that she had not been divorced; and, further, that if the second marriage had been established by competent proof, it raised the presumption that the prior marriage had been dissolved by death or divorce, but this presumption would not apply in favor of a second marriage where the evidence thereof was only as to cohabitation and reputation: *Held*, these two phases of the charge were not in conflict with each other, and that the second one was explanatory of the first; and, if there were error in the first, it was cured by the second one. *Ibid.*

5. *Deeds and Conveyances—Reservation of Life Estate—Consideration of Support—Defeasance.*—A deed to lands in consideration of support by the grantees of the grantor and his wife, with a clause of defeasance to compel performance, in which "a life estate is hereby reserved by" the grantors, conveys only a remainder to the grantees upon their performance of the consideration. *Thomas v. Bunch*, 175.

6. *Wills—Devise—Estates in Remainder—Rule in Shelley's Case—Heirs of the Body—Interpretation.*—For a devise of lands to come within the meaning of the rule in *Shelley's case*, the subsequent estate must be limited to the heirs *qua* heirs of the first taker, or to the heirs or heirs of the body as an entire class or denomination of persons, and not merely to individuals embraced within that class. *Puckett v. Morgan*, 344.

7. *Estates in Remainder—Heirs of the Body—Descriptio Personarum—Interpretation.*—The rule in *Shelley's case* applies only when the words "heirs" or "heirs of the body" are used in their technical sense, and not when such terms are used as *descriptio personarum*. *Ibid.*

8. *Same.*—The rule in *Shelley's case* will not apply to a devise of lands when, from the instrument, the intention of the devisor can reasonably and legitimately be construed as giving a life estate to the first taker with remainder over to designated persons of a certain class of heirs, as in this case to the "bodily heirs of" M. *Ibid.*

9. *Same—Contingent Remainders.*—A devise to M. of certain described lands, "during her life, then to her bodily heirs, if any; but if she

ESTATES—*Continued.*

have none, back to her brothers and sisters": *Held*, M. took only a life estate in the lands, with remainder to her children living at the time of her death, the intention of the testator in the use of the term "bodily heirs," in connection with the other words employed in the devise, being descriptive of a certain class of heirs, upon failure of whom the remainder would go to the brothers and sisters of M. *Ibid.*

EVIDENCE. See Navigable Waters; Estoppel.

1. *State's Lands—Grants—Evidence of Authenticity.*—A countersignature appearing to be that of the Secretary of State, on a grant for lands, as follows, "Secretary's office, February 3, 1869. H. J. Menninger, Secretary of State," by the use of the words which show not only that the grant was signed by the "Secretary of State," but in his office, gives evidence of the intent to authenticate, and, without more, will be held valid. *Richards v. Lumber Co.*, 54.

2. *Grants—Evidence — Certified Copies — Registered Copies — Questions for Jury.*—Certified copies by the Secretary of State of abstract of grants filed in his office may be used in evidence, and "shall be as good evidence in any court as the original" (Revisal, 1596); but this does not make them better evidence than the registration of the original (Revisal, sec. 1596); and where there is a material discrepancy, it is for the jury to find as a fact which one is correct. *Ibid.*

3. *Principal and Agent—Evidence—Ratification.*—When there is evidence of agency and of a ratification of the acts of an alleged agent, evidence is competent for the purpose of binding the principal by his agent's acts, which tends to show what occurred between plaintiff and the alleged agent relating to an acceptance by the latter of goods sold and delivered to the defendant, which the defendant claimed did not come up to representation made by the plaintiff to him. *Fisher v. Lumber Co.*, 61.

4. *Fraudulent Intent—Evidence—Contemporaneous Transaction.*—It was competent, in this case, to show a contemporaneous fraudulent conveyance by the defendant to a third party, as bearing upon the intent of the defendant to defraud his creditors in executing the conveyances which are sought to be set aside by them in this action. *Eddleman v. Lentz*, 65.

5. *Deeds and Conveyances—Trespass—Evidence—Chain of Title—Same Description—Instructions—Harmless Error.*—When the plaintiff in an action of trespass has shown no actual occupation of the lands by himself or those under whom he claims, it is immaterial and harmless for the court to confine him to lands contained in the description of his original deed in his chain of title, where the description in all of the mesne conveyances is the same. *Lamb v. Copeland*, 136.

6. *Damages to Crop—Evidence Speculative.*—A user of fertilizer of a deficient quality, furnished by a manufacturer, cannot recover damages for an alleged inferiority of his crop on that account; and evidence that where other fertilizers had been used the crop was

EVIDENCE—*Continued.*

better, is inadmissible, as it involves soil and weather conditions, cultivation, and other matters of a speculative character. *Fertilizer Works v. McLawhorn*, 274.

7. *Contracts, Written — Fertilizer — Representations — Parol Evidence.* Evidence of a parol agreement that a purchaser of fertilizer was to pay nothing for it if the vendor's representations were not found to be true upon analysis of the Department of Agriculture, is inadmissible to contradict the written contract of sale subsequently and unconditionally executed. *Ibid.*

8. *Master and Servant—Cities and Towns—Electricity—Defective Poles —Inspection—Negligence—Evidence.*—When it appears that an employee in the discharge of his duties to an electrical company has been injured by a pole of the company falling with him, which outwardly and from appearance was sound at the time, but was so decayed below the level of the ground that it would easily crumble between the fingers, and that it broke off beneath the ground, and had only been in use a small fraction of the time they usually lasted for the purpose, it is sufficient evidence that the employer has not exercised that degree of care in the original selection of the poles which the law requires. *Terrell v. Washington*, 281.

9. *Railroads—Live Stock—Unreasonable Delay—Negligence—Evidence.* In action for damages to cattle shipped under a live-stock bill of lading, alleged to have been caused by defendant railroad while in course of transportation, evidence is competent which tends to show that another shipment was made over the same road to the same destination and over practically the same route and distance, in a shorter period of time, with delivery of cattle in good condition, and is sufficient to be submitted to the jury under the issue as to defendant's negligence. *Southeralnd v. R. R.*, 327.

10. *Same—Principal and Agent—Evidence.*—Evidence tending to show that a certain person customarily acting for a railroad company in delivering car-load shipments of cattle at a stock yard is sufficient upon the agency of that person to receive notice there of a damaged car-load shipment and to permit recovery under a live-stock bill of lading requiring that notice of the damages be given before the removal of the cattle. *Ibid.*

11. *Railroads—Live Stock — Transportation — Negligence—Evidence.*—In this case, a charge *Held* correct, that the time a certain car of cattle was loaded and the time delivered at destination was some evidence of negligence, under the surrounding circumstances, damages to cattle in transportation being the subject of the action. *Ibid.*

12. *Public Highways—Cartways — Old Cartways—Evidence.*—In proceedings under a petition for a cartway over respondents' lands there was evidence tending to show that the respondents had closed up an old pathway across their lands to the petitioner's great inconvenience, etc.: *Held*, evidence as to the use of the old pathway, its convenience and directness, was competent as tending to prove its convenience to the public, permitting the jurors, should they see fit, to lay out the new pathway over the route of the old one. *Barber v. Griffin*, 348.

EVIDENCE—*Continued.*

13. *Public Highways— Cartways— Proceedings to Establish— Evidence — Elements for Consideration.*—In proceedings under a petition for a cartway over respondents' lands, a request for instructions is properly refused, that if petitioners by acting together can establish a cartway over their own lands to the public road, they are not entitled to the cartway over the respondent's lands, for it ignores the question of distance, convenience, and reasonableness. *Ibid.*

14. *Deeds and Conveyances—Fraud and Deceit—False Representations— Evidence.*—In order to recover damages for fraud in the procurement of a sale of lands, there must be false representations as an inducement of purchase, and shown to have been the reason for making the contract, and relied on. *Tarault v. Seip*, 363.

15. *Equity—Mutual Mistake—Limitation of Actions—Evidence.*—By mistake of the draftsman a deed to lands failed to carry out the mutual intent of the parties in excluding certain dower lands from the description. After the widow had dowered upon the lands, the plaintiffs entered into possession and remained therein up to a few months before action brought, without anything especial to put them on guard that defendants claimed the land by reason of failure of the draftsman to use proper words to exclude the dower lands. The plaintiffs introduced evidence tending to show they had no notice of defendant's claim until the commencement of their action, and there was evidence *contra: Held*, the question as to the time the plaintiffs had knowledge of the mistake they seek to relieve against is not one of law, but of fact, to be determined upon by the jury. *Pelletier v. Cooperage Co.*, 403.

16. *Husband and Wife—Deeds of Separation—Property Rights—Evidence.* When, after an agreement of separation has been entered into between a husband and wife, a decree of divorce has been obtained, the agreement, if otherwise valid and in so far as it affects the property rights involved, should be upheld by the decree. *Archbell v. Archbell*, 408.

17. *Corporations — Pleadings — Corporate Existence — Evidence.*—While ordinarily the right to question the exercise of corporate powers is with the State, and cannot be raised collaterally, a denial in the answer of plaintiff's corporate existence requires proof on plaintiff's part that it is a corporation. *Daniels v. R. R.*, 418.

18. *Damages by Fire—Evidence—Harmless Error.*—In this action for damages alleged to have been caused by the negligent burning off of plaintiff's lands, the testimony objected to was competent as tending to show that the fire was caused by defendant's act; and while the answer of a witness to a question asked by plaintiff, that the smokestack to defendant's engine was "in bad condition," was objectionable, it is not held for reversible error, as elsewhere he was required to state what he meant by his use of the words "bad condition." *Ibid.*

19. *Principal and Agent—Parties—Motion to Dismiss—Evidence.*—A motion to dismiss an action on a note made to an agent, on the ground that the agent was not the real party in interest, made before the introduction of evidence, is properly overruled, as the plaintiff would

EVIDENCE—*Continued.*

be entitled to show that he had the authority from his principal to have had the note payable to himself as such, for the benefit of the principal; though in this case it should have been allowed if it had been made after the close of the evidence, as there was nothing to prove the required authority. Revisal, sec. 404. *Martin v. Mask*, 436.

20. *Principal and Agent—Bills and Notes—Production of Note—Evidence, Prima Facie—Issues—Interpretation of Statutes.*—In an action by an agent upon a note made payable to himself as such for the benefits of his principal, the doctrine that the production of the paper is *prima facie* evidence of ownership has no application, the question being whether he has shown title sufficient to enable him to sue as agent. Revisal, sec. 404. *Ibid.*

21. *Bills and Notes—Contracts—Parol Evidence—Consideration — Credits —Rentals.*—In an action to recover upon a note given for rent, the defendant offered evidence tending to show by parol a separate and distinct contract made at the signing of the note, whereby he was only obligated to pay it if he continued to reside in the house for the period of time covered by the note, which was uncertain, owing to his occupation or business; and that accordingly he surrendered the possession before the said period, which the plaintiff received and rented to other parties: *Held*, competent, (*a*) as a parol agreement, which was a part of the rental contract; (*b*) if believed, it proved a total want of consideration for the note sued on; (*c*) if it did not avoid the payment of the note, it was competent to show that the defendant was entitled to have the rents subsequently received by the plaintiff credited thereon. *Ibid.*

22. *Release—Damages—Evidence.*—When in defense to an action for damages it is shown that the plaintiff has accepted a voucher which by its terms purports to be a full release for a grossly inadequate consideration, that the injury was inflicted by a blow on the head resulting from defendant's negligence from which partial paralysis followed, and under these conditions, known to a great extent by the defendant, the voucher was obtained, it is sufficient to set aside the voucher as a bar to the plaintiff's recovery. *Ipock v. R. R.*, 446.

23. *Appeal and Error — Incompetent Evidence — Instructions — Harmless Error.*—Instructions by the court in this case to the jury, that they must not consider certain incompetent evidence in an answer of a witness, on the question of the measure of damages for plaintiff's mental suffering alleged to have been caused by the negligence of defendant telegraph company in failing to transmit a message, *Held*, sufficient, and no error is found therein. *Alexander v. Tel. Co.*, 473.

24. *Instructions — Public Square — Abandonment — Adverse Possession— Evidence.*—When a county sues for the possession of lands used by it as a public square, a requested instruction by defendant is properly denied, in the absence of evidence of abandonment, that if the proper authorities of a public square willfully abandon the use of any part thereof which is claimed by defendant, and establish a different line, cutting off such abandoned part for twenty-one years or more, it would ripen into a title for defendant. *Gates v. Hill*, 584.

EVIDENCE—*Continued.*

25. *Deeds and Conveyances—Trusts and Trustees—Evidence.*—The quantum of proof required to establish a trust under the deed in this case, *Held*, sufficient under *Harding v. Long*, 103 N. C., 1, and that line of cases. *Makely v. Montgomery*, 589.

26. *Malicious Burning—Other Fires—Evidence.*—Evidence that after the defendants were imprisoned for unlawfully burning a house, other fires occurred in the town, is incompetent; and it would still have been incompetent had the evidence tended to prove the other fires incendiary, as it would have introduced other and different issues having no tendency to prove the guilt or innocence of those on trial. *S. v. Millican*, 617.

27. *Same — Ill-will — Motive— Contentions—Instructions.*— When there is evidence that the defendants had ill-will towards the people of a town wherein they are accused of unlawfully setting fire to a house, with evidence tending to prove the fact of their guilt, it is competent for the trial judge to state to the jury that the State contended that the defendants had manifested ill-will towards the people of the town, and that this conduct, if found to exist, could be considered by them; and in this case an instruction was not to defendant's prejudice as charging that the jury could consider evidence of other fires occurring there. *Ibid.*

28. *Malicious Burning—Incarceration—Evidence.*—The defendants being tried for unlawfully burning a house, evidence held incompetent as to the length of time they had been in jail, it not being contended by them that they were in jail at the time the offense was charged against them. *Ibid.*

29. *Malicious Burning—Former Trial—Inconsistent Charges—Evidence.*—When it is competent to prove that the State took a different position, at a former trial of the defendants for unlawfully burning a house, from that taken at the trial appealed from, it may not be proven by a witness who says he was not present when the case had formerly been tried. *Ibid.*

30. *Malicious Burning — Ill-will — Motive—Evidence—Harmless Error.*— Answers of the prisoner, on his trial for unlawfully burning a house, given in response to questions asked by the State for purposes of impeachment, to the effect that he had been wrongfully accused of taking pistols from houses when he was helping to save property, etc.: *Held*, in this case, to be unprejudicial, and necessary in contradiction of the testimony of a State's witness that the prisoner said, on the occasion referred to, that he wanted to see another fire in that town, as long as "the white people were so smart." *Ibid.*

EXCEPTIONS, GROUPED. See Appeal and Error.

EXECUTIONS. See Taxation.

1. *Executions—Irregularities—Motion to Quash—Practice.*—Usually, the proper method of obtaining redress for irregularities affecting the validity of an execution is to recall it upon notice and motion in the court from which it was issued. *Williams v. Dunn*, 399.

2. *Same—Parties—Purchasers.*—An execution and sale thereunder may be quashed on motion properly made, as against a party of record

EXECUTIONS—*Continued.*

or purchaser with full notice, for irregularities affecting its validity, but not as against an innocent purchaser who was not a party. *Ibid.*

3. *Executions—Irregularities—Motions to Quash—Courts—Jurisdiction—Clerks of Court.*—Before sale under execution, proceedings may be instituted before the clerk to recall the execution upon grounds affecting its validity, but after return made, and especially when there may be certain equitable claims for adjustment, *semble*, the practice is that the motion should be made before the judge in term. *Ibid.*

4. *Same—Interpretation of Statutes.*—The clerk is but a part of our Superior Court, and when a motion to quash an execution and sale under judgment for irregularities affecting the validity of the sale is made before the clerk, and regularly brought before the judge in term, all parties having been duly notified, the judge should retain jurisdiction, and not dismiss the proceedings for want of authority in the clerk to set aside the execution theretofore issued. *Semble*, Revisal, sec. 614, would apply. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

1. *Executors and Administrators—Sale to Make Assets—Lost Papers—Entries of Records—Regularity of Proceedings—Evidence—Judgment—Collateral Attack.*—When the original papers in proceedings by an administrator to sell lands of the deceased to pay debts have been lost, the regularity of the proceedings may be established by entries thereof on the minute docket of the court, and when therefrom it is made to appear that the parties were properly before the court, minors being represented by guardians *ad litem*, and in all other respects the proceedings were conducted according to the due course and practice of the courts, the judgment entered cannot be collaterally attacked. *Phillips v. Denton*, 299.

2. *Executors and Administrators—Sale to Make Assets—Lost Papers—Entries of Record—Regularity of Proceedings—Evidence Sufficient.* The validity of a deed made by an administrator in proceedings for the sale of lands to make assets to pay debts being in controversy, and it being shown that the original papers had been lost, the entries on the minute docket of the court *Held* sufficient to sustain the regularity of the proceedings, which show the appointment of the administrator, who gave a satisfactory bond, and qualified; his account of sale of the land, which was received and ordered recorded; his charging himself with the proceeds of sale of the land in his final account; that service was admitted of the petition to sell the lands, the prayer was granted and decree filed, and that the report of sale was returned and confirmed. *Ibid.*

3. *Executors and Administrators—Sale to Make Assets—Deeds and Conveyances—Recitation of Powers.*—Where an administrator acts under an order to sell land to make assets to pay debts and in accordance therewith sells the lands and executes his deed to the purchaser, it is not necessary that he recite the order in the execution of his deed for the deed to be valid, for by implication power is conferred by the order. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

4. *Superior Courts — Clerks — Probate—Executors and Administrators—Removal—Legal Discretion—Appeal and Error—Practice.*—In the exercise of their probate powers, and the legal discretion conferred upon them, clerks of the Superior Court may remove for good cause shown, upon petition filed and notice duly shown, an executor or administrator, subject to review by the Superior Court, and by the Supreme Court on appeal. *In re Battle*, 388.

5. *Superior Courts—Clerks—Executors and Administrators—Compensation—Contracts—Removal of Administrator—Appeal and Error.*—It appearing by admission of record in the Supreme Court on appeal from an order removing an administrator for cause, that he had procured from the wife of the deceased, an illiterate woman, and her minor children, the next of kin, a contract by which he and another, who had aided him, were to receive 25 per cent more than the legal charges allowed to administrators: *Held*, the order removing him was properly made. *Ibid.*

6. *Clerks of Court—Probate Powers—Executors and Administrators—Orders—Collateral Attack—Practice.*—When the clerk of the Superior Court, in the exercise of his probate powers conferred by statute, has general jurisdiction of the subject-matter of the inquiry, as indicated in Revisal, sec. 16, and, on application made, has entered a decree appointing an executor or administrator, and letters are accordingly issued, such decree is controlling and may not be successfully attacked or in any way questioned except by direct proceedings instituted for the purpose. *Batchelor v. Overton*, 396.

7. *Same—Nonresidents—Bonds — Irregularities.* — When a foreign executor has been in all other respects regularly appointed and qualified by the clerk, his failure to give bond specified in Revisal, secs. 5 (5), 28, and 319, is only an irregularity, and cannot be collaterally attacked in an action brought by him to recover upon a note due the estate and to foreclose a mortgage securing it. *Ibid.*

8. *Clerks of Courts — Executors and Administrators — Nonresidents — —Qualifications—Presumptions.*—When it appears that an executor was regularly qualified by the clerk of the court having jurisdiction, it is a fair inference that at that time he was a resident of this State, though it is made to appear that he was nonresident at the time of the commencement of his action to collect a debt alleged to be due the estate; and *semble*, the prohibitive terms of Revisal, secs. 28 and 319, respecting the giving of a bond by nonresident executors, does not apply to the facts of this case. *Ibid.*

9. *Clerks of Courts—Executors and Administrators—Nonresidents—Bills and Notes—Mortgages—Defenses.*—The defendant having bought certain property from the plaintiff, as executor, gave his note for a part of the purchase price, and secured it by a mortgage on the property. In an action by the executor upon the note and mortgage, *Held*, the defense is not open that the executor, though duly qualified, was a nonresident, or that, not having given the bond as required by the statute, he could not maintain an action in our courts, neither the title nor possession of the purchaser having been disturbed or in any way questioned. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

10. *Public Administrator — Period of Appointment—Unexpired Term—Interpretation of Statutes.*—The term of a public administrator is fixed by statute as eight years, without provision when that of any appointee, as such, is to begin or terminate, or power of appointment for an unexpired term. Hence the appointment of a public administrator is for eight years, and is not affected by a mistake of the clerk in stating in the appointment that it was for the unexpired term of his predecessor, or fixing the term of the new appointee for a less period. *Boynton v. Heartt*, 488.

11. *Same—Removal—Application—Parties Entitled.*—One who is a proper and competent person to act as public administrator, and has qualified, as such, on the estate of deceased, should not necessarily be removed for the reason that his term of office expired before his qualification, and this should not be done except at the instance of one having a prior right to administer. *Ibid.*

12. *Executors and Administrators—Supervision—Power of Courts—Distributee.*—The right of administration is not now as important as it was before our statute of distributions was enacted, for he now acts under the direction of the court, whose duty is to see that a competent person is appointed; and the appointee cannot, by any act of his, affect the right of those entitled to share in the distribution of the estate. *Ibid.*

13. *Public Administrator — Removal—Application — Nonresidents—Interpretation of Statutes.*—One who has qualified as public administrator of a decedent's estate here is not subject to be removed upon the application of a nonresident guardian of nonresident minors, heirs at law, they having no right of appointment in consequence of not having the right to administer upon the estate in North Carolina. Revisal, sec. 5, subsec. 2. *Wallis v. Wallis*, 60 N. C., 78, and that line of cases relating to the appointing powers of minors, etc., cited, distinguished, and discussed by ALLEN, J. *Ibid.*

EXPERTS. See Witnesses.

FRAUD AND MISTAKE.

1. *Contracts — Breach — Defenses—Legal Excuse—Fraud—Evidence.*—In consideration of an agreement of plaintiff to give defendant's daughter a course of musical instruction by mail, the defendant gave his note in a certain sum in part payment and after his daughter had received the instruction for a part of the time, resisted its payment upon the ground that as to another payment he thought he was giving a note, while in point of fact it turned out to be a check: *Held*, the defense was untenable, there being no evidence of fraud in the contract, which, on its part, the plaintiff stood ready to perform. *Conservatory v. Dickenson*, 207.

2. *Deeds and Conveyances—Reformation—Equity—Fraud or Mistake—Proof Required—Questions for Jury.*—For equity to correct a deed for mistake, it must be established by clear, strong, and convincing evidence, and it is for the jury to determine whether the proof meets the required standard according to the instructions from the court. *Highsmith v. Page*, 226.

FRAUD AND MISTAKE—*Continued.*

3. *Vendor and Vendee—Deceit—False Warranty—Evidence—Damages—Questions for Jury.*—In an action for damages for personal injuries caused by defendant's deceit and false warranty in the sale of a horse, there was evidence tending to show that the defendant falsely represented that the horse was kind and gentle, and that plaintiff, relying thereon, bought the horse, drove him twenty-five miles to his home, and a few days thereafter, while driving him to a buggy, the horse began to kick and back and threw plaintiff out of the buggy and broke his leg: *Held*, a question for the jury as to whether defendant intended his statement as to the character of the horse to be a warranty, and whether the plaintiff, relying thereon, was thereby induced to buy, and whether, under the evidence, there was deceit and a breach of warranty on defendant's part. *Hodges v. Smith*, 256.

4. *Deeds and Conveyances—Fraud and Deceit—False Representations—Evidence.*—In order to recover damages for fraud in the procurement of a sale of lands, there must be false representations as an inducement of purchase, and shown to have been the reason for making the contract, and relied on. *Tarault v. Seip*, 363.

5. *Same.*—Actions for fraud and deceit rest in the intention with which the representation is made, and not upon the representations alone. *Ibid.*

6. *Same—Scienter—Burden of Proof.*—When damages are sought in an action by the vendee of lands for fraud and deceit in the procurement of the purchase, claiming that certain lands were represented as being included in the description in the deed, when in point of fact they were not, the burden of proof is on the vendee, relying upon the fraud to prove the *scienter* of the vendor; and the principle holding the vendor liable for his statement, when the representation is a part of the warranty, whether it be true or not, has no application. *Ibid.*

7. *Same—Nonsuit.*—In the contemplation of purchase of a large tract of land the vendee sent its agents for the purpose of examination, who were informed by the agent of the vendor that he had not been over the lands and was unacquainted with its boundaries. The vendor's agent was sick and only showed certain lands in cultivation, and sent another person with the vendee's agents to show them the boundaries, who, at a certain place, said, "This ditch marks the line," whereas the ditch only marked a part of the boundary and excluded the lands in controversy, which belonged to an adjoining owner. The vendee's agents were given full opportunity to examine the lands, and could have ascertained that the lands in controversy were not included in the boundaries subsequently given in the deed: *Held*, no evidence in an action for damages for fraud and deceit, and a motion for nonsuit should be granted. *Ibid.*

8. *Equity—Mutual Mistake—Knowledge—Limitation of Actions.*—The statute of limitations begins to run from the discovery of a mistake of the draftsman in the wording of his deed from the time the mistake is discovered, or should have been discovered in the exercise of ordinary care. Revisal, sec. 395 (9). *Pelletier v. Cooperage Co.*, 403.

FRAUD. See Evidence.

HEALTH.

1. *Health—County Superintendent—Vacancy—Appointment—Interpretation of Statute.*—It is the intent of section 9, chapter 62 Public Laws of 1911, that the office of the county superintendent of health should not remain vacant, and when the county board of health has appointed such an officer, who refuses to qualify, and the office thus remains vacant for two calendar months, the Secretary of the State Board of Health may make a valid appointment of one to fill the vacancy. *McCullers v. Commissioners*, 75.

2. *Health — County Superintendent—Vacancy—Appoinment—Compensation—Interpretation of Statutes—Mandamus.*—The right of one appointed by the Secretary of the State Board of Health to fill a vacancy in the office of the county superintendent of health for two months is not affected by the question of whether the compensation has been fixed by the secretary "in proportion to the salaries paid by other counties for the same service" etc., for it is required that the board of county commissioners approve the expenditure and pass upon its reasonableness, and upon their failure to do so mandamus will lie to compel them in good faith to pass upon it and in the exercise of a sound judgment say whether or not the compensation for the services as fixed are warranted by the statute. Public Laws 1911, ch. 62, sec. 9. *Ibid.*

3. *Statutes—Cities and Towns—Health Ordinances—Extraterritorial Effect — Constitutional Law.*—A legislative act is constitutional and valid which confers the exercise of police powers, for sanitary purposes, etc., upon an incorporated city and town, to be operative by ordinances within the corporate limits and to a distance of one mile in all directions beyond them. *S. v. Rice*, 635.

4. *Same—Hogs or Pigs.*—When by legislative enactment it is provided that all ordinances of a cetain city passed "in the exercise of police powers given to it for sanitary purposes, etc., shall apply to territory outside of the city limits within one mile of the same in all directions," the city may pass a valid ordinance making it an offense for "any person, firm, or corporation to keep any hogs or pigs within the corporate limits," or within "one-fourth of a mile" beyond them. *Ibid.*

5. *Cities and Towns—Health Ordinances—Extraterritorial Effect—Commission Government.*—The extraterritorial effect of an ordinance of a city relative to the health of its citizens depends upon the legislative authority conferred, and the validity of such an ordinance is not affected by the fact that the city is under a commission form of government, with the initiative, referendum, and recall." *Ibid.*

6. *Cities and Towns—Health Ordinances—Extraterritorial Effect—Legislature—Municipal Discretion—Courts.*—From the operation of an ordinance prohibiting the keeping of hogs and pigs within the corporate limits of an incorporated town and beyond to the extent of one-fourth of a mile in all directions, passed under a legislative act conferring upon the town the authority to make sanitary ordinances applicable to the extent of one mile beyond its limits, an appeal

HEALTH—*Continued.*

should be made either to the proper authorities of the city or to the Legislature, for upon its reasonableness or unreasonableness when so authorized by the Legislature the courts are without authority to act. *Ibid.*

7. *Cities and Towns—Health Ordinances—Hogs or Pigs—Indictment.* When a valid ordinance of a city forbids "keeping any hogs or pigs within the corporate limits or within one-fourth of a mile of said limits," a warrant following the language of the ordinance is sufficient; and the offense is indictable without reference to the number of hogs or pigs, the condition or size of the pens or inclosures where they are kept. The advantages or benefits of sanitary laws discussed by CLARK, C. J. *Ibid.*

HOMESTEAD. See Estates.

Ejectment—Married Women—Homestead.—When a married women has brought her action in the nature of ejectment and claims rents and damages for its wrongful detention, and the defendant holding under color of title believed by him to be good has made permanent improvements, the statutes regulating the adjustments to be made under such circumstances apply (Revisal, 653, and other sections); and the plaintiff has no claim of homestead in preference to the defendant's lien. Revisal, sec. 408, permitting a *feme covert* to sue without joining her husband; chapter 78, Laws of 1899, repealing the exemption of married women from the statute of limitations, and the effect of the Constitution of 1868, discussed in its application to this subject by CLARK, C. J. *Whitfield v. Boyd*, 451.

HOMICIDE.

1. *Murder—Threats—Remarks—Evidence.*—Evidence of threats by the prisoner being tried for murder, made three days before the homicide, and of the remarks that brought them forth, which are connected with the threats, are competent. *S. v. Wilson*, 599.

2. *Murder—Character Witnesses—Particular Traits—Cross-examination—Rights of Witness.*—It is competent on cross-examination of a witness for a female defendant being tried for murder, who has testified to her good character, to ask the witness as to the general reputation of the prisoner in regard to a particular trait of character, and the witness, himself, may say in what respect the character of the prisoner is good or bad, so as to give the truth of the matter in justice to himself. *Ibid.*

3. *Murder—Character Witnesses—General Character—Chastity.*—It is competent for a character witness to be asked on cross-examination the general character for chastity of a female prisoner on trial for murder, but not as to specific acts of unchastity. *Ibid.*

4. *Same—Harmless Error.*—Questions asked a character witness for the female prisoner on trial for murder as to her general character for chastity, which appears to have been unprejudicial, will not be held for reversible error. *Ibid.*

5. *Murder—Evidence—Testimony Taken by Magistrate—Identification—Competency.*—Testimony of the deceased taken down by a magistrate

HOMICIDE—*Continued.*

before his death when the prisoner was being tried only for an assault, signed by the deceased and after his death handed by this magistrate to another conducting the preliminary trial for murder, with direction that he hand it to the clerk of the Superior Court, is competent evidence upon the trial for murder in the Superior Court when identified by the magistrate who transcribed it, and is a sufficient compliance with Revisal, sec. 3205. *Ibid.*

6. *Murder — Circumstantial Evidence — Husband's Previous Conduct.* — Where there is circumstantial evidence tending to connect the defendant with the commission of the crime and to show some preparation on his part to murder his wife, it is competent, as tending to show identification of the husband as the murderer and of his malice towards his wife, that they did not get on well together, and had quarreled shortly before the homicide was committed, when he drove her from his home, threatened to cut her with his knife and attempted to draw his pistol on her. *S. v. Wilkins*, 603.

7. *Murder—Motive—Evidence.*—Motive for committing a homicide is not required to be proved in order to convict, when it is not of the essence of the crime charged, but it may be shown to identify the prisoner as the perpetrator of the crime, and to establish malice, deliberation, and premeditation. *Ibid.*

8. *Murder—Evidence—Dying Declarations.*—Declarations of the deceased are admissible in evidence on trial of the prisoner charged with his murder, when from the circumstances and surroundings and from information given him by the attending physician it appeared that the deceased made the declarations in anticipation of his death. *S. v. Bagley*, 608.

9. *Same—Identification.*—With evidence tending to show that deceased died from the effect of being shot by the prisoner from behind, on the street of a town, about 9 o'clock at night, and that his attending physician informed him that his death was near, and that if he had any message he wanted to leave, it were best that he do so: *Held*, competent as dying declarations, made a short time before his death, that it was the prisoner who had shot him; that he saw his outline very distinctly as he ran down the street, and he was certain that the prisoner was the one. *Ibid.*

10. *Murder—Verdict—Findings—Practice—Interpretation of Statutes.*—It is required by our statute that a jury should render their verdict in a trial for murder so as to show, if murder was their verdict, whether it was in the first or second degree. Revisal, sec. 3271. *Ibid.*

11. *Same—Directions—Reconsideration—Recording.*—A verdict rendered in open court is not complete until accepted by the court for record, and it is the duty of the trial judge to prevent the recording of a doubtful or insufficient finding; and in this case it is *Held*, that his Honor, on seeing that the degree of murder was not expressed in the verdict, correctly told the jury to reconsider their finding, for the purpose of specifying the crime, and upon response being made by them of murder in the first degree, the verdict was properly recorded accordingly. *Ibid.*

HOMICIDE—*Continued.*

12. *Murder—Threats—Evidence—Practice.*—On a trial for homicide a question as to how many times the deceased had threatened to take the life of the prisoner was properly excluded, as in this case the prisoner had not brought the inquiry as to threats within the exception to the general rule at the time the question was asked, and the evidence was not again tendered by the prisoner after the facts and nature of the case had been sufficiently shown to have made evidence of threats competent; and, further, there was no evidence that the threats had been communicated to the prisoner. *S. v. Exum*, 138 N. C., 600, cited and applied. *S. v. Price*, 641.

13. *Murder—Leading Questions—Appeal and Error.*—Two brothers being tried for homicide, a question on direct examination of one of them, asking "if he went to his brother's house to make peace," was properly excluded as leading, if otherwise competent. *Ibid.*

14. *Murder — Evidence—Witnesses—Conflicting Satements—Impeachment.* On trial for a homicide there was evidence by a witness for the defendants tending to show that they had had a quarrel with the deceased a few days before his death. Evidence tending to show that the witness had made conflicting statements is held competent for the purpose of contradiction. *Ibid.*

15. *Murder—Evidence Sufficient—Unlawful Act—Joint Participaton.*—Evidence is sufficient for a conviction of murder in the second degree which tends to show that one of the defendants was seen with the other, both firing in rapid succession upon the deceased with a shotgun and pistols, as he was going from them in company with the State's witness, who left the deceased at a cotton patch, where he was soon thereafter found dead from a wound inflicted by a shotgun, it being some proof of a joint participation in the felonious assault, especially when considered with the other evidence in the case. *Ibid.*

16. *Same—Original Motive.*—When there is sufficient evidence to convict a defendant of murder, as an accomplice of the other defendant, in making a felonious assault upon the deceased, and in aiding and abetting in the unlawful act which resulted in death, his motive for going to the house of his codefendant immediately before committing the unlawful act is immaterial, as it does not tend to excuse the crime or even to mitigate it. *Ibid.*

17. *Murder—Instructions—Requests, Substantially Given.*—On a trial for murder it is not error for the trial judge to give in his own language the prisoner's requested instruction, to which he is entitled, if by the language used the force of the instruction is not weakened or its meaning materially altered. *Ibid.*

18. *Same—Charge, How Construed.*—Upon this trial for murder the judge charged the jury that the prisoners must have killed the deceased in their necessary self-defense: *Held*, no error, for in construing the charge as a whole, it appears that he substantially charged, in lanluage that could not well have been misunderstood, that if they had a reasonable apprehension, under the circumstances surrounding them, that they were about to suffer death or serious bodily harm, their act in slaying the deceased was excusable in law, and they should acquit the prisoner. *Ibid.*

HOMICIDE—*Continued.*

19. *Murder — Instructions — Manslaughter — Evidence—Requests for Instructions—Appeal and Error.*—When, upon a trial for murder, self-defense alone is relied on, and conviction of murder in the second degree is only sought, and there is no evidence of manslaughter, it is not error for the trial judge to fail to instruct the jury upon the principles of law applicable to a conviction for that offense, especially, as in this case, when the defendants have not offered prayers for special instruction thereon. *Ibid.*

HUSBAND AND WIFE.

1. *Husband and Wife—Contracts—Deed of Separation—Public Policy.*—A deed of separation executed by the husband and wife is not against our public policy, when properly made in accordance with our statutes. *Archbell v. Archbell*, 408.

2. *Same—Time of Separation.*—The validity of a deed of separation between husband and wife will not be upheld if it looks to a separation at some future time; and it is effective only when the separation has already taken place or is to immediately follow the execution of the deed. *Ibid.*

3. *Husband and Wife—Contracts—Deed of Separation—Reasonableness.* A deed of separation between husband and wife, to be valid, must be made for an adequate reason, not for mere mutual volition or caprice, and under circumstances of such character as to render it reasonably necessary to the health or happiness of the parties. *Ibid.*

4. *Same—Circumstances.*—An agreement of separation between husband and wife must be reasonable, just, and fair to the wife, having due regard to the condition and circumstances of the parties at the time it was made. *Ibid.*

5. *Husband and Wife—Contracts—Deed of Separation—Subsequent Relations.*—A deed of separation between husband and wife is rescinded by the acts of the parties in subsequently resuming their conjugal relations. *Ibid.*

6. *Husband and Wife—Contracts—Deed of Separation—Divorce, Action for.*—An agreement of separation betwen husband and wife does not affect the rights of the parties to sue for a divorce for cause occurring either before or after it has been made. *Ibid.*

7. *Same—Property Rights—Evidence.*—When, after an agreement of separation has been entered into between a husband and wife, a decree of divorce has been obtained, the agreement, if otherwise valid and in so far as it affects the property rights involved, should be upheld by the decree. *Ibid.*

8. *Husband and Wife—Marriage and Divorce—Property Rights—Maintenance.*—The right of a married woman to support and maintenance is primarily a property right, and it may be, and very usually is, made largely dependent on the amount of property owned by the husband. *Ibid.*

9. *Husband and Wife—Contracts—Deed of Separation—Requirements.* While it is not held to be against our public policy for a husband and wife to enter into a valid contract of separation, the identity of

HUSBAND AND WIFE—*Continued.*

person between husband and wife in reference to their right to contract with each other is not further relaxed or affected than is specified and required by our Constitution and statute. *Ibid.*

10. *Same—Interpretation of Statutes.*—Contracts between husband and wife upon consideration of their separation and living apart which purport to release or quitclaim dower, curtesy, and "all other rights which they might respectively acquire or may have acquired in the property of each other," are, by Revisal, sec. 2108, subjected to the requirements of Revisal, sec. 2107, that in addition to the ordinary form the probate officer shall certify that the contract is not unreasonable or injurious to the wife, which certificate shall be conclusive until successfully impeached for fraud; and where, as in this case, the requirements of the statute have not been met, the contract of separation is inoperative. *Ibid.*

INDICTMENT.

1. *Motions — Quash — In Arrest of Judgment—Indictment.*—Motions to quash and in arrest of judgment rest upon the same ground, the insufficiency of the warrant, and in determining them the affidavit and order of arrest must be considered together. *S. v. Hinton*, 625.

2. *Indictment—Rape—Assault with "Intent"—"Attempt."*—A charge in a bill of indictment of an assault with an "attempt" to commit rape necessarily includes the charge of "intent," and when the bill is otherwise sufficient, it is not defective because it omitted to expressly charge the intent. *S. v. Hewett*, 627.

IN FORMA PAUPERIS. See Appeal and Error.

INJUNCTION. See Navigable Waters.

1. *Injunction — Damages — Attending Hearings — Personal Expenses.* Damages recoverable against the sureties on an injunction bond are such only as may be sustained by the party enjoined by reason of the injunction (Revisal, sec. 817), which does not include the personal expenses in attending the hearing; and this applies to the fish commissioner's attendance at the hearing of an injunction against his removing private nets from certain waters, in which action a judgment of nonsuit was finally taken. *Midgett v. Vann*, 128.

2. *Injunction—Damages—Evidence—Recovery.*—When there is no evidence of any damages sustained by reason of an injunction, none are recoverable; and in this action there are no damages shown by reason of an injunction against the fish commissioner removing private nets from certain waters. *Ibid.*

3. *Injunction—Insolvency—Pleadings.*—An allegation of insolvency is not necessary for an injunction to restrain a continuous trespass over the lands of another in the operation of a tramroad for hauling timber and the cutting or destruction of timber thereon. *Lumber Co. v. Cedar Works*, 161.

4. *Injunction—Damages—Equity.*—Because a private corporation can respond in damages for its trespass in operating a tramroad over the lands of another and cutting or injuring timber thereon, it will not

INJUNCTION—*Continued.*

prevent the equitable relief of injunction against the continuance of the trespass. *Ibid.*

5. *Same—Trespass—Cutting Timber.*—The right to enjoin the continuance of a trespass upon the lands of another in operating a tramroad and cutting and injuring timber thereon is given because of the extraordinary character of the act sought to be enjoined, and does not depend upon the solvency of the tresspasser. *Ibid.*

INSURANCE.

1. *Insurance — Policy Contracts — Meaning Plain—Ambiguity—Interpretation.*—When the terms of a policy of insurance are expressed in language free from ambiguity or doubt as to their meaning, there is nothing left to construction and the policy will be enforced against the insured, in accordance with its plain meaning and intent, as it is written, unless fraud or public policy should intervene. *Penn v. Insurance Co.*, 29.

2. *Insurance — Accident — Policy Contracts — Independent and Direct Cause—"Proximate Cause"—Interpretation of Contracts.*—When under the express terms of a policy of insurance the insurer is only liable when an injury results from accidental means "directly and independently of all other causes," the rule of proximate cause, as applied to actions of negligence, will not apply, and the plaintiff, in his action on the policy, cannot recover, under the contract, if some other cause than the policy specifies is also and independently instrumental in producing the injury complained of. *Ibid.*

3. *Same—Instructions.*—In an action upon an accident insurance policy for the loss of an eye, the policy provided that the insurance should only be "against bodily injuries effected, directly and independently of all other causes, through external, accidental, and violent means." There was evidence tending to show the loss of the eye was through an accident to plaintiff in falling from a train, and, also, that the plaintiff, at the time of the alleged injury, had a cataract on that eye which would have resulted eventually in destroying it. A charge held correct, that if the jury find that the plaintiff fell from the car and was thereby injured, and that this injury was soon thereafter followed by loss of sight, and that the condition of the plaintiff's eye at that time was such that, independent of the injury, he would have ultimately lost his sight, which falling from the car merely hastened, he could not recover. *Ibid.*

4. *Insurance, Accident—Policy Contract—Limitation of Liability—Diseases—Interpretation of Policy.*—When an accident insurance contract provides for the payment of a loss for an injury received while riding on a railway passenger coach, and on the second page of the policy there is a provision limiting the liability of the insurer if the disability is due to an accident caused by or resulting from paralysis and certain other diseases, it is construed to mean that when an accident is the ultimate cause of paralysis, or of one of the other diseases named, which accrues at a more or less remote period of time after the injury has been received, the liability of the insurer is limited by the provision, but not when the paralysis, etc., is a direct inci-

INSURANCE—*Continued.*

dent and a part of the injury effected through the accident insured against. *Moore v. Insurance Co.*, 305.

5. *Insurance — Fraternal Order — "Legal Dependents" — Interpretation.* Brothers and sisters of the deceased, who died a bachelor, without having children, are not legal "dependents," nothing else appearing, so as to make them the beneficiaries under his membership certificate of a fraternal order providing that any benefits thereunder accrue to his "legal dependents." *Little v. Caldwell*, 351.

6. *Insurance — Fraternal Orders — "Legal Dependents"—Executors and Administrators—Creditors.*—When there are no "legal dependents" of the deceased, within the terms of his certificate of membership in a fraternal insurance order, the administrator is entitled to the proceeds of the policy for distribution among creditors of the deceased. *Ibid.*

INTERPLEADER.

Claim and Delivery—Title—Interpleader—Burden of Proof.—In claim and delivery, an interpleader claiming title to the property as the vendee of defendant has the burden of proving the title in his vendor. *Roberts v. Hudson*, 210.

INTERSTATE COMMERCE. See Constitutional Law.

INTOXICATING LIQUORS.

1. *Intoxicating Liquors—Sale to Minors—Pleadings—Allegations—Interpretation of Statutes.*—To sustain an action for exemplary damages under the provisions of the Revisal, sec. 3525, for the sale of intoxicating liquors to minors prohibited by the Revisal, sec. 3524, it is necessary that the person to whom the sale was made be "unmarried," as well as "under the age of 21 years," etc. *Spencer v. Fisher*, 264.

2. *Intoxicating Liquors — Possession — Evidence — Unlawful Sales.*—In this case, the possession of a certain quantity of intoxicating liquors by the defendant, as being *prima facie* evidence of unlawful sales by him, upheld. *S. v. Dowdy*, 145 N. C., 432; *S. v. McIntyre*, 139 N. C., 601 cited and applied. *S. v. Dunn*, 654.

ISSUES. See Appeal and Error; Principal and Agent.

1. *Pleadings—Issues Raised.*—An issue arises upon the pleadings when a material fact is alleged by one party and controverted by the other (Revisal, sec. 544) in special proceedings for partition of lands. Revisal, sec. 710. *Gregory v. Pinnix*, 147.

2. *Pleadings—Tenants in Common—Issues—Questions for Jury.*—When in proceedings for partition of lands, the allegation that the parties are tenants in common is denied, an issue of fact is raised which must be submitted to the determination of the jury. *Ibid.*

3. *Railroads—Fire Damages to Lands—Issues—Measure of Damages—Depreciation—Evidence.*—In an action for damages for the destruction of a house by fire alleged to have been caused by a spark from defendant's passing locomotive with a defective spark arrester, etc., the measure of damage is, "How much has the land been de-

INTOXICATING LIQUORS—*Continued.*

preciated in value by the fire?" And evidence is competent which tends to show the size of the house, the quality and cost of the materials used in its construction, the workmanship and other relevant facts, bearing on the question of the decreased value of the land. *Jeffress v. R. R.*, 215.

4. *Superior Courts—Clerks—Executors and Administrators—Issues of Fact—Practice.*—On issues raised in proceedings before the clerk of the Superior Court for the removal of an executor or administrator for good cause shown, it is not required that the clerk transfer the cause to the Superior Court for the trial of the issue, as applications of this character are not regarded in the nature of adversary proceedings, but as a power conferred on the clerk with a view of protecting estates, often presenting the necessity for his prompt action. Revisal, sec. 35. *In re Battle*, 388.

JUDGMENTS. See Claim and Delivery.

1. *Judgments of Other States—Fraud—Res Adjudicata—Second Appeal —Common Law—Presumptions—Evidence.*—A motion to set aside a judgment in an action brought in South Dakota on the grounds of fraud, having been held in this court, on a former appeal, to preclude an action brought here involving the same question, upon the presumption, in the absence of evidence to the contrary, that the common law prevailed there as adjudicated here, and the only additional evidence on this appeal being of a statute in South Dakota practically enacting the law as held on the former appeal, the matter is held *res adjudicata. Roberts v. Pratt*, 50.

2. *Judgments of Other States—Counterclaim—Subsequent Credits—Res Adjudicata.*—Matters alleged in counterclaim to an action brought on a judgment of another State in the courts of this State, and which arose since that judgment was rendered on the question of credits thereon of rents of lands in that other State, bearing a proper relation to the judgment sued on, are not *res adjudicata* in the former action. *Tyler v. Capeheart*, 125 N. C., 64, cited and applied. *Ibid.*

3. *Principal and Surety—Fraudulent Conveyances—Judgment—Assignment—Parties in Interest.*—In an action to set aside a fraudulent conveyance of the principal, the sureties are beneficially interested, and are proper parties, although the judgment against them and their principal, which they had paid, had been assigned to one of the sureties for the benefit of all of them and they may be made parties with the assignee, so that the entire controversy may be settled in one action. *Eddleman v. Lentz*, 65.

4. *Judgment—Satisfaction.*—Where the judgment against the principal and his sureties had been paid by the latter and assigned for the benefit of the sureties to one of them, the latter holds as assignee for the benefit of himself and the other sureties, but the transaction does not satisfy the judgment as to the cosureties and prevent their suing on the same, though as to the surety to whom the assignment was made, the judgment may have been canceled by the payment of his share. *Ibid.*

JUDGMENTS—*Continued.*

5. *Principal and Surety—Judgment—Assignment—Implied Promise to Pay—Creditors' Bill.*—Sureties who have paid a judgment against themselves and their principal may maintain an action against him upon his implied promise to reimburse them for the money they have paid on the judgment and in the same action may ask for a cancellation of any fraudulent conveyance made by him. *Ibid.*

6. *Judgment—Payment—Evidence—Proof of Payment of Note.*—It is competent for the sureties on a note given to a bank to prove by the cashier that a judgment on the note against them and the principal had been paid by them, if the cashier had knowledge of the fact. *Ibid.*

7. *Tenants in Common—Partition—Decree—Parties—Motion in the Cause —Procedure.*—A nominal party in a proceeding for partition, though not so in fact, should proceed by motion in the cause to set aside the decree therein. *Patillo v. Lytle*, 92.

8. *Same—Consent.*—A consent decree in partition proceedings for the division of lands among tenants in common, which purports to operate upon the whole land and every interest in it, does not affect the rights of a tenant who has not been made a party, and who has not waived his rights. *Ibid.*

9. *Same—Appeal and Error—Procedure.*—A sale of lands in partition proceedings among tenants in common being invalid because of the absence of necessary parties who have moved in the cause to set aside the decree, it is held in this case on appeal that the judgment be set aside, together with the order of sale and the commissioner's deed, and that necessary parties be made, and the cause further proceed as the parties may be advised and in accordance with law. *Ibid.*

10. *Commission to Sell Lands—Void Sales—Personal Dealings—Judgment —Credits—Disposition of Proceeds of Sale—Appeal and Error.*—A commissioner appointed by the court disbursed a large sum in the manufacture of concrete blocks for use in the construction of a building on the land. The court below found as a fact that the blocks were manufactured by the commissioner in his individual capacity, and was not the property of the estate, as he, personally, could not make a valid sale to himself as commissioner, and ordered the blocks to be sold and the proceeds applied as a credit on a judgment rendered against the commissioner: *Held*, the sale of the blocks under the order was void, and the commissioner in his individual capacity is entitled to have the value of the blocks, or at least the proceeds of the sale paid to him. *Smith v. Miller*, 98.

11. *Contracts—Title — Subject to Decree — Breach — Notice of Defect— Damages.*—A contract or option made by the life tenant to convey the fee in lands of which the remainder is in her children, made subject to a decree to be obtained in court confirming the fee in her and ordering the conveyance thereof to be made to the vendee, is unenforcible, and as the vendee has entered into the contract with notice of the defect in the vendor's title, he cannot recover any damages he may have sustained by reason of the breach. *Joyner v. Crisp*, 199.

JUDGMENTS—*Continued.*

12. *Railroads—Negligent Running of Trains—Defective Spark Arrester—Ordinary Risks — Former Recovery — Res Judicata.* — An action to recover damages to plaintiff's land caused by a spark from defendant railroad company's locomotive alleged to have had a defective spark arrester at the time, and to have been negligently run, etc., does not involve an ordinary risk run by the plaintiff as an owner of lands adjoining the right of way, and a recovery had in a former action for risks of that character does not affect plaintiff's recovery for negligence of the character stated, which is sought in a subsequent action. *Jeffress v. R. R.*, 215.

13. *Judgments Non Obstante—Pleadings—Confession and Avoidance.*—A judgment *non obstante veredicto* may be allowed only where the answer has confessed a cause of action and has set up matters in avoidance which were insufficient, although found true, to constitute a defense or a bar to the action. *Baxter v. Irvin*, 277.

14. *Same—Evidence—Practice.*—Upon a motion for judgment *non obstante veredicto*, it must appear from the plea and verdict, and not from the evidence, that the plaintiff is entitled to the judgment. *Ibid.*

15. *Same — Judgment Non Obstante — Justice's Court — Appeal.*—If the answer in the court of a justice of the peace raises the general issue, and there is no plea of confession and avoidance, a motion for judgment *non obstante veredicto* will not lie on appeal in the Superior Court after verdict. *Ibid.*

16. *Motions—Retaxing Costs—Judgment—"To be Taxed by Clerk"—Res Judicata.*—A judgment that a party litigant recover against his adversary the costs of the action "to be taxed by the clerk," by its express terms directs the clerk to tax the costs, and his doing so cannot be held as *res judicata*. *Chadwick v. Insurance Co.*, 380.

17. *Contracts—Insane Persons—Judgments—Credits.*—When a voucher is set up as a defense in bar to plaintiff's recovery in his action for damages for a personal injury negligently inflicted on him, and it appears that it should be disregarded as such, but without reason to conclude that the defendant had any design or purpose to circumvent him, the action, in this regard, is in the nature of an equitable proceeding to set aside the voucher or avoid the effect of the payment received thereon, and in the absence of positive, as distinguished from constructive fraud, is subject to the maxim that he who seeks equity must do equity, and, consequently, the amount received on the voucher will be held as a credit upon a judgment which has ascertained the full amount of the damages suffered. *Ipock v. R. R.*, 445.

18. *Courts, Superior—Time Allowed to Plead—Discretion—Former Order —Judgment by Default.*—An order of the Superior Court judge allowing time to file pleadings, with provision that if the complaint is not filed within a certain time the plaintiff should suffer a nonsuit, and after the filing of the complaint a judgment by default should be entered if the answer is not filed within a certain time, cannot control the discretion of a judge subsequently holding a term of the court in refusing to sign the judgment by default and allowing the answer to be filed. Revisal, sec. 512. *Church v. Church*, 564.

JUDGMENTS—*Continued.*

19. *Motions—Judgment Set Aside—Meritorious Defense—Practice.*—Upon a motion to set aside a judgment for excusable neglect a meritorious defense must be shown. Revisal, sec. 513. *Minton v. Hughes*, 587.

20. *Murder—Verdict—Findings—Directions—Reconsideration—Recording.* A verdict rendered in open court is not complete until accepted by the court for record, and it is the duty of the trial judge to prevent the recording of a doubtful or insufficient finding; and in this case it is *Held*, that his Honor, on seeing that the degree of murder was not expressed in the verdict, correctly told the jury to reconsider their finding, for the purpose of specifying the crime, and upon response being made by them of murder in the first degree, the verdict was properly recorded accordingly. *S. v. Bagley*, 608.

21. *Motions—Quash—In Arrest of Judgment—Indictment.*—Motions to quash and in arrest of judgment rest upon the same grounds, the insufficiency of the warrant, and in determining them the affidavit and order of arrest must be considered together. *S. v. Hinton*, 625.

22. *Same Statutory Form—Sufficiency.*—When the warrant and order of arrest for resisting and obstructing certain officers in the performance of their duties, construed together, substantially follow the statute, motions to quash and in arrest of judgment should be denied. *Ibid.*

JURISDICTION. See Courts; Removal of Causes.

JURORS.

Appeal and Error—Jurors—Relationship—Motion in the Supreme Court. *Quœre*, whether a motion for a new trial, made in this Court for the first time, should be granted because of the relationship of a party to the action to a juror, who had denied such relationship when challenged, the relationship being afterwards discovered. *Mizzell v. Manufacturing Co.*, 265.

LIMITATION OF ACTIONS. See State's Lands.

1. *Counties—Navigable Streams—Drawbridges—Obstructions—Easement—User—Limitation of Actions.*—A right to maintain a building on a navigable stream which obstructs the operation of a draw in a county bridge cannot be acquired by adverse user, and the operation of the statute of limitations in this regard is expressly forbidden by statute. Revisal, 389. *Lenoir v. Crabtree*, 357.

2. *Ejectment—Rentals, etc.—Limitation of Actions.*—The action to recover possession of lands known as "the Homestead," alleging want of title in the defendant, and for the recovery of rents, is held, in effect, a proceeding in ejectment, wherein the provisions of Revisal, 654, apply, that "the defendant shall not be liable for such annual value for any longer time than three years before the suit, or for damages for any such waste or other injury done before said three years, unless when he claims for improvements as aforesaid." *Whitfield v. Boyd*, 451.

3. *Deeds and Conveyances—Boundaries—Constructive Possession—Limitation of Actions.*—When both parties claim lands from a common

LIMITATION OF ACTIONS—*Continued.*

source of title, and one of them has shown actual possession on the west side of a certain creek under a deed which includes in its boundaries the *locus in quo* lying on the east side of the creek, also, within the description of the deed of the adverse party, but of which neither party has had actual possession, the constructive possession of the former will extend to the eastern boundaries of his deed, and will ripen title to the lands therein embraced after the lapse of the statutory period of time. *Pheeny v. Hughes*, 463.

4. *Instructions — Public Square — Abandonment — Adverse Possession — Evidence.*—When a county sues for the possession of lands used by it as a public square, a requested instruction by defendant is properly denied, in the absence of evidence of abandonment, that if the proper authorities of a public square willfully abandon the use of any part thereof which is claimed by defendant, and establish a different line, cutting off such abandoned part for twenty-one years or more, it would ripen into a title for defendant. *Gates County v. Hill*, 584.

5. *Instructions—Public Square—Adverse Possession—Interpretation of Statutes.*—A county having entered into the possession of a square for the public use, before act of 1891, now Revisal, sec. 389, the provisions of that act will not permit the plaintiff to acquire title thereto by adverse possession under a deed purporting to convey a part thereof. *Ibid.*

MALICIOUS PROSECUTION. See Claim and Delivery.

1. *Claim and Delivery — Malicious Prosecution — Pleading — "Probable Cause."*—An allegation in a complaint that the defendant maliciously, recklessly, and wantonly destroyed the plaintiff's business by seizing his property in a claim and delivery proceeding, is a sufficient allegation of a want of probable cause. *Ludwick v. Penny*, 104.

2. *Same—Interpretation of Pleadings.*—Pleadings will be liberally construed, and when there is an allegation in a complaint for damages for a malicious abuse of process, and it appears that it was based solely upon the facts that the plaintiff was unable to replevy the property seized under claim and delivery proceedings by the defendant, and that in consequence his business was destroyed, the allegations show that the action is really one to recover for the malicious prosecuton of a civil action and an interference with the plaintiff's property by claim and delivery proceedings. *Ibid.*

3. *Same.*—When in an action for damages to plaintiff's business by reason of the defendant's seizing his property in claim and delivery proceedings, it is alleged that the plaintiff was not indebted at all to the defendant, and that defendant seized the property which plaintiff was unable to replevy, and that the defendant "unlawfully, wrongfully, wantonly and recklessly commenced said action and prosecuted the same to his damage," the words employed are stronger than if a distinct allegation had been made that the claim and delivery were taken out "without probable cause," and, there being no set form for allegations of this character, the use of this expression is not required. Distinction between malicious prosecution and malicious abuse of process stated by WALKER, J. *Ibid.*

MANDAMUS.

1. *Health—County Superintendent—Vacancy—Appointment—Compensation—Interpretation of Statutes—Mandamus.*—The right of one appointed by the Secretary of the State Board of Health to fill a vacancy in the office of the county superintendent of health for two months is not affected by the question of whether the compensation has been fixed by the secretary "in proportion to the salaries paid by other counties for the same service, etc.," for it is required that the board of county commissioners approve the expenditure and pass upon its reasonableness, and upon their failure to do so mandamus will lie to compel them in good faith to pass upon it and in the exercise of a sound judgment say whether or not the compensation for the services as fixed is warranted by the statute. Public Laws 1911, ch. 62, sec. 9. *McCullers v. Commissioners*, 75.

2. *Municipalities—Discretionary Powers—Mandamus—Practice.*—Mandamus does not lie to enforce the exercise of a discretionary power vested in the officials of a municipal corporation by the Legislature, in any given or specified way. *School Commissioners v. Aldermen*, 191.

MANSLAUGHTER. See Instructions.

MARRIAGE LICENSE. See Register of Deeds.

MARRIED WOMEN. See Ejectment.

MEASURE OF DAMAGES. See Claim and Delivery.

1. *Contracts—Vendor and Vendee—Unliquidated Damages—Instructions.* When the plaintiff is suing only upon a contract for lumber sold and delivered, the contract price, and not unliquidated damages, is to be ascertained by the jury, and defendant's prayer for special instruction presenting the latter question of damages is properly refused. *Fisher v. Lumber Co.*, 61.

2. *Contracts—Vendor and Vendee—Measure of Damages—Vendee's Duty.* The plaintiff having purchased a number of sacks of cracked corn of the defendant, received shipments with knowledge that the sacks were not tagged as required by the Department of Agriculture and that it did not come up to the grade purchased, and sold a number of the sacks to a purchaser who kept them two weeks, when they were seized by the said department. The defendant theretofore sent the necessary tags for the sacks to the plaintiff, who refused to have anything further to do with the shipment, and the corn became worthless in the hands of the department: *Held*, it was the duty of the plaintiff to do what he reasonably could to lessen his loss, and the measure of his damages was the difference in value of the corn as it actually was and which it should have been under his contract, and such other expenses as were actually incurred by him in handling it. *Jennette v. Hay and Grain Co.*, 156.

3. *Contracts to Convey—Entirety—Vendor and Vendee—Part Performance—Damages.*—When upon the face of a contract to convey lands it appears that it is to be performed in its entirety, it is unenforcible

MEASURE OF DAMAGES—*Continued.*

as to a part, and hence the rule does not apply that where a vendor has not substantially the whole interest he has contracted to sell, the purchaser can insist on having all that the vendor can convey, with compensation for the difference. *Joyner v. Crisp*, 199.

4. *Contracts—Interpretation—Consideration—Breach—Measure of Damages.*—When the basis of an action is a special contract to pay a sum certain, and is founded upon a valuable consideration, the contract sued on, in the absence of fraud, must regulate the right to recover thereon, as well as the measure of damages. *Conservatory v. Dickenson*, 207.

5. *Same—Diminution of Damages.*—When the maker of a promissory note to pay a sum certain, made in consideration of a contract to give a course of musical instruction by mail, by his own act, without legal excuse, and without plaintiff's default, renders the performance by the plaintiff impossible, the measure of damages, in an action on the note, is the face value thereof, without diminution. *Ibid.*

6. *Vendor and Vendee—Fertilizer—Deficient in Quality—Measure of Damages—Interpretation of Statutes.*—When it is ascertained by analysis of the Department of Agriculture that fertilizer sold by a manufacturer was deficient in quality, the damages sustained is the difference in the price of the fertilizer actually sold and what it should have been. Revisal, sec. 3949. *Fertilizer Works v. McLawhorn*, 274.

7. *Same—Damages to Crop—Evidence Speculative.*—A user of fertilizer of a deficient quality, furnished by a manufacturer, cannot recover damages for an alleged inferiority of his crop on that account; and evidence that where other fertilizers had been used the crop was better, is inadmissible, as it involves soil and weather conditions, cultivation, and other matters of a speculative character. *Ibid.*

8. *Vendor and Vendee—Fertilizer—Deficient in Quality—Duty of Vendee—Measure of Damages.*—After a user of fertilizer has been informed by the Department of Agriculture that the fertilizer furnished by the manufacturer is deficient in quality, it is his duty to buy fertilizing material or ingredients to make good the deficiency, and, upon his failing to do so, an abatement in the price by reason of the deficiency is his measure of damages. *Ibid.*

MENTAL ANGUISH. See Telegraphs.

MISJOINDER. See Parties.

MORTGAGES. See Principal and Surety.

1. *Taxation—Liens—Lapse of Time— Mortgagor and Mortgagee—Interpretation of Statutes.*—Under our general statute applicable, one charged with the collection of taxes is allowed no longer than one year from the day prescribed by statute for his settlement and payment thereof, and thereafter his lien on property of a delinquent taxpayer is not enforcible against the right acquired under a registered mortgage. Revisal, sec. 2869. *Berry v. Davis*, 170.

MORTGAGES—*Continued.*

2. *Mortgages—Default in Part—Majority of the Whole.*—A mortgage on land to secure a series of bonds for borrowed money, giving the mortgagee power and authority to sell the lands upon default in payment "of either of said sums of money or any part thereof" after advertisement, etc., and convey the lands to the purchaser in fee simple, "and out of the moneys arising from said sale to retain the principal and interest which shall then be due on the said bonds," is valid, and authorizes a sale under the power upon failure to pay any part, and before the maturity of the whole debt. *Eubanks v. Becton*, 230.

3. *Mortgages—Foreclosures—Power of Sale—Strict Compliance—Notice of Sale—Invalid Sale.*—When a power of sale is given in a mortgage, a strict compliance with the terms on which it is to be exercised is necessary; and when it is prescribed that the notice of sale be posted at the courthouse door and four other public places, a sale thereunder is invalid if the notice is posted at the courthouse door and three other public places. The effect of Revisal, sec. 641, was not before the Court in this case, and it was not construed. *Ibid.*

4. *Same—Purchaser—Notice.*—A purchaser at a sale of lands under a mortgage with power of sale is a purchaser with notice of the terms under which the power of sale, as therein expressed, must be exercised, and his deed is invalid when the terms of sale of the mortgage, antedating Revisal, sec. 641, are not in strictness pursued. *Ibid.*

5. *Mortgages—Foreclosure—Invalid Sale—Purchaser—Rental of Mortgagor—Waiver—Knowledge.*—In order to waive an irregularity in the exercise of the power of sale contained in a mortgage, it is necessary that the acts alleged as a waiver be committed with the knowledge of the one who does them; and a mortgagor after an invalid sale for failure of the mortgagee to strictly observe the terms thereof, without knowledge of the irregularity, does not waive it by subsequently renting the lands from the purchaser. *Ibid.*

6. *Same—Application of Rents.*—The rents collected of the mortgagor who has rented from the purchaser of lands after an invalid sale, and who has not waived its irregularities, must be applied to the payment of the mortgage debt. *Ibid.*

7. *Mortgages—Foreclosure—Invalid Sale—Equitable Assignment.*—A deed of mortgaged lands made to a purchaser at a foreclosure sale, which is inoperative, is valid only as an equitable assignment of the note and mortgage, and the mortgagor, nothing else appearing, is entitled to an accounting. *Ibid.*

8. *Notes—Subrogation—Notice—Registration.*—A debtor secured a note by mortgage and subsequently made a deed of assignment for the benefit of his creditors, while the mortgage was outstanding and uncanceled of record. The land embraced in the mortgage was included in the deed of assignment: *Held*, the uncanceled mortgage was notice to the assignee of the rights of one who had advanced the money to the debtor to pay off the mortgage note and who had an equity to be subrogated to the rights of the holder thereof in the mortgaged premises. *Bank v. Bank*, 238.

MOTIONS.

1. *Removal of Causes—Motion to Remand—Practice.*—When a petition for the removal of a cause from the State to the Federal court, properly verified and accompanied by a proper and sufficient bond, has been filed in the State court in apt time, in an action brought against a nonresident corporation and its resident manager, alleging a joint wrong, and the petition contains allegations of fraudulent joinder, together with a full and direct statement of the facts and circumstances sufficient, if true, to demonstrate that there has been such fraudulent joinder of the resident defendant, the jurisdiction of the State court is at an end and the order should be made removing the cause, leaving the remedy for the opposing party in the Federal court upon motion to remand the cause or other proper procedure therein. *Rea v. Mirror Co.*, 24.

2. *Tenants in Common—Partition—Decree—Parties—Motion in the Cause—Procedure.*—A nominal party in a proceeding for partition, though not so in fact, should proceed by motion in the cause to set aside the decree therein. *Patillo v. Lytle*, 92.

3. *Appeal and Error—Jurors—Relationship—Motion in Supreme Court.*—*Quære*, whether a motion for a new trial, made in this Court for the first time, should be granted because of the relationship of a party to the action to a juror, who had denied such relationship when challenged, the relationship being afterwards discovered. *Mizzell v. Manufacturing Co.*, 265.

4. *Judgments Non Obstante—Motion, When Made.*—A motion for judgment *non obstante veredicto* must be made after verdict. *Baxter v. Irvin*, 277.

5. *Appeal and Error—Motion for Judgment—Fragmentary Appeal—Practice.*—A nonsuit and appeal taken by plaintiff upon the refusal of the trial judge to grant his motion for judgment upon the pleadings and order a reference is premature and fragmentary, and will be dismissed. *Blount v. Blount*, 312.

6. *Appeal and Error—Motion for Judgment—Exceptions—Final Judgment—Practice.*—Upon the refusal of the trial judge to grant plaintiff's motion for judgment upon the pleadings and order a reference, he should have noted an exception to be reviewed upon appeal from final judgment. *Ibid.*

7. *Motions—Retaxing Costs—Collateral Matters—Parties.*—The taxing of costs in an action is a collateral matter in which the witnesses and others claiming the costs, and the party against whom the costs have been taxed, are the real parties, and they may be retaxed at any time within twelve months. *Chadwick v. Insurance Co.*, 380.

8. *Motions—Retaxing Costs—Judgment—"To be Taxed by Clerk"—Res Judicata.*—A judgment that a party litigant recover against his adversary the costs of the action "to be taxed by the clerk," by its express terms directs the clerk to tax the costs, and his doing so cannot be held as *res judicata*. *Ibid.*

9. *Motions—Retaxing Costs—Witnesses—Tender—Nonsuit—Materiality.* When on motion of defendant a nonsuit upon the evidence is ordered after the examination of plaintiff's witnesses, the cost of defendant's

MOTIONS—*Continued.*

witnesses may not be taxed against the plaintiff when defendant has not tendered them; for he should have done so after the nonsuit was ordered, to give the plaintiff an opportunity to examine them upon their materiality, etc. *Ibid.*

10. *Motions—Costs—Expert—Allowance—Interpretation of Statutes—Res Judicata—Legality of Fees.*—The court has now the statutory authority to fix the fees of expert witnesses (Revisal, sec. 2803), and its action is *res judicata* as to the amount, leaving open the question of the legality of the taxing of the fee on a motion to retax. *Ibid.*

11. *Same.*—The court having fixed the fees of certain named experts, it was made to appear, on a motion to retax, that the witnesses had not been examined by or tendered to the party against whom the costs were taxed: *Held*, these witness tickets were not properly taxable against the losing party, but should be paid by the party whose witnesses they were. *Ibid.*

12. *Executions — Irregularities — Motion to Quash — Practice.*—Usually, the proper method of obtaining redress for irregularities affecting the validity of an execution is to recall it upon notice and motion in the court from which it was issued. *Williams v. Dunn*, 399.

13. *Executions—Irregularities—Motion to Quash—Courts—Jurisdiction—Clerks of Court.*—Before sale under execution, proceedings may be instituted before the clerk to recall the execution upon grounds affecting its validity, but after return made, and especially when there may be certain equitable claims for adjustment, *semble*, the practice is that the motion should be made before the judge in term. *Ibid.*

14. *Principal and Agent—Motion to Dismiss—Evidence.*—A motion to dismiss an action on a note made to an agent, on the ground that the agent was not the real party in interest made before the introduction of evidence, is properly overruled, as the plaintiff would be entitled to show that he had the authority from his principal to have had the note payable to himself as such, for the benefit of the principal; though in this case it should have been allowed if it had been made after the close of the evidence, as there was nothing to prove the required authority. Revisal, sec. 404. *Martin v. Mask*, 436.

15. *Motions—Judgment Set Aside—Meritorious Defense—Practice.*—Upon a motion to set aside a judgment for excusable neglect, a meritorious defense must be shown. Revisal, sec. 513. *Minton v. Hughes*, 587.

16. *Motions—Quash—In Arrest of Judgment—Indictment.*—Motions to quash and in arrest of judgment rest upon the same ground, the insufficiency of the warrant, and in determining them the affidavit and order of arrest must be considered together. *S. v. Hinton*, 625.

MOTIONS IN ARREST. See Judgments.

MOTIONS TO QUASH. See Judgments.

NAVIGABLE WATERS.

1. *Courts — Navigable Streams — Drawbridges — Judicial Notice.* — The courts will take judicial notice of the fact that the draws in a bridge over a navigable stream should turn both up and down the stream for the safety and convenience of passing vessels. *Lenoir v. Crabtree*, 357.

2. *Courts—Navigable Streams—Drawbridges—Federal Government—Approval — Presumptions — County Commissioners — Supervision.* — A bridge with a draw operating up and down a navigable stream built in 1884 will be presumed to have been with the consent of the War Department of the United States Government, and its usefulness cannot be impaired by obstructing its operation without the consent of the board of county commissioners. *Ibid.*

3. *Injunctions — Counties — Drawbridges — Obstructions — Discretionary Powers—Evidence.*—In proceedings for a mandatory injunction by a county to remove an obstruction to the operation of a drawbridge, any consideration of influence brought to bear upon the commissioners by an opposite shore owner cannot be entertained, when the commissioners in erecting the bridge were in the exercise of their valid discretionary powers. *Ibid.*

4. *Counties—Navigable Streams—Obstructions—Injunctions—Procedure.* In this action for a mandatory injunction for the removal of an obstruction to a draw in a bridge over a navigable stream, it is *Held*, that an order of the Superior Court dismissing the action be set aside, and judgment there be entered requiring the defendant to remove the obstruction within a reasonable time, and to such reasonable distance as may be found just, upon investigation of the conditions by the court. *Ibid.*

NEGLIGENCE. See Railroads.

1. *Railroads—Negligent Running of Trains—Defective Spark Arrester—Ordinary Risks—Former Recovery—Res Adjudicata.*—An action to recover damages to plaintiff's land caused by a spark from defendant railroad company's locomotive alleged to have had a defective spark arrester at the time, and to have been negligently run, etc., does not involve an ordinary risk run by the plaintiff as an owner of lands adjoining the right of way, and a recovery had in a former action for risks of that character does not affect plaintiff's recovery for negligence of the character stated, which is sought in a subsequent action. *Jeffress v. R. R.*, 215.

2. *Railroads—Negligence—Approved Appliances—"Modern Appliances"—Definition—Approved and in General Use.*—In an action for damages by fire to plaintiff's land involving the question of the negligence of the defendant railroad company in the operation of its locomotive, or in its being equipped with a defective spark arrester, the use of the words "modern appliances," in connection with the spark arrester the defendant was required to use, does not necessarily mean the latest and best appliances, but the use of those "extending from a not very remote past to the present time"; "not antiquated or obsolete"; and construed as a whole, *Held*, not reversible error. *Ibid.*

NEGLIGENCE—*Continued.*

3. *Railroads—Negligent Running—Defective Spark Arrester—Negligence.* When the defense to an action for damages in setting fire to plaintiff's land by sparks from a passing locomotive of the defendant with a defective spark arrester is that the spark arrester was a proper one, and did not throw any sparks, evidence is competent in showing that the locomotive was throwing an unusual quantity of sparks, that the locomotive set fire to a garment hanging in a garden nearby, and that the witness had to put her apron over her head to keep the cinders from the locomotive from burning her, about the time of the injury complained of. *Ibid.*

4. *Master and Servant—Cities and Towns—Electricity—Defective Poles—Inspection—Negligence—Evidence.*—When it appears that an employee in the discharge of his duties to an electricial company has been injured by a pole of the company falling with him, which outwardly and from appearance was sound at the time, but was so decayed below the level of the ground that it would easily crumble between the fingers, and that it broke off beneath the ground, and had only been in use a small fraction of the time they usually lasted for the purpose, it is sufficient evidence that the employer has not exercised that degree of care in the original selection of the poles which the law requires. *Terrell v. Washington*, 282.

5. *Master and Servant—Cities and Towns—Defective Poles—Duty to Supervise—Negligence.*—It is the duty of a city when engaged in furnishing electricity for lights and other purposes, not only to select sound and suitable poles on which to string its wires, but by proper and reasonable supervision to keep them sound and safe for the protection of its employees who are required to work on them. *Ibid.*

6. *Same—Notice, Actual or Constructive.*—A city engaged in the business of furnishing electricity to its citizens for light and other purposes, is liable to an employee who is injured without his contributory fault, by reason of a defect in a pole which fell with and injured him, of which the proper officers of the city knew, or should have known by ordinary care in inspecting the pole when originally placed in the ground. *Ibid.*

7. *Master and Servant—Cities and Towns—Electricity—Defective Poles—Negligence—Burden of Proof.*—In order to hold a city liable for an injury to an employee occasioned by a defect in a pole of its line of wires conveying electricity to its citizens, which the city was engaged in the business of furnishing, it is required that the plaintiff prove that the city had actual notice of the particular defect, or notice thereof implied from the existing circumstances and conditions. *Ibid.*

8. *Master and Servant—Cities and Towns—Electricity—Defective Poles—Duty of Master—Negligence—Verdict—Interpretation.*—When there is evidence that a city, engaged in the business of supplying its citizens with elctricity, has negligently failed to properly safeguard its poles with a guy wire, which fell with and injured an employee whose duty it was to climb the pole, because of a defect in the pole which was only discernible by digging below the surface of

NEGLIGENCE—*Continued.*

the ground, and which under usual circumstances would not have happened if the pole had been sound when it was placed, and when, under a proper charge, the jury have found that the defendant was negligent, the verdict, in effect, was a finding that the defendant had negligently failed in its duty to properly and carefully inspect the pole orginally, before it was placed in the ground, and eliminates the question as to whether the employee was negligent in climbing the pole under the existing conditions, or failed in his duty to examine the pole beforehand. *Ibid.*

9. *Master and Servant — Negligence — Logging Machines — Evidence.* Evidence that defendant's employee was injured at defendant's skidder, which was drawing in a log, by the wire rope, which was used for the purpose, slipping over a stump 2 feet high, around which it was being worked, at a distance from the skidder of 25 feet, the angle of the rope from the top of the skidder to the stump being about 90 degrees; that the recoil of the rope struck a small elm, which it broke and hurled on the plaintiff to his injury, where he was engaged in the scope of his employment, is sufficient upon the question of actionable negligence, as this situation was liable to cause the cable to slip over the stump unless a notch had been cut into the stump to prevent it, or other available means had been used to that end. *Jackson v. Lumber Co.*, 317.

10. *Master and Servant—Collision—Presumptions—Evidence—Negligence.* When it is shown that an employee of a railroad company was killed in a collision on defendant's road while engaged in the performance of his duties, a presumption of negligence is raised, and a nonsuit upon the evidence should not be granted. *Skipper v. Lumber Co.*, 322.

NEGOTIABLE NOTES. See Bills and Notes.

NEW TRIAL. See Appeal and Error.

1. *Practice—New Trial — Newly Discovered Evidence — Cumulative.*—A new trial for newly discovered evidence will not be granted when the evidence is only cumulative. *Gates County v. Hill*, 584.

2. *Practice—New Trial—Newly Discovered Evidence—Supreme Court—Discretion.*—A motion for a new trial upon newly discovered evidence made in the Supreme Court is addressed to the discretion of the Court, and in this appeal, the evidence relied on being the relation of the jurors to some of the commissioners of the plaintiff county, the relationship is regarded as too remote for the exercise of this discretion. *Ibid.*

NEXT OF KIN. See Descent and Distribution.

NON OBSTANTE. See Judgments.

NONRESIDENTS. See Executors and Administrators.

NONSUIT. See Appeal and Error; Evidence.

1. *Appeal and Error—Nonsuit in Part—Fragmentary Appeal.*—When the trial court dismisses an action as to a part of the lands involved in the controversy and retains it as to the other, the plaintiff

NONSUIT—*Continued.*

should note an exception as to the part nonsuited and bring the whole matter up for final judgment, for otherwise the appeal is fragmentary, and will be dismissed. *Shields v. Freeman*, 123.

2. *Same—Discretion of Supreme Court.*—While this appeal is held to be fragmentary and is dismissed, as it is from a nonsuit respecting only a part of the land in controversy, the Court notwithstanding in its discretion passed upon and approved the ruling below as to the nonsuit. *Ibid.*

3. *Nonsuit—Evidence, How Considered.*—Upon a motion to nonsuit, the whole evidence will be construed in the light most favorable to the plaintiff. *Mizzell v. Manufacturing Co.*, 265.

4. *Motions—Retaxing Costs—Witnesses—Tender—Nonsuit—Materiality.* When on motion of defendant a nonsuit upon the evidence is ordered after the examination of plaintiff's witnesses, the cost of defendant's witnesses may not be taxed against the plaintiff when defendant has not tendered them; for he should have done so after the nonsuit was ordered, to give the plaintiff an opportunity to examine them upon their materiality, etc. *Chadwick v. Insurance Co.*, 380.

5. *Nonsuit—Plaintiff's Evidence—Contributory Negligence—Questions of Law.*—Where the plaintiff's own evidence discloses such contributory negligence as bars her recovery, a motion to nonsuit should be sustained. *Fulghum v. R. R.*, 555.

6. *Evidence, Conflicting—Nonsuit.*—A motion to nonsuit upon conflicting and competent evidence will be denied. *Gates County v. Hill*, 584.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error.

1. *Objections and Exceptions—Questions and Answers—Materiality—Appeal and Error.*—An objection to the exclusion of a question asked a witness must show that the answer would have been material and competent, to constitute reversible error on appeal. *Gorham v. R. R.*, 504.

2. *Objections and Exceptions—When Taken—Practice.*—The evidence in this case objected to *Held* to have been without prejudice, as it had theretofore been testified to, in substance, without objection. *Ibid.*

OFFICERS EX OFFICIO. See Constitutional Law; Principal and Agent.

OFFICES. See Constitutional Law.

OPTIONS. See Contracts.

ORDINANCE. See Evidence; Taxation; Statutes.

PARTIES. See Counties.

1. *Principal and Surety—Fraudulent Conveyance—Judgment—Assignment—Parties in Interest.*—In an action to set aside a fraudulent conveyance of the principal, the sureties are beneficially interested, and are proper parties, although the judgment against them and

PARTIES—*Continued.*

their principal, which they had paid had been assigned to one of the sureties for the benefit of all of them, and they may be made parties with the assignee, so that the entire controversy may be settled in one action. *Eddleman v. Lentz*, 65.

2. *Tenants in Common—Partition — Parties — Decree — Waiver.*—Those who have an interest as tenants in common in lands to be divided in proceedings for partition, and whose names appear as parties in the proceedings without service of process and without their authority, are not in law parties to the proceedings, and the mere expression of their willingness or consent at the time will not bind them by an adjudication therein, when it does not appear that, by their acts, they have prejudiced the other parties or the purchaser of the lands at a sale for division, or that they have done something which creates an estoppel upon them. *Patillo v. Lytle*, 92.

3. *Tenants in Common—Partition—Decree—Parties.*—A deed by a commissioner to sell lands for partition among tenants in common, though the sale had been confirmed by the court, will not bind one of the tenants who had not been made a party to the proceedings or waived his rights; for in the absence of a necessary party the lands cannot be thus partitioned under the statute as to him. *Tayloe v. Carrow*, 156 N. C., 6, cited and applied. *Ibid.*

4. *Tenants in Common—Partition—Decree—Parties—Motion in the Cause—Procedure.*—A nominal party in a proceeding for partition, though not so in fact, should proceed by motion in the cause to set aside the decree therein. *Ibid.*

5. *Same—Consent.*—A consent decree in partition proceedings for the division of lands among tenants in common, which purports to operate upon the whole land and every interest in it, does not affect the rights of a tenant who has not been made a party, and who has not waived his rights. *Ibid.*

6. *Same—Appeal and Error—Procedure.*—A sale of lands in partition proceedings among tenants in common being invalid because of the absence of necessary parties who have moved in the cause to set aside the decree, it is held in this case on appeal that the judgment be set aside, together with the order of sale and the commissioner's deed, and that necessary parties be made, and the cause further proceed as the parties may be advised and in accordance with law. *Ibid.*

7. *Commissioners to Sell Lands—Taxes—Liens—Order of Court—Parties in Interest.*—An order of court that a commissioner, appointed to sell lands, pay taxes and assessments against the property, constituting a lien thereon, is valid and proper, being necessary for the protection of the interests of the parties. *S. v. Miller*, 98.

8. *Same.*—Parties interested in lands which have been ordered by the court to be sold by its commissioner cannot avail themselves of the benefit of an order that the commissioner pay the taxes and assessments constituting a lien on the land, and then be heard to complain of its validity. *Ibid.*

PARTIES—*Continued.*

9. *Legislature—Limitation of Time to Present Claims—Incapacity of Party—Interpretation of Statutes.*—A legislative requirement in the charter of a city that an employee injured in the scope of his employment by the negligence of the city must present his claim within a certain time is not construed to apply when the injured employee has been physically or mentally incapacitated by the injury received to comply with the provision. *Terrell v. Washington*, 281.

10. *Principal and Agent—Parties—"Real Party in Interest"—Bills and Notes—Rentals.*—An agent for the collection of rents is not the "real party in interest," within the meaning of Revisal, sec. 400, so as to maintain an action in his name for the benefit of his principal; but when he has taken a rental note with the consent of his principal, made payable to himself as agent, he may, under Revisal, sec. 404, maintain an action for its collection in his own name. *Martin v. Mask*, 436.

11. *Principal and Agent — Misappropriation — Corporations — Officers — Parties.*—When a corporation has entered into a contract for the sale of fertilizers under which the proceeds of sales, moneys collected on notes, etc., are to be the property of the one furnishing the fertilizer, an action against certain of its officers brought by the owner of the fertilizers and notes, alleging in the complaint that the defendants, with knowledge of the facts, misapplied and misappropriated the moneys derived from the sales or collections on notes given therefor, sets forth a good cause of action and is not demurrable; and when alleging a joint wrong, it is not a misjoinder of parties. *Chemical Co. v. Floyd*, 455.

12. *Pleadings — Parties — Misjoinder—Joint Cause—Debtor and Creditor.* A complaint is not objectionable for a misjoinder of parties which alleges a joint wrong as to two of the defendants in misapplying and misappropriating the moneys of the plaintiff, and seeks to set aside a deed made by one of them to his wife with the intent of delaying and defrauding his creditors, inclusive of the plaintiff's demand. *Ibid.*

PARTITION. See Tenants in Common; Trusts and Trustees.

PARTNERSHIP.

1. *Pleadings — Evidence — Estoppel — Partnership.*—When the plaintiff, purporting to be a corporation, takes title to lands from one defendant as a corporation and as a corporation conveys it to another defendant, the estoppel which would bind the defendants in the action concerning the lands conveyed would also bind the partnership, plaintiffs, if in point of fact a partnership and not a corporation, as it purported to be. *Daniels v. R. R.*, 419.

2. *Partnership Debts—Expenses of Partner—Evidence.*—A conversation relied on to permit the defendant partner to charge his living expenses to the partnership as the expenses of the firm, *Held*, too vague and indefinite in this case. *Makely v. Montgomery*, 589.

PLEADINGS. See Removal of Causes; Injunctions.

1. *Pleadings — Construction — Material Allegations.*—A complaint under our Code practice, while liberally construed, should state the facts going to make up the cause of action as plainly and concisely as is consistent with reasonable accuracy, and no material allegations should be omitted. *Eddleman v. Lentz*, 65.

2. *Same — Defective Statement—Demurrer—Amendments.*—A demurrer *ore tenus* to a defective statement of a good cause of action comes too late after answer, for the defect can be cured by amendment, and it is deemed to be waived when the answer is filed. The demurrer should, therefore, be overruled; but in this case the pleadings may be amended before final judgment, so as to remove the formal defect. *Ibid.*

3. *Same.*—In an action brought by sureties, who had paid the judgment against themselves and their principal, and had the same assigned to one of them for the benefit of all, for the purpose of setting aside a fraudulent conveyance, the failure to state in the complaint that the sureties had paid the judgment is, at most, but a defective statement of a good cause of action, when there is an allegation that the judgment had been assigned "for value, and without recourse" to a trustee for the sureties, which subrogated them to the rights of the creditor, the plaintiff in the judgment, to whom they had advanced the consideration, for the use and benefit of the defendant debtor. *Ibid.*

4. *Courts — Form of Action — Equity — Pleadings.*—Actions at law and suits in equity being adjudicated and determined under our statute by the same tribunal, equities will be administered therein where they sufficiently arise upon the allegations of the pleadings, without regard to the form or manner in which they are alleged. *Reid v. King*, 85.

5. *Pleadings—Defenses, Inconsistent.*—An action brought by an agent to sell lands to recover his commissions of sale, alleging the wrongful refusal of the owner to convey them to a purchaser he had found who was ready and able to pay the purchase price; and also alleging damages upon the ground that the owner had represented his title to be good, when it was afterwards ascertained to have been defective, which prevented the sale, sets forth inconsistent causes of action. *Clark v. Lumber Co.*, 139.

6. *Pleadings—Allegations—Interpretation.*—The allegations of a pleading are liberally construed with a view to substantial justice between the parties under our Code system. *Gregory v. Pinnix*, 147.

7. *Appeal and Error—Contributory Negligence—Pleadings.*—The question of contributory negligence will not be considered on appeal when not pleaded and no issue tendered presenting the question in the trial. *Jeffress v. R. R.*, 215.

8. *Same — Judgment Non Obstante — Justice's Court — Appeal.* — If the answer in the court of a justice of the peace raises the general issue, and there is no plea of confession and avoidance, a motion for judgment *non obstante veredicto* will not lie on appeal in the Superior Court after verdict. *Ibid.*

PLEADINGS—*Continued.*

9. *Public Highways — Prescriptive Rights — Easement — Inconsistent Pleadings.*—A claim of a prescriptive right to the use of an old pathway across the respondents' land, or of an easement therein, is inconsistent with the character of proceedings by petition to get a convenient pathway and outlet to a public road across the respondents' lands. Revisal, sec. 2686. *Barber v. Griffin*, 348.

10. *Railroads — Rights of Way — Highways—Pleadings—Demurrer.*—The complaint in an action alleging that a railroad company had laid out and used a public road over the plaintiff's lands under the care and in the charge of certain township road commissioners, causing the latter to go upon his lands to the side of the railroad right of way, to plaintiff's damage, without allegation that the railroad company had entered upon his lands or committed any act causing him injury, or any relationship which would cause liability to the railroad for the acts of the commissioners, does not state facts sufficient to constitute a cause of action as against the railroad company, and is demurrable. *Hicks v. R. R.*, 393.

11. *Courts, Superior—Time Allowed to Plead—Court's Discretion—Appeal and Error.*—The exercise of the discretion of the trial judge in permitting an extension of time to file pleadings is not reviewable on appeal. Revisal, sec. 512. *Ibid.*

12. *Appeal and Error—Motions—Pleadings—Allegations Sufficient—Practice.*—The case on appeal in this case not having been served in time, is not with the record in this Court, and it appearing from an examination of the record proper that the complaint states facts sufficient to constitute a cause of action, the defendant's motion to dismiss the action is disallowed, and plaintiff's motion to affirm the judgment below is allowed. *Hare v. Grantham*, 578.

PRACTICE. See Mandamus; New Trial.

1. *Removal of Causes — Petition — Verification—Practice.*—The petition upon which a removal of a cause from the State to the Federal court is based, which alleges a fraudulent joinder of a resident with a nonresident defendant for the purpose of retaining jurisdiction in the State courts, should be properly verified. *Rea v. Mirror Co.*, 24.

2. *Claim and Delivery—Malicious Prosecution—Termination of Action—Practice.*—A suit for maliciously prosecuting a proceeding in claim and delivery for the purpose of breaking up the business of another will not lie before the termination of the claim and delivery proceedings, and the defendant in such proceedings cannot therefore set up a counterclaim in that action for the damages he may have sustained in his business. *Ludwick v. Penny*, 104.

3. *Quo Warranto—Leave of Attorney-General—Practice.*—An action cannot be maintained to declare an office vacant because the incumbent has accepted a second office, within the meaning of our Constitution, Art. XIV, sec. 7, unless it appears that the leave of the Attorney-General has been obtained either before the commencement of the action or afterwards supplied pending the proceedings. Revisal, secs. 826, 827, 828, 829, and 830. *Midgett v. Gray*, 133.

PRACTICE—*Continued.*

4. *Taxation—Methods of Collection—Personal Property—Levy—Practice —Special Circumstances.*—While in this action the ordinary methods of collecting taxes on personal property should have been pursued by the officer charged with collecting them, instead of resorting to claim and delivery for the purpose, the possession of the property by the principal defendant, his appearing under the facts of the case to have regarded the levy as properly made, and his agreement that the courts should determine the controversy, witholds the court from dismissing the action. *Berry v. Davis*, 170.

5. *Appeal and Error — Instructions — "Contentions"—Objections — Practice.*—It is the duty of counsel to call to the attention of the court, at the time, any statement of the contentions of the parties which is not supported by the evidence, or it will not be considered on appeal. *Jeffress v. R. R.*, 215.

6. *Appeal and Error—New Trial in One—Same Result in the Other—Appeal Dismissed—Practice.*—When both parties appeal, and in one appeal a new trial is ordered, an appeal as to the other will be dismissed when it appears that the questions are the same and the determination of the other case will necessarily dispose of both appeals. *Lumber Co. v. Branch*, 251.

7. *Wills—Probate—"Duly Proven"—Inference—Burnt and Lost Records —Evidence—Practice.—Semble*, an entry made of record in the minute-book of the county court regarding the probate of a certain will in the chain of title of a party claiming the lands involved, that the will was duly proven by the oath of two subscribing witnesses, according to law, would irresistibly imply that the testator signed the will in their presence and they in his; but in the case at bar the party may recover without this proof, and this question is adverted to only for the purpose of suggesting that if he wishes to rely upon the will, in a new trial ordered, he may perhaps restore the lost record under the provisions of Revisal, ch. 2. *Ibid.*

8. *Judgments Non Obstante—Evidence—Practice.*—Upon a motion for judgment *non obstante veredicto*, it must appear from the plea and verdict, and not from the evidence, that the plaintiff is entitled to the judgment. *Baxter v. Irvin*, 277.

9. *Judgments Non Obstante—Demurrer—Instructions—Practice.*—When in defense of an action to recover rents the defendant denies the plaintiff's allegations and alleges a breach of contract as a bar to the action, the answer raises the general issue, and, before verdict, the objecting party should either demur to the evidence, if it is insufficient, or request the judge to direct a verdict in his favor because of its insufficiency. *Ibid.*

10. *Same — Judgment Non Obstante — Justice's Court — Appeal.*—If the answer in the court of a justice of the peace raises the general issue, and there is no plea of confession and avoidance, a motion for judgment *non obstante veredicto* will not lie on appeal in the Superior Court after verdict. *Ibid.*

11. *Same—Jurisdiction—Questions of Law.*—When a nonresident defendant of this State files his petition with sufficient allegations and bond

PRACTICE—*Continued.*

in a court of this State for the removal of a cause to the Federal court, the jurisdiction of the State court ends, leaving only to the judge of the State court the right to pass upon the sufficiency of the petition and the bond. *Ibid.*

12. *Appeal and Error — Motion for Judgment — Fragmentary Appeal — Practice.*—A nonsuit and appeal taken by plaintiff upon the refusal of the trial judge to grant his motion for judgment upon the pleadings and order a reference is premature and fragmentary, and will be dismissed. *Blount v. Blount*, 312.

13. *Appeal and Error—Motion for Judgment—Exceptions—Final Judgment—Practice.*—Upon the refusal of the trial judge to grant plaintiff's motion for judgment upon the pleadings and order a reference, he should have noted an exception to be reviewed upon appeal from final judgment. *Ibid.*

14. *Same—Nonsuit—Suit in Forma Pauperis.*—When an appeal is taken by defendant from an overruling of its motion to nonsuit upon the evidence, the evidence should be sent up in a narrative form, and the requirement that all the evidence should be sent up on appeals of this character, though the action is *in forma pauperis*, does not excuse the appellant in sending up the transcribed stenographer's notes in a voluminous record. The object of an opinion by the Supreme Court discussed by CLARK, C. J. *Skipper v. Lumber Co.*, 322.

15. *Principal and Surety—Joint Action—Severance—Practice—Appeal and Error.*—When sureties on a sheriff's bond have been compelled to pay in unequal amounts for the defalcation of the sheriff, and a demurrer to the cause of action against the county has been sustained, leaving the defaulting sheriff the only party defendant: *Semble*, the cause might well have proceeded in joint action, that the ultimate rights of the parties should be finally determined, and *Held*, in this case, that as no claim for adjustment among the sureties is made and the plaintiffs have not appealed, the order of severance made in the trial court is upheld, and the plaintiffs allowed to proceed in separate actions for the amount each may have paid. *Hudson v. Aman*, 429.

16. *Objections and Exceptions—When Taken—Practice.*—The evidence in this case objected to *Held* to have been without prejudice, as it had theretofore been testified to, in substance, without objection. *Gorham v. R. R.*, 504.

17. *Instructions — Power of Court — Request of Counsel—Practice.*—The trial judge on his own motion, or counsel for the parties, may request the judge to instruct the jury upon general principles applicable and necessary to an understanding of the cause being tried. *Kearney v. R. R.*, 521.

PRESUMPTIONS. See Burden of Proof.

PRINCIPAL AND AGENT.

1. *Principal and Agent—Evidence—Ratification.*—When there is evidence of agency and of a ratification of the acts of an alleged agent, evidence is competent for the purpose of binding the principal by his

PRINCIPAL AND AGENT—*Continued.*

agent's acts, which tends to show what occurred between plaintiff and the alleged agent relating to an acceptance by the latter of goods sold and delivered to the defendant, which the defendant claimed did not come up to representation made by the plaintiff to him. *Fisher v. Lumber Co.*, 61.

2. *Options — Principal and Agent — Vendor and Vendee — Terms.* — An agent to sell lands upon commission procured an option to be given by the owner to the proposed purchaser to buy a certain number of acres of land more or less, for which the owner would execute a deed with general warranty, provided that the purchase, if consummated, would be at a designated place after at least five days prior notice given the owner: *Held*, the agent was not entitled to his commissions when the acceptance was for the specific number of acres, was for a clear and undisputed title for the whole tract, and the notice of acceptance was not given to the owner as provided for in the option. *Clark v. Lumber Co.*, 139.

3. *Contracts—Options—Vendor and Vendee—Principal and Agent—Misrepresentations — Damages — Evidence.* — An agent for the sale of lands brought his action against the owner for damages alleged to have been sustained by him from the owner's misrepresentation of title, and the consequent loss of the sale to a purchaser whom he had procured under an option: *Held*, (1) he could not recover the expenses he had incurred prior to the date of the option he relied on; (2) it was necessary for the agent to show he relied on the alleged misrepresentations of title by the owner; (3) that under an agreement that the acceptance was subject to an investigation of title, it is necessary that the title be found acceptable and clear by the attorney selected; (4) there must be evidence of the value or amount of the work claimed by the agent as damages; (5) there must be evidence to show the connection between the representations alleged to have been made by the owner and the damages claimed on that account. *Ibid.*

4. *Contracts — Corporations—Officers—Misappropriation of Funds—Principal and Agent—Parties.*—When a corporation has entered into a contract for the sale of fertilizers under which the proceeds of sales, moneys collected on notes, etc., are to be the property of the one furnishing the fertilizer, an action against certain of its officers brought by the owner of the fertilizers and notes, alleging in the complaint that the defendants, with knowledge of the facts, misapplied and misappropriated the moneys derived from the sales or collections on notes given therefor, sets forth a good cause of action and is not demurrable; and when alleging a joint wrong, it is not a misjoinder of parties. *Chemical Co. v. Floyd*, 456.

5. *Telegraphs—Messenger—Agent of Sender—Principal and Agent—Telephone—Evidence.*—A telegraph company cannot avail itself of a stipulation in its message blank to the effect that a messenger boy is to be deemed the agent of the sender in taking a telegram to the telegraph office for transmission, without liability on the part of the company, when it appears that the sender of the message got into communication with a person answering the telephone number call of the company and the messenger came on accordance with a re-

PRINCIPAL AND AGENT—*Continued.*

quest that one be sent, and was evidently sent by the company for the express purpose of getting the message for transmission. *Alexander v. Telegraph Co.*, 473.

6. *Same—Prima Facie Agency.*—Testimony that the sender of a message called the well-known telephone number of a telegraph company's office and requested the one responding thereto that a messenger be sent to take a telegram to the office, and that the messenger appeared in consequence and received the message, affords evidence that the messenger was the duly authorized agent of the company for the purpose of receiving the message for transmission. *Ibid.*

7. *Vendor and Vendee—Breach of Contract—Principal and Agent—Notice—Measure of Damages.—Held*, in this case, the knowledge of the agent of the defendant of the purposes for which certain glass had been purchased by the plaintiff was sufficient notice to the defendant that plaintiff would sustain damages of the character claimed upon the defendant's breach of his contract of shipment. *O'Neal v. Seim*, 588.

PRINCIPAL AND SURETY. See Parties; Equity.

1. *Principal and Surety—Joint Action—Severance—Practice—Appeal and Error.*—When sureties on a sheriff's bond have been compelled to pay in unequal amounts for the defalcation of the sheriff, and a demurrer to the cause of action against the county has been sustained, leaving the defaulting sheriff the only party defendant: *Semble*, the cause might well have proceeded in joint action, that the ultimate right of the parties should be finally determined, and *Held*, in this case, that as no claim for adjustment among the sureties is made and the plaintiffs have not appealed, the order of severance made in the trial court is upheld, and the plaintiffs allowed to proceed in separate actions for the amount each may have paid. *Hudson v. Aman*, 429.

2. *Same—Inquiry.*—One who has acquired by indorsement a note of a tenant in common secured by a mortgage of his equity of redemption in the lands should inquire into the nature and extent of his security, and in this case should have ascertained that a prior registered mortgage given on the entire tract of land by all the tenants in common to secure a note which appeared upon the face of the papers to have been given by them as joint principals was in fact made by one of them as principal and the others as sureties. *Ibid.*

PROBATE. See Wills; Deeds and Conveyances; Courts.

PROBATE, FOREIGN. See Wills.

PROCEDURE. See Practice; Navigable Waters.

Partition—Sales—Appeal and Error—Procedure.—A sale of lands in partition proceedings among tenants in common being invalid because of the absence of necessary parties who have moved in the cause to set aside the decree, it is held in this case on appeal that the judgment be set aside, together with the order of sale and the commissioner's deed, and that necessary parties be made, and the cause further proceed as the parties may be advised and in accordance with law. *Patillo v. Lytle*, 92.

"PROXIMATE CAUSE." See Insurance; Negligence.

PUBLIC ADMINISTRATORS. See Executors and Administrators.

QUARANTINE.

1. *Quarantine of Cattle — Board of Agriculture — Powers.* — The State Board of Agriculture has authority to make and enforce regulations for the quarantine of cattle and to prevent their transportation, in view of preventing the spreading of contagious diseases. *S. v. Garner*, 630.

2. *Quarantine of Cattle — Prohibited Territory — Fence Law, County— "Willfully Permit."*—An owner of cattle, in permitting them to run at large in a no-fence county, which results in their straying from a prohibited territory, willfully "allows" them to move across the line when he purposely turns them out and they cross the line; for it is not necessary that he drive them across—it is enough that he permit them such liberty that thereby they are "allowed" by him to move across the line. *Ibid.*

QUO WARRANTO.

1. *Health — County Superintendent — Vacancy—Board's Appointee—Colorable Title—Quo Warranto.*—The county board of commissioners having failed for two months to fill a vacancy in the office of county superintendent of health, one was appointed by the Secretary of the State Board of Health, whom the county refused to recognize, and engaged another person to attend to his duties: *Held*, the appointee of the board of commissioners had not a colorable title to the office, and the remedy of the appointee of the secretary was not by *quo warranto*. *McCullers v. Commissioners*, 75.

2. *Quo Warranto — Parties—Two Offices — Leave of Attorney-General.* Where one holding an office accepts another, within the inhibition of our Constitution, Art. XIV, sec. 7, an action to declare the first office vacant may be instituted in the name of the State on the relation of the Attorney-General, by any individual who is a citizen and taxpayer of the jurisdiction where the officer is to exercise the powers of his office. Revisal, sec. 826, *et seq. Midgett v. Gray*, 133.

RAILROADS.

1. *Railroads — Tramways — Rights of Way — Written Authority—Indefiniteness—Waiver.*—A defendant, sought to be enjoined from a continuous trespass on plaintiff's lands, in operating a tramroad through them for the purpose of hauling lumber which had been cut on other lands in litigation between the parties, relied on a permission alleged to have been given by the plaintiff, contained in a letter, as follows: "Should there be any desire on your part to remove the timber which you have cut, you will find us not unwilling to give our permission." The right claimed was over a different tract of land than that referred to in the letter: *Held*, the language relied on by defendant was too indefinite to authorize the right of way for the tramroad or to be effective as an estoppel. *Lumber Co. v. Cedar Works*, 161.

2. *Railroads—Tramways—Rights of Way—Former Adjudications—Locus in Quo—Insufficiency.*—In an action to enjoin the continued opera-

RAILROADS—*Continued.*

tion of a tramroad across plaintiff's land, the defendant relied on an order entered in an action concerning other and separate lands in litigation between the same parties, and not included in the present proceedings, as follows: "It is further ordered and adjudged that each party shall have the right to remove such timber as it has already cut on said lands": *Held*, the order relied on cannot be so construed as to include a grant of right of way across lands not contemplated by or in any way subject to that litigation. *Ibid.*

3. *Railroads—Tramways—Rights of Way—Partition—Grants—Interpretation.*—In 1817 a certain large tract of land was partitioned among several tenants in common, through which a cross canal runs eastwardly as tributary to Dismal Swamp Canal, used for floating logs to the latter canal, a navigable waterway. For the preservation of the cross canal, it was provided in the division: "It will be convenient in carting to the cross canal, for one proprietor to have the free privilege of carting across another proprietor's share," etc. This provision or privilege was not incorporated in subsequent conveyances: *Held*, it could not have been contemplated at the time that instrumentalities such as tramroads for hauling timber would be employed, but that each proprietor should only have the privilege theretofore enjoyed, as appurtenant to each tract, instead of in gross. *Ibid.*

4. *Railroads—Tramways—"Way by Necessity"—Pleadings.*—For the plea of "a way by necessity" to lands to be available it must be pleaded with particularity, setting out the facts from which it may be seen by the courts that the necessity for the way exists, and a general plea is not sufficient. *Ibid.*

5. *Railroads—Tramways—"Way by Necessity"—Presumption from Grants—Privity—Unity of Possession.*—A way by necessity known to the common law arises only by implication in favor of a grantee, and being founded on a grant, it can only arise between grantor and grantee, and may not be presumed or acquired over the land of a stranger, or where there is no privity of title and unity of ownership. *Ibid.*

6. *Same—Inconvenience.*—When there is a grant from which the law may imply "a way by necessity," mere inconvenience will not suffice to justify it. *Ibid.*

7. *Railroads—Damages by Fire—Intervening Negligence—Second Fire—Proximate Cause.*—When damages are claimed by the owner of lands adjoining the right of way of a railroad company, as caused by a spark from the negligent operation of defendant's locomotive or the use of a defective spark arrester, the doctrine of proximate cause as laid down in *Doggett v. R. R.*, 78 N. C., 311, has no application, when it appears that plaintiff's employee had extinguished the fire, and thereafter the damage complained of was caused by sparks from the locomotive setting out another fire. *Jeffress v. R. R.*, 215.

8. *Appeal and Error—Railroads—Negligent Running—Defective Spark Arrester—Instructions—Harmless Error.*—An instruction in this case to the effect that the jury should answer the first issue, as to defendant's negligence, "No," if the spark arrester on defendant's

RAILROADS—*Continued.*

locomotive, alleged to have set fire to and damaged plaintiff's lands, was in good condition and the train prudently operated, or if the foul condition on plaintiff's premises was the proximate cause of his loss, and that the issue could not be answered in plaintiff's favor unless the jury found that the locomotive was not properly equipped with a spark arrester and was not properly managed and operated, and this was the proximate cause: *Held*, not reversible error over defendant's exception, as it was more favorable to it than it was entitled to. *Ibid.*

9. *Railroads — Rights of Way — Burning—Negligence—Evidence.* — The plaintiff having introduced evidence tending to show that his lands had been burnt over and damaged by fire communicated to it by a high wind from a right of way whereon straw, trash, tree-tops, etc., had been permitted to accumulate, and which was being burnt over by the defendant, it was for the jury to consider, in this case, upon the issue of negligence, the condition of the right of way, the time of the year, the state of the weather, whether the defendant's agents could sooner have employed the method which had proved sufficient for extinguishing the fire, and all the attendant circumstances; and though the evidence was slight, it was held to be sufficient. *Mizzell v. Manufacturing Co.*, 265.

10. *Railroads—Rights of Way—Burning—Negligence—Evidence—Presumptions—Prima Facie Case.*—When in an action to recover damages to his lands caused from the defendant's burning off its right of way, the plaintiff has shown his damage from the cause alleged, which ordinarily does not produce damage, he makes out a *prima facie* case of negligence, which cannot be repelled but by proof of care, or some extraordinary accident which makes care useless. *Ibid.*

11. *Burnings—Interpretation of Statutes.*—Revisal, sec. 3346, does not apply to the burning off of a right of way by a railroad company whereon straw, trash, tree-tops, and stubble had been allowed to accumulate; nor does the statute apply unless the firing is voluntary or intentional, and not merely accidental or necessary. *Ibid.*

12. *Railroads — Easements — Rights Acquired—Use by Owner of Lands.* Only an easement in lands passes from the owner to a railroad company under condemnation proceedings (Revisal, sec. 2575), divesting all the rights of owners who are parties to the proceedings in such easement during the corporate existence of the company (Revisal, sec. 2587), but allowing them to use and occupy the right of way in any manner not inconsistent with the easement acquired. *R. R. v. McLean*, 498.

13. *Railroads — Easements — Use by Railroad —Necessity — How Determined.*—A railroad company may use and occupy a right of way acquired by it under condemnation proceedings, when, in its own judgment, the proper management and business necessities of the road may require it. *Ibid.*

14. *Railroads—Easements — Additional Burdens—Owner's Compensation.* When a railroad company puts additional burdens upon a right of way which it has acquired by condemnation, not properly embraced

RAILROADS—*Continued.*

in the general purpose for which it was obtained, the owner is entitled to compensation for them. *Ibid.*

15. *Railroads—Easements—Measure of Damages—Minerals—Special Circumstances.*—In awarding damages to the owner of lands for an easement therein acquired for railroad purposes, there should, as a general rule, be included the market value of the land actually covered by the right of way, subject to modification under special circumstances, as where there is a mineral deposit of the use of which the easement does not interfere. *Ibid.*

16. *Railroads—Easements—Measure of Damages—Special Benefits.*—The owner of lands through which a railroad has acquired a right of way by condemnation is entitled to recover therefor the damages done to the remainder of the tract or portions of the land used by him as one tract, deducting from the estimate the pecuniary benefits or advantages which are special and peculiar to the tract in question, but not those which are shared by him in common with other owners of lands of like kind in the same vicinity. *Ibid.*

RAPE. See Indictment.

RECEIVERS.

1. *Debtor and Creditor—Insolvent Corporations—Receivers—Collaterals—Application of Dividends—Credits—Bills and Notes.*—A creditor of an insolvent corporation holding its notes with collaterals is entitled to a dividend, which the court has ordered the receivers to pay to its creditors, on the amount the debtor is due on the note, without deduction for credits received from the collaterals; and should there be any collaterals or proceeds thereof after the note has been paid in full, they should be turned over to the receivers. *Bank v. Flippen*, 334.

2. *Courts — Regularity of Proceedings — Presumptions—Receivers—Permission of Courts to Sue—Interpretation of Statutes.*—When it appears from the record that an action has been instituted against a corporation, and after several months a receiver of the defendant has, upon motion, been made a party defendant, without anything to show when the receivership was granted, the judgment of the lower court in overruling a demurrer to the complaint, upon the grounds that it is not alleged that permission to sue the receiver had been obtained from the court, nor that the claim had been filed, etc., will be sustained, every presumption being in favor of the regularity of the proceedings in the Superior Court, and that its judgment was authorized by law. The statutory powers and duties of receivers of insolvent corporations relative to the court's discretion for "good cause shown" to allow suits against them, discussed by ALLEN, J. *Black v. Power Co.*, 468.

REFERENCE.

Reference—Jury Trial—Evidence.—Under our statute, a jury trial after a reference, and in the absence of new matter, is properly confined, under the issues, to the evidence taken before the referee. *Makely v. Montgomery*, 589.

REGISTER OF DEEDS.

1. *Register of Deeds—Marriage License—Venue.*—An action for the penalty against a register of deeds for unlawfully issuing a marriage license under Revisal, 2090, should be tried in the county wherein the cause of action arises. Revisal, 420(2). *Dixon v. Haar*, 341.

2. *Same—Removal of Cause—Practice—Jurisdiction.*—When an action for the penalty sought against a register of deeds for unlawfully issuing a marriage license is brought in the wrong county, Revisal, 420 (2), it should be removed and not dismissed; and when after the refusal of a justice of the peace to remove the cause to the proper county and on appeal the motion is renewed in the Superior Court, the judge should order the cause removed to the proper county, and not remand it to the justice who had wrongfully assumed jurisdiction. *Ibid.*

3. *Register of Deeds—Marriage License—Defect of Venue—Jurisdiction.* A justice of the peace has jurisdiction of an action against a register of deeds for unlawfully issuing a marriage license, and when service is made in the wrong county, the defect is one of venue, and not of jurisdiction. *Ibid.*

4. *Register of Deeds — Parent and Child — Marriage License—Written Consent — From Whom Obtained — Interpretation of Statutes.*—The statute fixes the order in importance of those from whom the register of deeds should obtain the written consent for the marriage of minors under eighteen years of age (Revisal, sec. 2088); and when such minor resides with the father, which the register could reasonably have ascertained, the written consent of the mother only indicates that the subject of the application for the license is under the age specified, and is not a sufficient defense by the register to an action for the prescribed penalty. Revisal, sec. 2090. *Littleton v. Haar*, 566.

REGISTRATION. See Evidence; Mortgages; Wills.

RELIGIOUS SOCIETIES. See Trusts and Trustees.

REMAINDERMAN. See Estates.

REMAINDERS. See Wills; Deeds and Conveyances; Estates.

REMOVAL OF CAUSES.

1. *Removal of Causes—Federal Courts—Pleadings—Fraudulent Joinder—Jurisdiction.*—When a complaint in an action for damages, alleged to have been negligently inflicted by a nonresident corporation and its resident general manager, alleges in good faith a joint wrong, the allegations must be considered and passed upon as the complaint presents them, and no several controversy being presented which requires or permits a removal to the Federal courts, the cause should be determined in the courts of the State where it was brought. *Rea v. Mirror Co.*, 24.

2. *Same—Allegations of Petition.*—When the complaint in an action for damages against a nonresident corporation and its resident general manager alleges in good faith a joint wrong for which the corporation and its general manager are responsible, the position that the cause is properly determinable in the State court, when a proper mo-

REMOVAL OF CAUSES—*Continued.*

tion with sufficient bond for removal to the Federal court is made and presented by the defendant, is not altered or affected by an allegation of the petition that the resident defendant was joined for the mere purpose of avoiding removal, or with no honest intent of seeking relief against such resident, or the like, or by general allegations of fraudulent joinder. *Ibid.*

3. *Removal of Causes—Federal Courts—Diversity of Citizenship—Filing Petition and Bond—Practice.*—The mere filing of a petition and bond for the removal of a suit from the State to the Federal court, on the ground of diversity of citizenship, does not effect a transfer, unless it appears by the petition that the petitioner has the right to remove it. *Herrick v. R. R.*, 307.

4. *Same—Jurisdiction—Questions of Law.*—When a nonresident defendant of this State files his petition with sufficient allegations and bond in a court of this State for the removal of a cause to the Federal court, the jurisdiction of the State court ends, leaving only to the judge of the State court the right to pass upon the sufficiency of the petition and the bond. *Ibid.*

5. *Same—Appeal and Error.*—When the State court errs in retaining jurisdiction of a cause sought to be removed to a Federal court by a nonresident defendant, the Supreme Court of the United States can, upon writ of error review its decision, when affirmed by the highest appellate court of the State. *Ibid.*

6. *Removal of Causes—Federal Court—Diversity of Citizenship—Questions of Law—Issues of Fact—Jurisdiction.*—When a proper petition and sufficient bond for removal of a cause from the State to the Federal court has been duly filed by a nonresident defendant in the State court, the latter court cannot pass upon an issue of fact as to whether the defendant was a nonresident, as such an issue is determinable only in the Federal court. *Ibid.*

RENTS. See Mortgages; Principal and Agent; Ejectment.

RESTRAINT OF TRADE. See Constitutional Law.

REVISAL.

SEC.

5 (2). A nonresident guardian may not apply for removal of public administrator here. *Boynton v. Heartt*, 488.

5 (5). Failure of a foreign executor to give bond is an irregularity, and the act of the clerk cannot be collaterally attacked. *Batchelor v. Overton*, 395.

16. Direct proceedings must be had to attack an order of the clerk in appointing an administrator or executor. *Ibid.*

28. Failure of a foreign executor to give bond is an irregularity, and the act of the clerk cannot be collaterally attacked. *Ibid.*

35. The clerk of court is not required to transfer to the Superior Court for trial issues raised upon the question of removing an administrator or executor. *In re Battle*, 388.

REVISAL—*Continued.*

SEC.

101. The correctness of the probate of a deed taken before another requires the clerk to certify to its correctness. *Lumber Co. v. Branch*, 251.

104. The certificate of the clerk for registration of a deed probated by him is only required. *Ibid.*

133 (3). When the mother is the next of kin. *Wells v. Wells*, 330.

319. Failure of a foreign executor to give bond is an irregularity, and the clerk's act of appointment cannot be collaterally attacked. *Batchelor v. Overton*, 395.

400. Where an agent has taken a note for his principal, payable to himself, as agent, he may maintain an action thereon in his own name. *Martin v. Mask*, 436.

404. An agent must show his authority in taking a note of his principal payable to himself as agent, to maintain an action thereon, as such. *Ibid.*

408. Discussed as to right of *feme covert* to sue without joining her husband. *Whitfield v. Boyd*, 451.

420 (2). Action for penalty for register of deeds unlawfully issuing a marriage license, tried where cause arose; when brought in wrong county, should be removed; appeal not premature. *Dixon v. Haar*, 341.

451. Pleadings in court of justice of peace by complaint and answer. *Baxter v. Irvin*, 277.

512. Order of one judge allowing time to plead cannot control a subsequent judge, and from the exercise of this discretion no appeal lies. *Church v. Church*, 564.

535. An exception that the trial judge "failed to state in plain and correct manner the evidence and to explain the law" under this section, is too vague. *Jackson v. Lumber Co.*, 317.

544. Issues arise from material facts controverted in pleadings. *Gregory v. Pinnix*, 147.

570. Defendant's recovery in claim and delivery is limited to return of the property or its value, and special damages may be recovered in an independent action. *Ludwick v. Penny*, 104.

591. A case on appeal consisting of stenographer's notes will be dismissed. *Skipper v. Lumber Co.*, 322.

614. *Semble*, this section would not apply upon a motion to quash an execution in this case, because of the fact that the clerk ordered it, and it was irregular. *Williams v. Dunn*, 400.

641. Purchaser at mortgage sale takes with notice of terms of sale expressed in the mortgage. *Eubanks v. Becton*, 230.

653. As to when and for what period defendant in ejectment may recover for betterments, and applied to married women. *Whitfield v. Boyd*, 451.

654. The provisions in this case of an action for possession as to the measure of damages and betterments controlled by this section. *Ibid.*

REVISAL—*Continued.*

SEC.

655. As to when and for what period defendant in ejectment may recover for betterments, and applied to married women. *Ibid.*

656. As to when and for what period defendant in ejectment may recover for betterments, and applied to married women. *Ibid.*

657. As to when and for what period defendant in ejectment may recover for betterments, and applied to married women. *Ibid.*

658. As to when and for what period defendant in ejectment may recover for betterments, and applied to married women. *Ibid.*

710. In partition proceedings issues arise from material facts controverted in pleadings. *Gregory v. Pinnix*, 147.

817. Expenses in attending the hearing are not recoverable by a party enjoined. *Midgett v. Vann*, 128.

826. *Quo warranto* brought in name of State on relation of Attorney-General, where the powers of the office are exercised. *Midgett v. Gray*, 133.

826. In *quo warranto* leave of Attorney-General must be obtained before commencement of proceedings, or afterwards supplied. *Ibid.*

827. In *quo warranto* leave of Attorney-General must first be obtained or afterwards supplied. *Ibid.*

828. In *quo warranto* leave of Attorney-General must first be obtained or afterwards supplied. *Ibid.*

829. In *quo warranto* leave of Attorney-General must first be obtained or afterwards supplied. *Ibid.*

830. In *quo warranto* leave of Attorney-General must first be obtained or afterwards supplied. *Ibid.*

999. It is only required that the clerk certify to the correctness of the probate of a deed when it is taken by another officer. *Lumber Co. v. Branch*, 251.

1309. In an action by a county to have an obstruction removed from a stream, it is not necessary that it be in the name of the county commissioners. *Lenoir v. Crabtree*, 357.

1310. In an action by a county to have an obstruction removed from a stream, it is not necessary that it be in the name of the county commissioners. *Ibid.*

1317. Appointment of fence commissioners by county commissioners cannot be collaterally attacked or called in question by injunction. *Tripp v. Commissioners*, 180.

1318. Duty of county commissioners to provide necessary drawbridges. *Lenoir v. Crabtree*, 357.

1458. Oral pleadings to be entered by justice of peace on his docket; reference to written pleadings made on the justice of peace docket. *Baxter v. Irvin*, 277.

1459. Answer in court of justice of the peace must state facts constituting a defense or counterclaim. *Ibid.*

1460. Answer in court of justice of the peace must state facts constituting a defense or counterclaim. *Ibid.*

1571. Electrical companies may condemn lands. *Wissler v. Power Co.*, 465.

REVISAL—*Continued.*

SEC.

1577. Electrical companies may condemn lands. *Ibid.*

1596. Certified copies of abstracts of grants, as evidence. *Richards v. Lumber Co.*, 54.

1618. Copies of letters testamentary must be properly certified to be competent as evidence. *Riley v. Carter*, 484.

1619. Copies of letters testamentary must be properly certified to be competent as evidence. *Ibid.*

1693 (3). Statute does not run in favor of a claimant under a void grant except by sufficient adverse possession; testimony as to swamp lands upon witness's observation; when not subject to entry; what constitutes swamp lands; burden of proof; when void under section 4047; the board of education presumed to be the owner. *Board of Education v. Lumber Co.*, 313.

1869. An action upon a cotton-future contract cannot be maintained here. The purchaser of such draft with knowledge is not an innocent party. *Burrus v. Witcover*, 384.

2088. The order of consent to be obtained by the register of deeds for issuing a license to a minor is stated in this section. *Littleton v. Haar*, 566.

2090. Consent of mother not sufficient for register of deeds to issue license to minor, when the father's consent is obtainable. *Ibid.*

2090. Appeal from removal of action to proper venue in an action for penalty against register of deeds for unlawfully issuing a marriage license is not premature. *Dixon v. Haar*, 341.

2108. Contracts of separation between husband and wife, involving the release of mutual rights of each in the property of the other, must be executed under the requirements of section 2107. *Archbell v. Archbell*, 409.

2109. Certain contracts of separation between husband and wife affecting the property of the wife must be executed in accordance with the provisions of this section. *Ibid.*

2215. The provisions made as to warranties in case of unqualified indorsements refer to lawful transactions. *Sedbury v. Duffy*, 432.

2506. A partition of the whole lands is only authorized, and a purchaser at the sale, not confirmed, is not a tenant in common. *Patillo v. Lytle*, 92.

2575. Only an easement passes to railroad company upon condemnation of lands. Owners may use, not inconsistent with easement. *R. R. v. McLean*, 498.

2587. Easements acquired by railroads by condemnation continue during corporate existence. Owners may use, not inconsistent with easement. *Ibid.*

2686 To establish cartways, etc., over lands of others the statute must be followed. *Lumber Co., v. Cedar Works*, 161.

2686. The petition for a cartway in this case stated sufficient facts; claim of prescriptive rights is inconsistent. *Ibid.*

2698. This section does not apply to passenger alighting at regular station after the train has stopped. *Kearney v. R. R.*, 521.

REVISAL—*Continued.*

SEC.

2698. County commissioners may provide drawbridges, and it is discretionary as to their turning both ways. *Lenoir v. Crabtree*, 357.

2803. The action of the Superior Court in fixing expert fees is *res judicata* as to the amount, leaving open the question of legality. *Chadwick v. Insurance Co.*, 380.

2859. Remainderman may pay taxes on the land and maintain an action to recover them. *Smith v. Miller*, 98.

2863. Taxes not a lien on personal property. *Berry v. Davis*, 170.

2863. Requirements that notice of lien on land for taxes must be given to mortgagee, etc., are valid. *Ibid.*

2869. Lien on property of delinqeunt taxpayer not enforcible after a year, etc. *Ibid.*

2886. Seizure of personal property for taxes not affected by certain transfers; exception. *Ibid.*

2934. A city may require license tax from fertilizer agents or dealers, etc. *Guano Co. v. New Bern*, 354.

3133. It is necessary for copy of a will, probated in another State, to be registered here, that it be duly certified and authenticated by the clerk who allowed it for probate. *Riley v. Carter*, 484.

3271. By their verdict the jury should show the degree of murder found against the prisoner. *S. v. Bagley*, 608.

3346. This section does not apply to burning off railroad right of way; the firing must be voluntary and intentional, not merely accidental or necessary. *Mizzell v. Manufacturing Co.*, 265.

3524. The person must be "unmarried" as well as a minor, to convict for unlawful sale of intoxicating liquor. *Spencer v. Fisher*, 264.

3525. The person must be "unmarried" as well as a minor, for conviction of unlawful sale of intoxicating liquor. *Ibid.*

3823. An action upon a cotton-future contract cannot be maintained here. The purchaser of such draft with knowledge is not an innocent party. *Burrus v. Witcover*, 384.

3824. An action upon a cotton-future contract cannot be maintained here. A purchaser of such draft with knowledge is not an innocent party. *Ibid.*

3949. The measure of damages for furnishing deficient fertilizer, the difference in value caused by deficiency. *Fertilizer Works v. McLawhorn*, 274.

3955. Payment of fertilizer inspection tax does not relieve payment of property tax, and the act is constitutional. *Guano Co. v. Biddle*, 212.

4047. When grants to State's lands are void the board of education is presumed the owner, under section 1693 (3). *Board of Education v. Lumber Co.*, 313.

4048. Statute does not run in favor of a claimant under a void grant, except by sufficient adverse possession. *Ibid.*

ROADS AND HIGHWAYS. See Easements.

1. *Public Highways—Cartways — Petition — Sufficiency — Demurrer Ore Tenus—Interpretation of Statutes.*—A petition for a cartway over the lands of the respondents alleged that it was necessary in order to get a convenient pathway and outlet to the public road to cross the respondents' land, and that the respondents closed up an old pathway which had run through their lands for over forty years, greatly to the detriment and inconvenience of the petitioners: *Held*, the petition stated facts sufficient to constitute a cause of action, and it should not be dismissed upon a demurrer *ore tenus*. Revisal, sec. 2686. *Barber v. Griffin*, 348.

2. *Public Highways—Cartways—Proceedings to Establish—Evidence—Elements for Consideration.*—In proceedings under a petition for a cartway over respondents' lands, a request for instructions is properly refused, that if petitioners by acting together can establish a cartway over their own lands to the public road, they are not entitled to the cartway over the respondents' lands, for it ignores the question of distance, convenience, and reasonableness. *Ibid.*

3. *Railroads—Rights of Way — Highways — Pleadings—Demurrer.*—The complaint in an action alleging that a railroad company had laid out and used a public road over the plaintiff's lands under the care and in the charge of certain township road commissioners, causing the latter to go upon his lands to the side of the railroad right of way, to plaintiff's damage, without allegation that the railroad company had entered upon his lands or committed any act causing him injury, or any relationship which would cause liability to the railroad for the acts of the commissioners, does not state facts sufficient to constitute a cause of action as against the railroad company, and is demurrable. *Hicks v. R. R.*, 393.

4. *Highways—Cartways—Road Supervisors—Obedience to Valid Orders—Indictment.—Held* in this case, irregularities in certain proceedings by road supervisors to lay off a cartway over certain lands, under which the defendant assumed to act officially in removing a part of a fence where the proposed cartway was to be, does not subject the defendant to an indictment for obeying the order of the supervisors, which, it is further held, they had jurisdiction to make. *S. v. Hardy*, 652.

RULE IN SHELLEY'S CASE. See Deeds and Conveyances; Estates.

SALES. See Intoxicating Liquors; Executors and Administrators.

1. *Judicial Sales—Courts—Death of Commissioner—Deeds and Conveyances—Custodia Legis—Motion in Cause—Procedure.*—When a commissioner appointed by the court to sell land has done so in accordance with the order, and has since died without making a deed thereof to the purchaser at the sale who has paid the purchase money, the lands remain *in custodia legis*, and the remedy of an assignee of the purchaser in possession under the sale is by motion in the original cause for the appointment of a commissioner to complete the transaction by making a proper deed. *Campbell v. Farley*, 42.

SALES—*Continued.*

2. *Judicial Sales—Order as to Payment—Directory—Time Not of the Essence—Irregularities.*—When a sale of lands has been made by a commissioner appointed by the court under an order that the purchaser at the sale pay the purchase money by a certain time, and the purchase money has either been paid and accepted by the court or the proper parties in interest at a different or later date, it is immaterial that it was not paid *ad diem*, the order being merely directory, and time not being of the essence of the contract, but the matter being within the discretion and control of the court. *Ibid.*

3. *Judicial Sales—Courts—Confirmation—Nunc Pro Tune.*—When it appears that a purchaser at a judicial sale is entitled, under his motion in the cause, to have another commissioner appointed to make him a deed, which had not been done, owing to the death of a former commissioner, and it also appears that the sale has not been confirmed by the court, the confirmation may be made *nunc pro tunc*, if it is not dispensed with by an agreement of the parties. *Ibid.*

4. *Commissioner to Sell Lands—Taxes—Liens—Order of Court—Parties in Interest.*—An order of court that a commissioner appointed to sell lands, pay taxes and assessments against the property, constituting a lien thereon, is valid and proper, being necessary for the protection of the interests of the parties. *Smith v. Miller*, 98.

5. *Same.*—Parties interested in lands which have been ordered by the court to be sold by its commissioner cannot avail themselves of the benefit of an order that the commissioner pay the taxes and assessments constituting a lien on the land, and then be heard to complain of its validity. *Ibid.*

6. *Same—Future Taxes.*—An order of court that a commissioner of the court appointed to sell the lands in controversy pay "all such taxes and assessments as are and have been levied" is sufficiently comprehensive in its terms to include the past, present, and future taxes and assessments. *Ibid.*

7. *Same—Title.*—An order of court that its commissioner appointed to sell the land in controversy pay off such future taxes and assessments as may constitute a lien on the lands is valid, when it is made in the interest of the parties and in protection of their title. *Ibid.*

8. *Same—Commissioner to Sell—Purchaser—Clear Title—Interpretation of Statutes.*—When a commissioner is appointed by the court to sell lands, in which there is an estate in remainder after a life estate, an order directing him to pay "all such taxes and assessments as are and have been levied" thereon is valid, and will be allowed out of the proceeds of the sale of the lands, the object of the law being to pass a clear title to the purchaser. Revisal, secs. 2857, 2858. *Ibid.*

9. *Commissioner to Sell Lands—Order of Court—Commissions Allowed—Appeal and Error.*—An order of court allowing a certain sum to a commissioner for the sale of lands in dispute, not excepted to, will be presumed, on appeal, to have been made by the lower court upon a full consideration of all the facts and circumstances, and will therefore be upheld. The question in this case, as to the

SALES—*Continued.*

power of another judge subsequently hoding court in the county to review such an order, was stated by the Court, but not determined, it not being deemed necessary to pass upon it. *Ibid.*

10. *Commission to Sell Lands—Void Sales—Personal Dealings—Judgment —Credits—Disposition of Proceeds of Sale—Appeal and Error.*—A commissioner appointed by the court disbursed a large sum in the manufacture of concrete blocks for use in the construction of a building on the land. The court below found as a fact that the blocks were manufactured by the commissioner in his individual capacity, and was not the property of the estate, as he, personally, could not make a valid sale to himself as commissioner, and ordered the blocks to be sold and the proceeds applied as a credit on a judgment rendered against the commissioner: *Held*, the sale of the blocks under the order was void, and the commissioner in his individual capacity is entitled to have the value of the blocks, or at least the proceeds of the sale, paid to him. *Ibid.*

11. *Principal and Agent—Vendor and Vendee—Commissions on Sales— Lands—Purchaser, "Ready, Able, and Willing."*—For an agent to recover commissions for the sale of lands, he must show that he found a purchaser who was ready, able, and willing to buy upon the terms prescribed by the owner. *Clark v. Lumber Co.*, 139.

12. *Contracts—Telegrams—Vendor and Vendee—Terms of Sale—Interpretation.*—In reply to defendant's letter offering corn at a certain price without stipulation as to time of delivery, plaintiff telegraphed: "Letter 23. Book 400 cracked corn. Shipment thirty days if possible. Answer immediately by wire"; to which defendant replied: "Booked cracked corn": *Held*, under the contract, the defendant was obliged to sell to plaintiff cracked corn in the quantity and at the price named if ordered within thirty days, and not thereafter. *Jennette v. Hay and Grain Co.*, 156.

13. *Contracts, Written—Conditional Sale—Parol Contracts—Reservation of Title—Statute of Frauds.*—A parol contract of conditional sale of personal property is not valid as against an innocent purchaser for value unless reduced to writing and recorded; when the contract is executory, the title thereunder does not vest in the vendee until the purchase price has been paid. *Robertson v. Hudson*, 210.

SCHOOLS AND SCHOOL DISTRICTS.

1. *Cities and Towns—School Committees—Discretionary Powers—Aldermen—Supervision.*—The Board of Aldermen of Charlotte have no supervisory power of the school committee of that city in selecting a site, etc., for school purposes. *School Commissioners v. Aldermen*, present volume, 191, cited and applied. *Newton v. School Committee*, 186.

2. *Cities and Towns—School Committees—Discretionary Powers—Power of Courts—Abuse of Discretion.*—The courts may not interfere with discretionary powers conferred on school committees in their administration of school affairs, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of the discretion conferred. *Ibid.*

SCHOOLS AND SCHOOL DISTRICTS—*Continued.*

3. *Same—Evidence.*—In this proceeding involving the right of the school committee of the city of Charlotte to select and build upon a certain site selected for public school purposes, it is *Held*, upon the affidavits tending to show the site complained of was properly selected, that the court cannot inquire into the discretion of the committee in selecting it, there being no sufficient evidence that this discretion was unreasonably or arbitrarily exercised. *Ibid.*

4. *Municipalities—Discretionary Powers—Mandamus—Practice.*—Mandamus does not lie to enforce the exercise of a discretionary power vested in the officials of a municipal corporation by the Legislature, in any given or specified way. *School Commissioners v. Aldermen.* 191.

5. *Statutes—Interpretation—Municipalities—Aldermen—School Board—Discretion.*—A charter of a city which provides for the maintenance of public schools creating a board of commissioners with exclusive control separate from the board of aldermen, with ample power to purchase sites and provide necessary school buildings and facilities; to employ teachers and fix their salaries, etc.; and in general, to do anything that may be necessary and proper to open and conduct a sufficient number of schools to meet the needs of the scholastic population of the city, etc., leaves nothing to the discretion of the board of aldermen of the city in regard to the selection of a site for school purposes by the school commissioners of the town; and the board of aldermen are without authority to withhold from the school commissioners moneys received by them from a valid bond issue they were authorized to issue for school purposes, upon their assumption that a certain site in which the money was to be invested by the school commissioners was not one suitable for the purposes intended. *Ibid.*

6. *Statutes—Interpretation—Municipalities—School Board—Board of Aldermen—Discretionary Powers.*—A general legislative power of government and control over a city given to the board of aldermen will not be so construed as to defeat the clearly expressed intention of another part of the act giving to a board of school trustees the exclusive control of schools of the city, with the power to select sites for schools therein, etc., so as to permit the board of aldermen a discretionary power to withhold moneys obtained for school purposes, or to determine whether a site selected by the school trustees was a suitable one. *Ibid.*

STATE'S LANDS.

1. *Grants of Land — Countersignature — Deputy Clerk — Invalidity.* — A countersignature by the chief clerk to the Secretary of State on a grant for lands held void under the doctrine of *Richards v. Lumber Co.*, present volume, 54. *Fowler v. Development Co.*, 48.

2. *Same—Correction—Validity.*—When the countersignature of the Secretary of State correctly appears on a grant in all respects regular in form, the validity of the grant will not be affected because a void attempted countersignature of the Secretary appears thereon as having been made by the chief clerk in his office. *Ibid.*

STATE'S LANDS—*Continued.*

3. *Grants of Land—Regular in Form—Countersignature—Seal—Entry—Presumptions.*—A grant of land under the great seal of the State, regular in substance and form, had thereon the following countersignature by the Secretary of State: "Secretary's office, May 21, 1869. H. J. Menninger, Secretary of State." The countersignature held sufficient, and the reference to the Secretary of State's office, with the entry plat as well as the great seal affixed to the grant, shows that the grant was duly issued upon the payment of the money. *Ibid.*

4. *Words and Phrases—"Countersign."*—The verb "countersign" means "to sign on the opposite side" or in addition to the signature of another, and the noun means "the signature of a secretary or other officer to a writing, or writings, added to that by the principal or superior to attest its authenticity." *Richards v. Lumber Co.*, 54.

5. *Same—Grants of Lands—Secretary of State.*—Within the intent and meaning of our Constitution, Art. III, sec. 16, it is not required that the Secretary of State "countersign" grants of lands and commissions in any particular place or position thereon, and when a grant to the land in controversy is put in evidence by one of the parties and in all respects appears to be regular and authentic upon its face, it will not be held to be defective because the countersignature of the Secretary of State appears on the opposite side of the sheet from the signature of the Governor. *Ibid.*

6. *Grants — Countersignature — Deputy — Interpretation of Statutes.*— A deputy clerk of the Secretary of State is not authorized by the statute to countersign, in the name of the Secretary, a grant to lands, and his attempt to do so is void; and chapter 512, Laws of 1905, validating all grants thus defectively authenticated does not, by its express terms, interfere with vested right, and is therefore not available to the defendants in this case. *Ibid.*

7. *State's Lands—Grants—Interpretation of Statutes — Swamp Lands—Statute of Limitations—Adverse Possession.*—Until barred by adverse possession the statute of limitations does not run against the State (Revisal, sec. 4048) in an action to recover swamp and marsh lands from a claimant holding under a grant which is invalid according to the provisions of the Revisal, sec. 1693 (3). *Board of Education v. Lumber Co.*, 313.

8. *State's Lands—Grants — Swamp Lands — Interpretation of Statutes—Evidence—Opinion—Personal Knowledge.*—In an action involving the question as to whether the *locus in quo* are swamp lands, etc., within the meaning of Revisal, sec. 1693 (3), it is competent for witnesses to testify, upon their own observation, as to whether the lands were swamp lands or not, subject to the cross-examination of the opposing party, leaving the truth of the matter for the jury to determine. *Ibid.*

9. *State's Lands—Void Grants—Swamp Lands.*—An instruction in this case held correct, that if the jury found from the evidence as a fact that the lands in controversy were swamp lands and in a swamp of over 2,000 acres, prior to and at the time the defendant's claims were taken out, they would not be subject to entry, and defendant's grant would be void. Revisal, sec. 1693 (3). *Ibid.*

STATE'S LANDS—*Continued.*

10. *State's Lands—Swamp Lands—Definition—Interpretation of Statutes.* After giving definitions as to the meaning of the term "swamp lands," and quoting from that given in Revisal, sec. 1695, and instructing the jury that the statutory definition would not apply against the defendant who held under a grant prior to that time, the court said that he did not mean to lay down any fixed rule for the jury to determine whether the lands in controversy were swamp lands, but only to assist them in ascertaining the common and generally accepted definition: *Held*, no error. *Ibid.*

11. *State's Lands—Swamp Lands—Definition—Knolls or High Places—Interpretation of Statutes.*—A tract of land within the area of swamp lands coming within the meaning of Revisal, sec. 1693 (3), need not necessarily be free from knolls or higher and drier places; for when, taken as a whole, the general effect is that of swamp lands, the provisions of the statute apply which withdraw them from the granting authority conferred on the State officials. *Ibid.*

12. *State's Lands—Swamp Lands—Burden of Proof—Evidence—Quantum of Proof.*—Upon the issues as to whether the lands granted to the defendant were swamp lands within the meaning of the Revisal, sec. 1693 (3) the burden is upon plaintiffs, in this case the State Board of Education, to establish the affirmative by the preponderance of the evidence, and not by "clear, strong and convincing proof." *Ibid.*

13. *State's Lands—Swamp Lands—Void Grants — Ownership — Presumptions.*—Grants of swamp lands within the meaning of Revisal, 1693 (3), are void under the Revisal, sec. 4047, and the law presumes the Board of Education is the owner of them. *Ibid.*

STATUTE OF FRAUDS.

1. *Contracts—Oral—Party Walls—Abutting Owner—Agreement to Pay—Equity—Statute of Frauds.*—A parol agreement between adjoining owners of lands that one should build a division wall partly on the lands of each owner and for the use of both, for which the other was to pay one-half of the cost in the event he should thereafter use it, is enforcible in equity after the wall has been built by the one and the other has used it accordingly; and being enforced upon equitable principles, it does not fall within the meaning of the statute of frauds, which requires that a contract concerning lands or interests therein be in writing. *Reid v. King*, 85.

2. *Same—Easement—Deeds and Conveyances—Subsequent Purchasers with Notice.*—By parol agreement between the owners of adjoining lots, one of them built a brick building on his own land, one wall of which rested partly on the lands of the other, and one-half the cost of its erection was to be paid by the other party when he should use it: *Held*, the effect of this agreement was to create cross-easements as to each owner, which would bind all persons succeeding to the estates to which the easements are appurtenant, and in equity a purchaser of the estate of the owner so contracting, having notice of the agreement, would take it with the liability to pay one-half the cost of the wall, whenever he availed himself of its benefits. *Ibid.*

STATUTE OF FRAUDS—*Continued.*

3. *Same—Incorporeal Hereditaments.*—When by parol agreement one owner of lands has built a party wall one-half upon his own land and the other half upon that of an adjoining owner, and the latter had agreed to pay for one-half of the wall when he should use it, equity, to give effect to the agreement, will regard the agreement as creating an incorporeal hereditament (in the form of an easement) out of the unconveyed estate, rendering it appurtenant to the one conveyed, and binding upon the title of subsequent assignees with notice. *Ibid.*

4. *Contracts, Written—Conditional Sale—Parol Contracts—Reservation of Title—Statute of Frauds.*—A parol contract of conditional sale of personal property is not valid as against an innocent purchaser for value unless reduced to writing and recorded; when the contract is executory, the title thereunder does not vest in the vendee until the purchase price has been paid. *Roberts v. Hudson*, 210.

STENOGRAPHER'S NOTES. See Appeal and Error.

STOCK LAW.

1. *Stock Law—Added Territory—Boundaries—Interpretation of Statutes.* Chapter 702, Laws of 1911, prescribes a well-defined line, all west of which is to be added to the stock-law territory of Pitt County, which, with the lines of such territory theretofore existing by chapter 386, Laws 1901, makes complete boundary lines to the old and new territory, and includes stock-law districts of inconsiderable area already established by the Legislature: *Held*, chapter 702, Laws 1911, enlarging "the present stock-law territory of Pitt County," refers only to the territory embraced in chapter 386, Laws 1901, entitled "An act to consolidate and enlarge the stock-law territory of Pitt County." *Tripp v. Commissioners*, 480.

2. *Stock Laws—County Commissioners—Appointment of Fence Commissioners—Collateral Attack—Injunction—Interpretation of Statutes—Officer de Facto.*—The action of the board of county commissioners in appointing certain fence commissioners at a special meeting, without giving the public notice required by Revisal, sec. 1317, cannot be collaterally attacked, or called in question in proceedings to enjoin them from acting as such; and the fence commissioners acting under the appointment are officers *de facto*. *Ibid.*

3. *Stock Law—County Commissioners—Fence Commissioners—Irregularity of Appoinmtent—Quorum—Valid Acts.*—The action of a majority of the board of fence commissioners is valid, and the validity thereof is not affected by the irregularity of the appointment of a minority number, when all concur. *Ibid.*

4. *Stock Laws—Uniformity of Penalties—Interpretation of Statutes.*—The small areas of stock-law territory in Pitt County included in the territory added by chapter 702, Laws 1911, to that described in chapter 386, Laws 1901, have the same penalties imposed for the infraction of the law as those prescribed by chapter 386, Laws 1901, being "the same as those in the Revisal," and hence it is not indefinite or uncertain what penalties would apply. *Ibid.*

STOCK LAW—*Continued.*

5. *Stock Laws—County Commissioners—Fence Commissioners—Trespass —Interpretation of Statutes.*—The Fence-law Commissioners of Pitt County, proceeding under chapter 702, Laws 1911 in the added stock-law territory, to grade, build, and widen the public road along which the new boundary fence runs, in accordance with the provisions of chapter 714, Laws 1905, and chapter 386, Laws 1901, are not trespassers in so doing. *Ibid.*

6. *Stock Laws—Building Fences—Assessments—Interpretation of Statutes—Constitutional Law—Referendum.*—The courts will construe a statute to ascertain as far as possible the intention of the Legislature, and there being nothing in the Constitution, Art VII, sec. 7, which requires that an assessment in stock-law territory for the purpose of fencing be referred to a vote of the people, it is not required of chapter 386, Laws 1901, that this should have been provided for in order to sustain its validity. The Referendum discussed. *Ibid.*

7 *Quarantine of Cattle—Prohibited Territory—Fence Law, County—"Willfully Permit."*—An owner of cattle, in permitting them to run at large in a no-fence county, which results in their straying from a prohibited territory, willfully "allows" them to move across the line when he purposely turns them out and they cross the line; for it is not necessary that he drive them across—it is enough that he permits them such liberty that thereby they are "allowed" by him to move across the line. *S. v. Garner*, 630.

SUBROGATION. See Debtor and Creditor.

TAXATION.

1. *Taxation—Tax Collectors—Powers—Interpretation of Statutes.*—A tax collector of a city to whom has been given all the rights and remedies for collecting taxes possessed by sheriffs under the general revenue laws of the State is confined to the methods which the statute specifies, and resort may not be had to a civil action for that purpose except where these methods are inadequate and unavailing. *Berry v. Davis*, 170.

2. *Taxation—Methods for Collection—Interpretation of Statutes—Constitutional Law.*—Our statutes provide "that no mortgage or deed of trust executed upon personal property shall have a lien thereon superior to the lien acquired by a subsequent levy upon said property" for the payment of taxes, etc., requiring certain notice to the mortgagee or trustee to afford them an opportunity for payment, with costs incident to making the levy, which shall become a part of the mortgage debt, etc. (Revisal, sec. 2863); that taxes shall not be a lien on personal property, etc. (Revisal, sec, 2863); that all personal property shall be liable to be seized and sold for taxes, etc., and transfers thereof, except as to *bona fide* purchasers, etc., "shall be null and void as to said taxes," and not affect the rights, etc., of the sheriff to levy upon and sell it for taxes, if the "levy shall be made within sixty days after such transfer" (Revisal, sec. 2886): *Held*, these provisions are within the power of the Legislature, and are valid. *Ibid.*

TAXATION—*Continued.*

3. *Taxation—Methods of Collection—Personal Property—Tax List—Execution—Levy—Claim and Delivery—Interpretation of Statutes.*—The express statutory method for collecting taxes on personal property is by seizure and sale, and in the absence of some exceptional conditions rendering such remedies inadequate and unavailing, an executive officer holding the tax list and charged with the duty of collecting is confined to them; and the tax list being in the nature of an execution, he may not under ordinary conditions resort to the process of claim and delivery in enforcement of his claim. *Ibid.*

4. *Taxation—Tax Collector—Settlement—Subsequent Enforcement—Interpretation of Statutes.*—A tax collector does not lose his right to pursue the statutory methods provided for enforcing the collection of taxes against the personal property of a delinquent taxpayer because he has accounted for those taxes to the proper authorities in a settlement with them. *Ibid.*

5. *Same—Property Tax.*—Article V, sec. 3, of our Constitution imperatively requires that all real and personal property be taxed by a uniform rule according to its true value in money, and Revisal, sec. 3955, providing for the levy of an inspection tax, will not be so construed as to relieve the manufacturers of fertilizers or fertilizing material, paying this inspection tax, from the payment of property tax required by the Constitution, *Guano Co. v. Biddle*, 212.

6. *Taxation—Bond Issues—Vote of the People—Unrelated Propositions—Single Ballot.*—When a popular vote is required to authorize or validate a municipal indebtedness the proposition should be single, and when the question presented embodies two or more distinct and unrelated propositions, and the voter is only afforded opportunity to express his preference or decision on a single ballot, and on the question as an entirety, the election as a rule is invalid and, on objection made, in apt time and in proper way, may be disgregarded and set aside. *Winston v. Bank*, 512.

7. *Same—Constitutional Law—Legislative Control.*—The general rule that a proposition to authorize or validate a municipal indebtedness should be single, not embodying two or more distinct and unrelated propositions, is not, in North Carolina, regulated by our Constitution, and the method of voting on a proposition of municipal indebtedness, under all ordinary conditions, is for the Legislature. *Ibid.*

TAXES. See Sales; Statutes.

TELEGRAPHS.

1. *Telegraphs—Mental Anguish—Surgeon—Notice of Importance—Substantial Damages.*—For mental anguish proximately resulting from the negligence of a telegraph company in sending an affirmative reply from a surgeon to a message reading, "Young lady appendicitis; can't pay anything till fall. Will you operate? Answer," and signed by the physician of the patient, substantial damages are recoverable by the patient for whose benefit it was sent, the message giving notice of the character of damages that would likely result. *Alexander v. Telegraph Co.*, 474.

TELEGRAPHS—*Continued.*

2. *Telegraphs — Reasonable Stipulations — Message—Blank.*—Telegraph companies may make reasonable stipulations restrictive of liability to the extent that they are not relieved thereby from the obligations of diligence superimposed by law in the performance of their duties. *Ibid.*

3. *Same—Messenger—Agent of Sender—Principal and Agent—Telephone —Evidence.*—A telegraph company cannot avail itself of a stipulation in its message blank to the effect that a messenger boy is to be deemed the agent of the sender in taking a telegram to the telegraph office for transmission, without liability on the part of the company, when it appears that the sender of the message got into communication with a person answering the telephone number call of the company and the messenger came in accordance with a request that one be sent, and was evidently sent by the company for the express purpose of getting the message for transmission. *Ibid.*

4. *Telegraphs—Mental Anguish — Surgeon — Measure of Damages—Evidence.*—In this case damages were demanded for mental anguish caused by the plaintiff on account of the failure of the defendant telegraph company to transmit a telegram replying affirmatively to one sent to a surgeon by the plaintiff's physician, reading, "Young lady appendicitis; can't pay anything till fall. Will you operate? Answer." Evidence upon the measure of damages *held* competent which tended to show that the attending physician, not hearing from his telegram, did not call upon his patient until several hours after his usual time for a visit, desiring to make arrangements elsewhere; that in this interval of waiting the plaintiff, not understanding his absence, suffered mental anguish in apprehension that she could not get operated on, from which she supposed that she would die, etc. *Ibid.*

TENANTS IN COMMON.

1. *Tenants in Common—Partition — Parties — Decree — Waiver.*—Those who have an interest as tenants in common in lands to be divided in proceedings for partition, and whose names appear as parties in the proceedings without service of process and without their authority, are not in law parties to the proceedings, and the mere expression of their willingness or consent at the time will not bind them by an adjudication therein, when it does not appear that, by their acts, they have prejudiced the other parties or the purchaser of the lands at a sale for division, or that they have done something which creates an estoppel upon them. *Patillo v. Lytle*, 92.

2. *Tenants in Common—Partition—Decree—Partial Division—Interpretation of Statutes.*—Upon motion made by tenants in common to set aside the judgment rendered in proceedings in partition wherein a sale had been made of the property, it is reversible error for the trial court, upon finding that the sale was necessary to the interest of the tenants, to adjudge that the purchaser at the sale, which had not been confirmed, was a tenant in common with one who had not been bound by the former judgment, the former having bid for the interests of all except those of the latter; for the statute authorizes only a partition of the whole, and the provisions of Revisal, sec. 2506, have no application. *Ibid.*

TENANTS IN COMMON—*Continued.*

3. *Tenants in Common—Partition—Sale—"Preferred Proposer"—Confirmation.*—The highest bidder at a sale of lands in proceedings for partition by tenants in common cannot be an innocent purchaser until the sale is confirmed by the court, and until it is, the bidder is only regarded as a "preferred proposer," and is presumed to know that his bid is subject to the condition of its acceptance or rejection by the court. *Ibid.*

4. *Tenants in Common—Partition—Void Conveyances—Confirmation.*—A deed made by a commissioner to sell the lands in proceedings for partition among tenants in common is invalid unless the sale has been confirmed by the court, or the parties have otherwise become bound by it. *Ibid.*

5. *Tenants in Common—Partition—Decree—Parties.*—A deed by a commissioner to sell lands for partition among tenants in common, though the sale had been confirmed by the court will not bind one of the tenants who had not been made a party to the proceedings or waived his rights; for in the absence of a necessary party the lands cannot be thus partitioned under the statute as to him. *Tayloe v. Carrow*, 156 N. C., 6, cited and and applied. *Ibid.*

6. *Pleadings — Tenants in Common — Material Allegations.*—In special proceedings to partition lands the allegation that the parties are tenants in common is a material one, as the right of the parties to the partition is only conferred on tenants in common. Revisal, sec. 2487. *Gregory v. Pinnix*, 147.

7. *Tenants in Common—Partition—Pleadings—Amendments—Discretion —Appeal and Error.*—It is within the discretion of the trial judge to permit answers to be filed in proceedings for partitioning lands which had been stricken out by the clerk, and his action therein is not reviewable on appeal. *Ibid.*

TRAMWAYS. See Railroads.

TRESPASS. See Instructions; Injunctions.

1. *Injunction—Tresspass—Contempt of Court.*—A party going upon lands claimed by plaintiff, described in the complaint by metes and bounds, after an injunction had been issued thereon, and cutting timber in violation of the order granted, commits a contempt of court. *Weston v. Lumber Co.*, 270.

2. *Injunction—Trespass—Location—Specific Findings.*—A party who has violated the mandate of an injunction by cutting timber upon the lands described, cannot complain that the findings of the lower court imposing the punishment were not more specific or more in accordance with the probative force and full significance of the evidence, when they are favorable to him. *Ibid.*

3. *Trespass—Possession—Pleadings—Damages—Freehold.*—In an action for damages for trespass on lands possession must be alleged and shown; but when the damages claimed are to the freehold, the land itself, the plaintiff must show his title at the time of the injury complained of. *Daniels v. R. R.*, 418.

TRIAL BY JURY. See Reference.

TRUSTS AND TRUSTEES.

1. *Trusts and Trustees—Religious Societies — Partition.*—Lands held by trustees under a deed from the Shiloh Association of churches for certain declared school purposes, which association has subsequently increased in the number of churches and the school has been incorporated by the Legislature in an act recognizing the trusts set out in the deed, cannot be divided by the churches in proceedings for partition, for such would be subversive and destructive of the trusts declared. *Church v. Trustee*, 119.

2. *Trusts and Trustees—Religious Societies—Appointment of Trustees—Control.*—The only manner in which the Shiloh Association of churches may exercise any control of the property held by the trustees under its deed declaring certain trusts, is by the election of trustees at the meeting for that purpose regularly held under the legislative act of its incorporation. *Kerr v. Hicks*, 154 N. C., 265, cited and applied. *Ibid.*

3. *Trusts and Trustees—Religious Societies—Trusts Declared—Powers of Sale—Purposes.*—The provisions in the deed in trust to the trustees of the "Shiloh Association" of churches, that the trustees have "the rights and privileges of selling and mortgaging the property herein conveyed whenever they are required and requested to do so by the association," is construed to apply only to selling and mortgaging the trust estate in pursuance and furtherance of the trusts declared, and not for the purpose of partition. *Ibid.*

4. *Trusts and Trustees—Religious Societies—Trust Estates—Cotenants—Possession—Partition.*—The individual churches of the Shiloh Association hold no such interest in the trust estate declared by their deed in trust as to make them cotenants therein and permit a division of it in proceedings for partition thereof; nor have they the possession, a necessary element in maintaining such proceedings. *Ibid.*

5. *Trusts and Trustees—Religious Societies—Failure of Trustee—Equity.* The courts, in their equitable jurisdiction, would not permit the trusts declared in the deed of the Shiloh Association of churches to fail for the want of a trustee; and if these trusts are considered for charitable purposes, the courts, under proper conditions, would appoint trustees from time to time, under Revisal, sec. 3923. *Ibid.*

6. *Note—Subrogation—Debtor and Creditor—Notice—Equity—Trusts and Trustees.*—Equity will not allow a debtor, who has had money advanced to him with which to take up his note secured by a mortgage under an agreement that the security will be held as collateral to his note given for the money advanced, to avail himself of a breach of trust in taking an assignment of the note and mortgage to himself and thereby defeat the right created by his agreement, upon the faith of which the money was advanced, but will regard the assignment of the security, if made to the debtor, as being for the benefit of him to whom it justly belongs. *Bank v. Bank*, 238.

7. *Deeds and Conveyances—Trusts and Trustees—Evidence.*—The quantum of proof required to establish a trust under the deed in this case, *Held*, sufficient, under *Harding v. Long*, 103 N. C., and that line of cases. *Makely v. Montgomery*, 589.

USURY.

1. *Bills and Notes—Guarantors of Payment—Loan—Usury — Interpretation of Statutes.*—When the transaction is free from fraud and unlawful imposition, a purchaser may buy a note at any price they may agree upon; but if the purchaser requires the indorsement of the seller, the transaction, as between the immediate parties thereto, is in effect a loan, and will be so considered within the meaning and purport of our usury laws. *Sedbury v. Duffy*, 432.

2. *Same.*—The purchaser at $3,200 of a promissory note given for $5,200, upon which $1,000 had been paid, required an indorsement by the payee and another guaranteeing payment. In an action upon the note our statute as to usury was pleaded by the guarantors of payment: *Held*, as between the purchaser and guarantors of payment, the transaction is regarded as a loan, upon which a usurious charge was made in addition to the legal rate of interest. *Ibid.*

3. *Bills and Notes — Unqualified Indorsers — Usury — Interpretation of Statutes.*—The provisions made as to warrants which prevail in case of unqualified indorsements by Revisal, sec. 2215, refer to lawful transactions, and do not relate to transactions coming within the meaning of our usury laws. *Ibid.*

VENDOR AND VENDEE. See Contracts; Equity.

Vendor and Vendee—Breach of Contract—Principal and Agent—Notice—Measure of Damages.—Held, in this case, the knowledge of the agent of the defendant of the purposes for which certain glass had been purchased by the plaintiff was sufficient notice to the defendant that plaintiff would sustain damages of the character claimed upon the defendant's breach of his contract of shipment. *O'Neal v. Seim*, 588.

VENUE.

1. *Register of Deeds—Marriage License—Venue.*—An action for the penalty against a register of deeds for unlawfully issuing a marriage license under Revisal, 2090, should be tried in the county wherein the cause of action arises. Revisal, 420 (2). *Dixon v. Haar*, 341.

VERDICT. See Judgment.

WAIVER. See Tenants in Common; Railroads.

WATER AND WATER COURSES. See Navigable Waters.

WIDOW. See Estates.

WILLS. See Estates.

1. *Wills—Construction—Estates—Remainder—Intent—Real and Personal Property—Possession at Death of First Taker.*—Giving effect to the intent of the testator from the language employed by him in the will: *Held*, a devise and bequest to A. of real and personal property "to have and to hold during her natural life," and at her death "the said property or so much thereof as may be in her possession at the time of her death is to go to B., her heirs and assigns forever," gave A. only a life estate in the lands, with remainder to B. in fee. *Herring v. Williams*, 1.

WILLS—*Continued.*

2. *Same—Consistency.*—When there is a devise and bequest of real and personal property to A. for life, with a limitation after the death of A. that the "said property or so much thereof as may be in her possession at the time of her death is to go to" B., her heirs and assigns forever, the words "or so much thereof as may be in her possession at the time of her death," are construed for consistency to refer only to the personal property bequeathed, and not to the realty which is of a permanent nature. *Ibid.*

3. *Wills—Construction—Power of Disposition—Implication.*—The intention of the testator to create the power of disposition in the devisee must clearly appear from the language of the will, and it will not be implied from language entirely consistent with the devise to him of a life estate. *Ibid.*

4. *Wills — Construction — Estates — Power of Disposition—Reference—Deeds and Conveyances.*—A deed made by the devisee to a life estate with power of disposition, must refer to the power contained in the will to convey the fee, and in the absence of such reference only the life estate is conveyed. *Ibid.*

5. *Wills—Devisees—Pleadings—Evidence—Issues.*—An issue as to whether a devisee "failed or refused to support the widow and unmarried daughters" of J., being a condition annexed to the devise, when not alleged or supported by evidence, should not be submitted to the jury. *Shields v. Freeman*, 123.

6. *Wills—Intent — Interpretation—"Desires"—Fee Simple.*—The testator put his son in charge of his lands during his life and gave him a one-horse crop for his services. At this time the testator did not own a part of his father's old homestead, but urged his son, in a will he had made, to acquire as much of it as possible. Later the testator acquired that land, and by codicil added it to the devise to his son "in fee simple, to descend to his heirs," and expressed the purpose that his son should own this homestead. In his will the testator "desired" that his unmarried sisters should have a home with their mother and brother on the land: *Held*, (1) a devise to the son in fee simple; (2) a desire that the son keep the land in the male line of inheritance was without legal effect. *Ibid.*

7. *Wills—Prefixes — Uncertainty of Identification — Interpretation.*—An undated prefix to a will, "This is written for L. and J. F. and is an addendum to the agreement" of a specified date, is of no effect, the agreement referred to not being described and indentified with such particularity as to designate and clearly show, and so that the court may clearly see, what paper was meant to be a part of the will." *Siler v. Dorsett*, 108 N. C., 300, cited and approved. *Ibid.*

8. *Wills—Devise—Description—Parol Evidence.*—A devise to the wife of "the house where we now live, with all the outhouses, embracing the peach and apple orchard," etc., is a sufficiently definite description to pass title to the property and permit the reception of parol evidence to fit the description to the land intended by the devise. *Boddie v. Bond*, 204.

9. *Wills—Probate—"Duly Proven"—Inference—Burnt and Lost Records—Evidence—Practice.—Semble*, an entry made of record in the min-

ute-book of the county court regarding the probate of a certain will in the chain of title of a party claiming the lands involved, that the will was duly proven by the oath of two subscribing witnesses, according to law, would irresistibly imply that the testator signed the will in their presence and they in his; but in the case at bar the party may recover without this proof, and this question is adverted to only for the purpose of suggesting that if he wishes to rely upon the will, in a new trial ordered, he may perhaps restore the lost record under the provisions of Revisal, ch. 2. *Lumber Co. v. Branch*, 252.

10. *Wills—Foreign Probate—Registration—Title—Evidence—Practice.*—It is necessary to the registration of a copy of a will in North Carolina, which has been probated in another State, that the copy of exemplification of such will be duly certified and authenticated by the clerk of the court in which it had been proved or allowed (Revisal, sec. 3133), and if it has been allowed to be registered here under the certificate and seal of the register of deeds in another State it is ineffectual as evidence in a claimant's chain of title. *Riley v. Carter*, 484.

11. *Same—Act of Congress—Copies.*—In a controversy concerning lands the plaintiff claimed title under a will which had been probated in another State under a certificate of the register of deeds there executed under his own seal, without certificate from the clerk of the court there, and admitted not to conform to the act of Congress relating to such registration: *Held*, the probate was ineffectual, for copies of letters testamentary or administration, for certain purposes, must be "properly certified" (Revisal, secs. 1618, 1619), either according to the act of Congress or by the proper officer of the State or territory from whence they come, our statute requiring such certificate to be from the clerk of the court. Revisal, sec. 3133. *Ibid.*

12. *Wills—Interpretation—Intent.*—The intent of the testator, to be ascertained under the rules of construction, and gathered from the will construed as a whole, should be given effect. *Chewning v. Mason*, 578.

13. *Same — Powers of Disposition — Life Estates — General or Indefinite Estates.*—A devise of all the testator's real property to his wife, "during her natural life, and then to dispose of as she sees proper," does not, by the power of disposition, enlarge the estate devised to her into a fee simple, for the limitation of her estate for life shows the intent of the testator that only a life estate, and not the fee, was intended by the gift; and upon her failure to exercise the power of disposition, the estate will revert to the heirs at law of the husband. It is otherwise when an estate is devised generally or indefinitely, with a power of disposition. *Ibid.*

14. *Wills—Estates for Life—Powers of Disposition—Property—Mere Authority.*—A devise for life with the power of disposition creates a life estate only, the power of disposition being a mere authority which can be exercised or not, in the discretion of the life tenant. *Ibid.*

WILLS—*Continued.*

15. *Wills—Estates—Power of Disposition—Exercise of Power—Donor.*—One taking lands under a power of disposition given by will does not take from the one exercising the power, but from the testator or donor of the power. *Ibid.*

16. *Wills—Estates for Life—Power of Disposal—Interpretation of Statutes.* Revisal, sec. 3138, only establishes a rule between the heir and devisee in respect to the beneficial interest of the latter, and does not affect the construction of a will devising a life estate in lands with the power of disposition. *Ibid.*

WITNESSES. See Measure of Damages,

Motions—Retaxing Costs—Witnesses—Tender—Nonsuit—Materiality.—When on motion of defendant a nonsuit upon the evidence is ordered after the examination of plaintiff's witnesses, the cost of defendant's witnesses may not be taxed against the plaintiff when defendant has not tendered them; for he should have done so after the nonsuit was ordered, to give the plaintiff an opportunity to examine them upon their materiality, etc. *Chadwick v. Insurance Co.*, 380.

WORDS AND PHRASES.

1. *Words and Phrases—"Countersign."*—The verb "countersign" means "to sign on the opposite side" or in addition to the signature of another, and the noun means "the signature of a secretary or other officer to a writing, or writings, added to that by the principal or superior to attest its authenticity." *Richards v. Lumber Co.*, 54.

2. *Same—"By Command"—Blanks Left in Grant.*—When a grant from the State to the land in controversy is relied on by one of the parties, in his chain of title, and the words appear on the grant as follows, "By command," and a blank space followed by the words "Secretary of State," and it further appears that the Secretary of State did not use the blank space evidently left for the purpose, but countersigned properly on the "opposite side" from the signature of the Governor, the countersignature will be held valid, in the absence of evidence to the contrary, it not being required that the words "By command" be used at all in this connection. *Ibid.*

3. *Same—Evidence of Authenticity.*—A countersignature appearing to be that of the Secretary of State, on a grant for lands, as follows: "Secretary's office, February 3, 1869. H. J. Menninger, Secretary of State," by the use of the words which show not only that the grant was signed by the "Secretary of State," but in his office, gives evidence of the intent to authenticate, and, without more, will be held valid. *Ibid.*

4. *Indictment—Rape—Assault with "Intent"—"Attempt."*—A charge in a bill of indictment of an assault with an "attempt" to commit rape necessarily includes the charge of "intent," and when the bill is otherwise sufficient, it is not defective because it omitted to expressly charge the intent. *S. v. Hewett*, 627.

WRITTEN DEMANDS. See Carriers of Goods,