ANNOTATIONS INCLUDE 172 N. C.

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VOL. 159

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1912
(IN PART)
FALL TERM, 1912
(IN PART)

ROBERT C. STRONG
REPORTER

ANNOTATED BY
WALTER CLARK

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1912

R. R. COTTEN v. J. M. MOSELEY ET AL.

(Filed 3 April, 1912.)

Estates—Husband and Wife—Limitations Over to Heirs of Wife—Rule in Shelley's Case—Deeds and Conveyances.

An estate to a husband and wife, with limitation over to the heirs of the latter, conveys the fee simple to the wife under the rule in *Shelley's case*, subject to the life estate of the husband; and a deed made by both the husband and wife of all of their estate in the lands conveys the fee simple. The rule in *Shelley's case* discussed by WALKER, J.

APPEAL from *Whedbee, J.*, at December Term, 1911, of PITT.

This case was heard below upon the following admitted facts: On 13 September, 1871, William Gardner, being then the owner in fee of the tract of land in controversy, containing 140 acres, conveyed the same by deed "to Henry C. Gardner and his wife, Martha Jane Gardner, during their natural lives, afterwards to Martha Jane's heirs forever." The said grantees entered into possession of the land on that day, continued in the possession until 2 January, 1886, when they conveyed the land in fee, by their deed duly executed, to the plaintiff, R. R. Cotten, and he contracted to sell and convey the same in fee by deed, good and sufficient for the purpose, to the defendants, J. M. Moseley and W. B. Wooten. Plaintiff tendered a deed to them for the premises, and they declined to accept it and pay the purchase money, because the title is defective, as by the terms of the deed of William Gardner to Henry C. and his wife, Martha Jane, they acquired only a life estate with remainder to the heirs of Martha Jane, who, it is al- (2)

leged, take by purchase and not by descent, and that the said heirs now claim the land accordingly, subject to the life estate of Henry C. Gardner, who is now living, his wife, the said Martha Jane, being dead. The heirs of Martha Jane Gardner are defendants in the case.

The court held, and so adjudged, that the deed of William Gardner to Martha Jane Gardner did not convey the fee, but only a life estate, and therefore, the plaintiff's deed will not convey a fee-simple estate to Moseley and Wooten. Plaintiff appealed.

F. G. James & Son and Aycock & Winston for plaintiff.
W. A. Finch and C. C. Pierce for defendant.

WALKER, J., after stating the case: The question in the case is, whether the limitation of the estate to husband and wife for their natural lives, afterwards to the heirs of the wife forever, is sufficient to pass the fee under the rule in *Shelley's case.* The principle embodied in this rule, which, perhaps, was first formally and authoritatively announced by all the judges during the reign of Elizabeth, in the case from whch it takes its name (1 Coke, 219), was of far more remote origin, and for many years had been called "an ancient dogma of the common law." The principal and most forceful reasons advanced for adopting the rule were to prevent the abeyance or suspension of the inheritance, and to facilitate the alienation of land, throwing it into the track of commerce one generation sooner, by vesting the inheritance in the ancestor, than if he continued tenant for life and the heir was declared a purchaser. "Therefore," said *Justice Blackstone,* "where an estate was limited to the ancestor for life, and afterwards (mediately or immediately) to his heirs, who are uncertain till the time of his death, the law considered the ancestor as the first principal of the donor's bounty; and therefore permitted him (who, as it is said, Co. Litt., 22, beareth in his body all his heirs, and who had the only visible and notorious freehold in the land) to sell it, devise it where the custom would permit, or charge it with his debts and encumbrances. And however narrow and illiberal the original establishment of this
(3) rule, or the adhering to it in later times, may have been represented in argument, I own myself of opinion that those constructions of law which tend to facilitate the sale and circulation of property in a free and commercial country, and make it more liable to the debts of the visible owner, who derives a greater credit from that ownership—such constructions, I say, are founded upon principles of public policy altogether as open and as enlarged as those which favor the accumulation of estates in private families by fettering inheritances till the full age of posterity now unborn, and which may not be born for half a century."

The rule has also been fiercely assailed by some and mildly criticised by others, as being at war with our free institutions and policy, and as founded upon subtle and artificial reason and extremely technical consideration. Whether it is an arbitrary rule which is calculated to defeat rather than to execute the intention of the grantor, we are not at liberty to inquire, as it has been firmly established in our jurisprudence as a rule of law, which we must enforce whenever applicable.

The question before us is as to the legal effect of the deed of William Gardner to Henry C. and his wife, Martha Jane Gardner. Did it convey the fee to Martha, under the rule in *Shelley's case? We are of the opinion* that it did. The defendants contend that the subsequent limitation must be to the heirs of the person who takes the particular estate —that is, in this case, the second limitation should have been to the heirs of both husband and wife, as they were seized of the entirety and did not take by moieties; but such is not the true operation of the rule. If the limitation had been to the wife for life, remainder to the heirs of the husband and wife, the freehold being in the wife alone, the limitation over would be a contingent remainder, and their heirs would take as purchasers, because the heirs of the husband would not necessarily be the heirs of the wife. 2 Washburn Real Property (5 Ed.), p. 649; *Robinson v. Wharey,* 3 Wilson 125. As Fearne (p. 38)says: "Every person may so far be supposed to carry his own heirs in himself during his life as that a limitation to them where he takes a preceding freehold may vest in himself; yet no person can be supposed to include in himself the heirs of himself and of somebody else." (4) Coke (sec. 26) refers to this passage from Littleton: "If tenements be given to a man and to his wife, and to the heirs of the bodie of the man, in this case the husband hath an estate in general taile, and the wife but an estate for terme of life. If lands be given to the husband and wife, and to the heires of the husband which he shall beget on the body of his wife, in this case the husband hath an estate in special taile, and the wife but an estate for life. If the gift be made to the husband and to his wife, and to the heires of the body of the wife by the husband begotten, there the wife hath an estate in special taile, and the husband but for terme of life. But if lands be given to the husband and the wife, and to the heires which the husband shall beget on the body of the wife, in this case both of them have an estate taile, because this word (heires) is not limited to the one more than to the other." Commenting upon the passage, Coke says: "This word (heires) is *nomen operativum.* To which of the donees it is limited, it createth the estate taile; but if it incline no more to the one than to the other, then both doe take, as here Littleton putteth the case." In pleading seizin of such an estate (when the inheritance inclines to the wife), "it shall be alleged that they were

seized together and to the heirs of the body of the wife in her right; and not that they were seized of the freehold or fee tail." Coke, sec. 28 and note 1. And Fearne (p. 39) tells us that that "the same distinction was relied on in *Repps v. Bonham,* Yelverton, 131": "Where, upon a feoffment to the use of R and his wife for their lives, remainder to the use of the first, second, and third sons of the body of the wife, and afterwards to the heirs of the body of the wife by R begotten, it was held, that the inheritance was only in the wife; because the word heirs, which made the inheritance, was annexed only to the body of the wife; but that if it had been to the heirs which the husband should beget on the body of the wife, it would have been an estate tail in them both." In the official report of this case it is stated to have been held that R had an estate for life and his wife an estate tail, and "this was adjudged by all the Court, without any scruple." In a note to that
(5) case it is said that to whichever body the word *heirs* inclines by the limitation, it creates a descendible estate in such person; but if it be not more particularly limited to the body of one than the other, but inclines to each alike, then it creates a descendible estate in each of them. 33 Bac. Abr. (Bouvier's Ed.), p. 439. It is not necessary that the limitation to the heirs should be enjoyed immediately upon the death of the first taker. Nor will it have effect to exclude the rule that the remainder cannot by possibility vest as a remainder in the lifetime of the ancestor, as where the limitation was to A and B and the heirs of him who should die first. So if the remainder be limited on a contingency which does not happen in the ancestor's lifetime, nevertheless the heirs will take by descent. The mere circumstance that the remainder was contingent does not prevent the operation of the rule the moment the remainder vests. Thus, an estate limited to A for life, and if A survives B, then to his heirs, would be a contingent remainder in A, depending upon his surviving B. If he does, his estate becomes at once vested, and his term of life merges in the inheritance. *Starnes v. Hill,* 112 N. C., 1. As a consequence from the foregoing principles, whoever has a freehold, which, by the terms of the limitation, is to go to his heirs, may alien the estate, subject only to such limitations as may have been created between his freehold and the inheritance limited to his heirs. Thus, where the limitation is to A for life, and after his death to B for life, and after his decease to the heirs of A, A practically has two estates—one in possession the other in remainder; the first for life, the other in fee, divided by the estate to B. And if B were to die in the life of A, the latter's estate would merge, and he would at once become the unlimited tenant in fee of the estate. 2 Washburn R. P. (5 Ed.), p. 650. There are many cases in the books where it has been held that if an estate is limited to several persons for or during their lives, with re-

mainder to the heirs of one of them, that one will take a fee, subject, of course, to the life estates of the others. See exhaustive note on the rule in *Shelley's case* to *Price v. Griffin,* 150 N. C., 523, and other cases in 29 L. R. A. (N. S.), 935. *Bailes v. Davis,* 241 Ill., 536. The rule is said to "act upon the words of inheritnace, and does not affect the rules for determining the quantity of estate conveyed, or the (6) number and connection of the owners of the land."

The very question presented in this case has been decided in other jurisdictions. In *Hess v. Lakin,* 7 Ohio S. and C. P. Dec., 300, where the grant was to a man and a woman during their natural lives, then to the woman's heirs at law, it was held that the woman took a fee in the whole tract of land, expectant as to one moiety, or subject to that life estate, and the Court said: "It must be conceded the rule applies only when the subsequent limitation is to the heirs of him to whom the preceding estate was given, but nowhere has it been affirmed in express terms, by either a court or a text-writer, that the ancestor must take the whole of the preceding estate, or, if there is more than one preceding estate, he must have all of them. There is just as much rason for requiring him to have all of them when several antecede the remainder, as there is for requiring him to have the entire preceding estate when only one precedes the remainder."

The rule is learnedly discussed in that case, and was held to apply to a limitation similar to the one in the William Gardner deed. The two cases are strikingly alike in their facts, for in *Hess v. Lakin* it was decided that the wife acquired a fee simple, subject to her husband's life estate, and having purchased that estate, she held the entire fee, which was, therefore, conveyed by her subsequent deed. The following authorities are cited in support of the decision: 1 Preston on Estates, 337-340; Fearne on Remainders, 36; *Fuller v. Chamier,* L. R., 2 Eq., 682; *Bullard v. Goffe,* 20 Pick., 252. The Court gives the following extract from Wooddeson: "If the particular estate be to A and B, jointly for their lives, remainder to the heirs of the body of B, this will be an estate tail in B, executed in B, so as to make the inheritance not grantable distinct from the particular estate of freehold, by way of remainder, but, on the other hand, not to sever the jointure, or entitle the wife of B to dower." Preston on Estates, 338. This corresponds with what is said in Fearne on Remainders, at p. 36. The same was decided in *Kepler v. Reeves,* 7 Ohio Dec., Reprint 34, in which (7) there was a grant to husband and wife for their lives, remainder to the heirs of the wife. *Judge Avery,* delivering the opinion of the Court, said: "Where either, husband or wife singly, has an estate for life, and the subsequent limitation is to the heirs of the two, it is widely different from where the life estate is in the two, with a limitaion singly to the

heirs of one. No person can be supposed to include in himself the heirs of himself and some other person, and yet may so far be supposed to carry his own heirs in himself during life that a limitation to them, where he takes a preceding freehold, will vest in him. That the preceding freehold may be taken jointly by himself with others seems, according to the authorities, not to make a difference. It is laid down that the subsequent limitation to the heirs must be confined to those of the ancestor who takes a particular estate, but at the same time that if the heirs be confined to those of the persons taking a particular estate, it matters not whether the estates of the ancestors be several (so they all take) or jont, nor whether the remainder over be to the heirs of all or only of some of such ancestors. Watkins on Descents 162; Fearne, 36; 1 Prest. Est., 315-320; 2 Prest. Est., 442; 9 Mod., 292; 2 Rep., 61. In *Fuller v. Chamier,* L. R., 2 Eq., 682; it was held that an estate to A, B, and C in equal shares during life, and after their decease unto the next lawful heir of A forever, was a limitation within the rule of *Shelley's case* and that A took an estate in fee simple. In *Bullard v. Goffe,* 20 Pick., 252, upon a conveyance to the use of husband and wife for their lives, and the life of the survivor, and after their decease to the use of H for life, and after the decease of H to the use of the heirs of the wife forever, it was held that a fee simple in the land vested in the wife, in the case of her surviving her husband and H. This last case furnishes a precedent precisely in point, and will be followed." So in *Patterson v. Patterson,* Dayt., 28 (cited in Laning Ohio Cyc. Dig., 5865), it was held that, "Where title to lands is derived by deed limiting it to a person and her husband during their lives, and to the heirs of her body forever, the grantees in the deed take an estate for their lives under the rule, and the children take by descent and not by
(8) purchase, and the husband is entitled to the estate by curtesy, and there can be no partition."

In *Griffiths v. Evan,* 5 Beav., 241, a devise of a freehold estate to testator's daughter for life and the life of her husband, (and after their deaths to the use of the lawful issue of the body of the wife forever, the testator empowering and authorizing the daughter, for want of such issue, to settle and dispose of the estate as she should think fit by will, was held to create an estate tail in the daughter, with a power of appointment. Under a deed by which lands were conveyed to a man and his wife during the term of their natural lives, and to the heirs of the wife and her assigns forever, to have and to hold unto the said husband and wife during the term of their natural lives, and to the heirs of the wife and their assigns forever, it was held that the wife took a fee simple. *Badgley v. Hanford,* 12 N. J. L. J., 75. The Court said (by *Van Syckle, J.*) that where the particular estate is granted to

two, with a limitation to the heir or heirs of the body of one of them, the inheritance is executed in the person to whose heirs it is limited. And it was further said: "This case, I think, is not excluded from the rule in *Shelley's case* by the fact that the husband was entitled to the use of the property during the joint lives of himself and wife. *Washburne v. Burns,* 34 N. J. L. (5 Vr.), 18; *Bolles v. Trust Co.,* 12 C. E. Gr., 308. That is an incident of the marriage relation necessarily flowing from the unity of husband and wife. Each was, in law, however, seized of the entirety, and all the conditions were fulfilled which are necessary to bring it within the rule in *Shelley's case.* The particular estate and the remainder in her were created by the conveyance from Simpson." It is the form of the second limitation which determines the application of the rule, and it is so held in *Crockett v. Robinson,* 46 N. H., 461. Under the rule in *Shelley's case,* the Court said: "It is not material to inquire what the intention of the testator was as to the quantity of estate that should vest in the first taker. If the limitation were to A for life, remainder to his heirs in fee simple, without other qualifying words, the actual intention would undoubtedly be that A should take an estate for life only and have no power to dispose of the remainder in fee, and negative words saying that A should take for (9) life only would add nothing to the clearness of the first words. The material inquiry is, What is taken under the second devise? If those who take under the second devise take the same estate that they would take as his heirs or as heirs of his body, the rule applies. However clear the intention may be to create an estate in A for life, remainder to his heirs, so that the estate shall go to those persons who are the heirs of A, and descend to his heritable blood in line of decent, the policy of the law, which established the rule in *Shelley's case,* did not allow such a limitation. By that rule no person was permitted to raise in another an estate of inheritance, and at the same time make the heirs of that person purchasers. 6 Cruise, 325, 326, 328; Fearne on Con. Rem., 196; Hargrave's Tracts, 551; 4 Kent, 208, 214; *Denn v. Puckey,* 5 T. R., 299, 303; *Richardson v. Wheatland,* 7 Met., 172." This passage was cited with approval in *Nichols v. Gladden,* 117 N. C., 502, in which the Court said that, "The material inquiry is, What is taken under the second devise?"

As H. C. Gardner survived his wife, the limitation is the same, in legal effect, as if it had been to his wife for life, then to him for life, and ultimately to the heirs of his wife. She acquired a fee simple, subject to his life estate, and as he joined with her in the deed to R. R. Cotten, the entire estate in fee passed to the latter. Wooddeson, 205. The judgment of the court was, therefore, erroneous.

Reversed.

CLINTON-DUNN TELEPHONE COMPANY v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY.

(Filed 17 April, 1912.)

1. Public-service Corporations—Telephone Companies—Discriminative Rates.

A telephone company, acting under a *quasi*-public franchise, is a public-service corporation, and as such is subject to public regulation and reasonable control, and is required to afford its service at uniform and reasonable rates and without discrimination among its subscribers and patrons for like service under the same or substantially similar conditions.

2. Same—Contracts—Breach—Physical Connection—Rights of Public.

In the absence of constitutional or statutory requirement, the obligation of a public-service corporation to afford service at reasonable rates, without discrimination, to those who pay the charges and abide by the reasonable regulations of the company, does not extend to the enforcement of one company to make physical connection with another; but after this physical connection has been voluntarily made, under a fair and workable arrangement and guaranteed by contract between the companies, and the continuous line has come to be patronized and established as a great public convenience, such contract shall not, in breach of the agreement, be severed by one of the parties.

3. Public-service Corporations—Telephone Companies — Contracts—Vendor and Vendee—Knowledge, Expressed or Implied.

A purchaser of a telephone company under contract with another to render certain services to the subscribers of the latter at a stipulated price, the contract covenanting to that effect for the successors and assigns of each of the contracting parties, cannot, after taking over the property and entering on the enjoyment of the rights and privileges conferred, be allowed to repudiate its obligations and its burdens, when it has purchased with full knowledge of the existence of the contract, or of facts sufficient to put it upon inquiry leading to knowledge.

4. Public-service Corporations—Contracts—Rates — Discrimination — Rights of Public—Performance of Duties.

Public-service corporations, being required to render their service at uniform and reasonable rates and without discrimination, are not allowed to enter, or continue, in the performance of a contract which discriminates among their patrons or which renders them unable to perform the duties imposed upon them by reason of their charter.

5. Same—Reasonable Rates—Modification of Contract—Issues.

Two public-service telephone companies having entered into a contract specifying certain services, at a fixed rental or toll or charge, to be performed by each to the subscribers of the other, and having made a physical connection of the two systems and lived up to the contract for a period of years, one of them sold to another corporation which sought to put an end to the contract upon the ground that it was discriminative among its subscribers, and that the charges for the services to be performed

under the contract were insufficient: *Held*, the contract was binding between the parties, but should be annulled, on account of the rights of the public therein, as to which an issue should be submitted, to the extent that they are discriminative among patrons receiving like service under like conditions, or if it is so unreasonable and burdensome as to render a party unable to perform properly the duties under its charter, the parties should be allowed to continue the service under such reasonable rates as they may further agree upon, or which may be sanctioned and approved by the Corporation Commission.

6. Mandamus—Mandatory Injunction—Equity—Courts—Practice.

In this State, where both legal and equitable jurisdiction is vested in the same court, there is very little difference in its practical results between proceedings in mandamus and by mandatory injunction, the former being permissible when the action is to enforce performance of duties existent for the beenfit of the public, and the latter being confined usually to causes of an equitable nature, and in enforcement of rights which solely concern individuals.

7. Public-service Corporations—Contracts—Rights of Parties—Scope of Inquiry.

In this action to annul a contract made between two public-service telephone companies by a vendee of one of the parties, it is *Held*, if it is found in the lower court that the public rights are not affected, physical connection between the two systems having been made and service continuously rendered thereunder, the mere fact that, as between the individuals concerned, the contract may operate unequally would not justify or permit that the contract in that respect be avoided; and further, that, as affecting the rights of the parties, it be ascertained and determined whether one of them has extended the privileges conferred to persons or telephone systems not embraced in the agreement.

BROWN, J., did not sit.

APPEAL from SAMPSON, from order rendered by *Peebles, J.*, at chambers.

Action to compel defendant company to restore telephone connection of plaintiff company with the local exchange of defendant company in Dunn, N. C., and supply service in that town for plaintiff and subscribers, pursuant to a contract set forth and described in (12) the complaint. The cause was heard on a rule to show cause, obtained in term and returnable before *Peebles, J.*, holding the courts of the Sixth District, at Wilmington, N. C., on 3 June, 1911, and on affidavits and proofs offered it was adjudged that, on plaintiff's entering into a justified bond in the sum of $1,000, conditioned to pay all costs and damages arising by reason of the order, in case same should be set aside, that the connection be restored as prayed for and the services rendered free of charge to plaintiff and its subscribers, accord-

ing to the terms of the contract referred to. Both parties having consented that the hearing could be continued and issue determined outside of Wilmington, the judgment was signed and entered at Beaufort, N. C., on 5 July, 1911, and defendant, having duly excepted, appealed to Supreme Court.

Faison & Wright for plaintiff.
J. C. Clifford and G. M. T. Fountain for defendant.

HOKE, J., after stating the case: On the hearing it was made to appear that, in 1901, E. F. Young and wife owned and operated, for charge, a local telephone system in the town of Dunn, N. C., and plaintiff, a corporation acting under a *quasi*-public franchise, owned and operated a like system in the town of Clinton, N. C., and was extending its line towards Dunn. That on 15 February of that year the said Young and wife entered into a contract with plaintiff, in consideration of $10 and that plaintiff company would pay for two-thirds of the poles from the corporate line of Dunn to the local exchange in the town and of mutual stipulations in the agreement whereby the said plaintiff company could physically connect its system with the local exchange in Dunn and the patrons of the Dunn system, for a single charge of 25 cents, could send messages to Clinton and have service for local delivery, in that town, without further charge, and plaintiff and its subscribers should have like privilege and service in reference to local delivery in Dunn. The agreement stipulated further: "That the parties shall quietly enjoy the same and that this contract shall remain in full force and effect from and after the signing and sealing of
(13) the same, and the successors and assigns of each shall forever quietly enjoy the privileges granted by the contract; that the toll fees of each shall be 25 cents from exchange to exchange and that local messages shall be settled and established by each so that the fees charged shall not exceed 25 cents. . . . That this contract shall not be revoked or changed without the consent and the same mutually agreed to by each, their successors and assigns. In testimony whereof," etc. That the physical connection was then made, the parties entered into the enjoyment and exercise of the privileges conferred by the contract and continued therein until October, 1901, when Young and wife sold and conveyed their system and all rights, etc., held by them to defendant company, a corporation acting also under a *quasi*-public franchise and owning and operating an extended system of telephone lines in the eastern part of the State; that the purchaser entered into the exercise of the rights conferred by the contract with plaintiff, and physical connection being continued, and stipulated service afforded by each until February,

1910, when defendant, having as stated, acquired the plants of various companies in the eastern part of the State and claiming to have spent large sums of money in improving these lines, giving them better equipment and affording a higher order of service, wrote plaintiff company, saying that the contract was not considered as binding on defendant; that it had not been made by the company; that it was unfair in its obligations and burdens and discriminative in its terms and operation. The letter stated, further, that the rights conferred had been abused on the part of plaintiff company, by extending the privileges granted to other lines and systems not included in the agreement, and contained formal notice that, unless within thirty days plaintiff entered into a contract agreeing to pay $72 per annum for service in Dunn to plaintiff and its subscribers and $72 additional per annum for each additional system exercising the priveleges of the contract, and by plaintiff's permit or procurement, the connection with plaintiff company would be discontinued. That this demand not having been complied with, defendant severed the connection with plaintiff's system, depriving plaintiff and its subscribers and patrons of all service and telephone connection with Dunn and its inhabitants or any possibility of (14) procuring the same except on defendant's terms.

On these, the facts chiefly relevant to the inquiry, we think the court below correctly ruled that plaintiff was entitled to have the connection restored and service afforded, but that the order should be modified or so interpreted that the rate at which this service shall be rendered must be made to depend upon further findings of fact to be had and made in the cause.

It is very generally recognized that a telephone company, acting under a *quasi*-public franchise, is properly classified among the public-service corporations, and as such is subject to public regulation and reasonable control and is required to afford its service at uniform and reasonable rates and without discrimination among its subscribers and patrons for like service under the same or substantially similar conditions. *Godwin v. Telephone Co.*, 136 N. C., 258; *Leavell v. Telegraph Co.*, 116 N. C., 211; *Horner v. Electric Co.*, 153 N. C., 535; *Griffin v. Water Co.*, 122 N. C., 206; *Telegraph Co. v. Telegraph Co.*, 61 Vt., 241; *Telephone Co v. Telegraph Co.*, 66 Md., 399; *Yancey v. Telephone Co.*, 81 Ark., 486; *Telegraph Co. v. Kelly*, 160 Fed., 316.

In the absence of constitutional or statutory requirement, this obligation to afford service at reasonable rates and without discrimination to all who will "pay the charges and abide by the reasonable regulations of the company" does not as a rule extend to making physical connection with the company's lines, but there is high authority for the position that, when such physical connection has been voluntarily made,

under a fair and workable arrangement and guaranteed by contract, and the continuous line has come to be patronized and established as a great public convenience, such connection shall not, in breach of the agreement, be severed by one of the parties. In that case the public is held to have such an interest in the arrangement that its rights must receive due consideration. This position finds approval in *S. v. Cadwallader,* 172 Ind., 619-636 and is stated in the elaborate and learned opinion of *Chief Justice Myers* as follows: "Such physical connection cannot be required as of right, but if such connection is voluntarily made by contract, as is here alleged to be the case, so that the public acquires an interest in its continuance, the act of the parties in making such connection is equivalent to a declaration of a purpose to waive the primary right of independence, and it imposes upon the property such a public status that it may not be disregarded," citing *Mahan v. Telephone Co.,* 132 Mich., 242; and the reasons upon which it is in part made to rest are referred to in the same opinion as follows: "Where private property is by the consent of the owner invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public in the exercise of that public interest or privilege conferred for their benefit." *Allnut v. Inglis* (1810), 12 East, 527. The doctrine of this early case is the acknowledged law. It is stated somewhat differently in *Munn v. Ill* (1876), 94 U. S., 113, 24 L. Ed., 77, where it is said: "Property does become clothed with a public interest when used in a manner to make it of public consequence and affects the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use he must submit to the control." See, also, *Telephone Co. v. Telephone Co.,* 118 Ky., 277; 37 Cyc., pp. 1621-1658.

(15)

While we hold, therefore, that the physical connection of these lines should be continued, it does not necessarily follow that the service shall be rendered at the rate originally fixed upon. So far as these parties are individually concerned, these original rates should bind. It is true that defendant company was not one of the original contracting parties, but the contract provides that it shall extend to the successors and assigns of each, and defendant company, with full knowledge of its existence or of facts that should have put it upon inquiry leading to knowledge, took over the property, entered on the enjoyment of the rights and privileges conferred, and may not be allowed as individuals

(16)

to repudiate its obligations and its burdens. *Mahan v. Telephone Co.*, 132 Mich., 242. But here, too, the rights of the public must, on authority and principle, be allowed to affect the question. As heretofore stated, these public-service corporations are required to render their service at uniform and reasonable rates and without discrimination, and they are not allowed to enter on or continue in the performance of a contract which discriminates among their patrons or which renders them unable to afford the same or perform the duties imposed upon them by reason of their charter. *Griffin v. Water Co., supra; Gibbs v. Gas Co.*, 130 U. S., 396; *Western Union v. American Union*, 65 Ga., 160; Thompson on Corporations, sec. 2792, and authorities cited.

In the case of *Gibbs v. Gas Co.* the position is stated as follows: "Courts decline to enforce contracts which impose a restraint, though only partial, upon business of such character that restraint to any extent will be prejudicial to the public interest. But where the public welfare is not involved and the restraint upon one party is not greater than protection to the other party requires, a contract in restraint of trade may be sustained. A corporation cannot disable itself by contract from the performance of public duties which it has undertaken, and thereby make public accommodation or convenience subservient to its private interests."

And applying the principle, if, under conditions developed in the reasonable and orderly exercise and performance of defendant's duties, under its charter, the rates agreed upon between these contracting parties are of a character that discriminate among defendant's patrons receiving like service under like conditions, or it is so unreasonable and burdensome as to render defendant company unable to perform properly the duties incumbent under its charter, the agreement, to that extent, must be annulled and the parties allowed to continue the service under such reasonable rates as they may further agree upon, or which may be sanctioned and approved by the supervising agencies established by law for the purpose. Revisal, 1905, sec. 1986 *et seq.*

In regard to the form of remedy available where, as in this (17) State, the same court is vested with both legal and equitable jurisdiction, there is very little difference in its practical results between proceedings in mandamus and by mandatory injunction, the former being permissible when the action is to enforce performance of duties existent for the benefit of the public, and the latter being confined usually to causes of an equitable nature and in the enforcement of rights which solely concern individuals. High on Injunctions (4 Ed.), sec. 2. Owing to the public interests involved, in controversies of this character, it is generally held that mandamus may be properly

resorted to. *Godwin v. Telephone Co., supra; Commercial Union v. Telephone Co., supra; Mahan v. Telephone Co.,* 132 Md., 242; *Yancey v. Telephone Co.,* 81 Ark., 486.

We are not inadvertent to *Solomon v. Sewerage Co.,* 142 N. C., 439. This was a case in which the rights of individual litigants were alone involved and where, in a well-considered opinion by *Associate Justice Connor,* specific performance of the contract, at a specified rate, was refused, on the ground that the contract in question was indefinite as to time, and in that respect also, was unilateral in its obligation. The rights growing out of the contract as affected by the public interests was referred to, but not considered or determined. The order, directing that physical connection with defendant's exchange be restored and service continued, is affirmed, and the cause is remanded for further findings of facts and determination thereon by the court; whether the contract, at the stipulated rate, is discriminative among patrons receiving like service under like conditions or whether it is so unfair and burdensome as to render defendant company unable to perform properly the duties incumbent under its character to afford the general public telephone service at uniform and reasonable rates, an issue to be decided on conditions affecting the public interests, for, if these interests may be properly conserved, the fact that, as between the individuals concerned, the contract rate may operate unequally, would not justify or permit that the contract in that respect be avoided. It will be also ascertained and determined whether plaintiff has extended the privileges conferred by the contract to persons or telephone
(18) systems not embraced within the agreement. The judgment will be modified, in accordance with this opinion, and is otherwise affirmed.

Modified and affirmed.

BROWN, J., did not sit.

Cited: Woodley v. Telephone Co., 163 N. C., 286.

JOHN W. WEAVER ET AL. v. P. C. WEAVER.

(Filed 17 April, 1912.)

1. Deeds and Conveyances—Time of Delivery—Control of Grantor.

In order to make a valid delivery of a deed the grantor must part with the possession of the deed, with all power or control over it at the time of delivery.

2. Same—Instructions to Deliver.

A deed made by a father to a son, reserving a life estate, and given to another for safe keeping, with the understanding that the grantor retained control over it, with power of cancellation, *Held* not to be a valid delivery, though the grantor may have instructed the delivery to be made after his death if he had not taken it up or canceled it.

3. Deeds and Conveyances—Time of Delivery—Control of Grantor—Possession by Grantee—Presumptions—Evidence.

The presumption of a valid delivery of a deed, reserving a life estate, from the possession in the hands of a third person for the benefit of the grantee, is rebutted by showing that the grantor had retained control over it during his lifetime, with the right of cancellation.

APPEAL by defendant from *Justice, J.*, at January Special Term of ROWAN.

T. F. Kluttz and Whitehead Kluttz for plaintiffs.
P. S. Carlton and R. Lee Wright for defendants.

CLARK, C. J. This is an action to set aside a deed from Henry Weaver to the defendant Peter C. Weaver. The only question before the Court is whether there was in law a delivery of the deed unconditionally in escrow, for the benefit of the defendant P. C. Weaver.

The evidence, briefly stated, is as follows: (19)
Deaton, witness for the plaintiff, testified that Henry Weaver told him he wanted to make a deed to Peter Weaver but wanted it fixed so that he (Henry Weaver) could have it during his lifetime; 'Squire Linn had told him that he could have the deed so fixed that he could hold the land during his lifetime; the deed was drawn with this reservation of a life interest; nothing was said to him by Henry Weaver, then or at any other time, about giving the deed to Peter Weaver; that he never delivered it to him or any one else; that it remained in witness's safe until Henry Weaver died; that he did not turn it over to 'Squire Linn, and only knew that it was out of his safe after Henry's death and had been turned over to Peter, by his telling him so; there was no consideration expressed in the deed.

Linn, witness for defendant, testified that Henry Weaver told him he wanted a lifetime right reserved, and to leave the papers with him; he said in case anything should happen and his son should not treat him with the respect he ought to have, that he would take his deed up; he did not say he would tear it up, but that was about what he meant; that he told him to put the deed in Deaton's safe; that after Henry Weaver's death the witness got the deed out of Deaton's safe and sent it for registration, at the request of Peter; that he did this because Henry

Weaver had left it in his possession; that if Henry had called for it, he would have given it up to him; that Henry told him that if Peter did not treat him right, that he would come and take it up; that he wanted to keep his thumb on it and did not want to give his right away; that the land was to go to Peter, if Peter treated him right; Peter was to come in possession after Henry's death if the contract was carried out; in other words, if he did not call for it during his lifetime, the land was to be Peter's at his death; Henry said I should give it to Peter; this deed conveyed all the land Henry Weaver had. Peter was living with his father at the time of his death; all other children had married and moved off.

M. C. Leazer, witness for defendant, testified that Henry Weaver, in December, 1909, said he was going to make a deed to Peter; that Peter was to take care of him. He said he got Mr. Linn and Mr. Deaton to help fix deed up; that he left deed in hardware safe until called
(20) for; that Peter was to have the land at his death, that Peter was to have the deed for taking care of him; Peter was good to him and took care of him and was living with him at his death.

Peter Weaver, the defendant, testified that he lived with his father, Henry Weaver, all his life; that last year he demanded and got from the administrator one-half of the crops; but before that he got one-third.

The court instructed the jury that "if the deed was left with 'Squire Linn, and the testator retained control over it, and instructed Linn to hold it for him, unless he called for it, and that he retained the right to call for it and destroy it if he desired, then the testator still retained control of it until his death, and if such was the state of facts, there was no delivery in law." He further charged the jury that "if they found that Henry Weaver absolutely parted with the deed when he delivered it to Deaton and 'Squire Linn, and did not retain any control over it, and it was to be delivered to Peter at his death, that would be a good delivery," and they would so answer the issue. The court also charged: "If a deed has been simply found in the possession of other parties, duly executed, the law would presume the delivery; but when the facts shown are that the grantor retained control and power to recall the deed, that would not be a delivery, and the deed being found in the hands of a third party under such circumstances would create no presumption of delivery. That a deed is not considered executed when the maker has not gone so far with the execution that he cannot recall or control it, and if the jury should find from the greater weight of the evidence that Henry could control and recall said deed, there was no delivery; that a deed is only operative from the time of actual delivery, and if the jury should find the said deed was never

delivered to said Peter C. Weaver by Henry Weaver, or any one under his direction, then the deed is void, of no effect, and passed no title to said Peter."

The court also instructed the jury that "if they found that the paper-writing was delivered to Linn and Deaton with the right on the part of Henry Weaver to recall it, and that he retained control of it, but with instructions that if he did not recall it, it was to be delivered to Peter at his death, and it was so delivered, still that would not (21) make the delivery by Henry Weaver complete."

The above was duly excepted to, but we find no error. In *Tarlton v. Griggs,* 131 N. C., 216, it is held "There must be an intention of the grantor to pass the deed from his possession and beyond his control, and he must actually do so, with the intent that it shall be taken by grantee or some one for him. Both the intent and the act are necessary to the valid delivery. Whether such existed is a question of fact to be found by the jury. But if the grantor did not intend to pass the deed beyond his possession and control, so that he would have no right to recall it, and did not do so, then there would be no delivery in law. . . . Our conclusion is that there is no delivery of a deed when the maker has not gone so far with its execution that he cannot recall or control it."

To the same effect is *Bond v. Wilson,* 129 N. C., 326; *Robbins v. Rascoe,* 120 N. C., 80. In the recent case of *Gaylord v. Gaylord,* 150 N. C., 232 *et seq.,* this Court in an elaborate opinion, reviewing the authorities in this and other States, cites with approval from *Porter v. Woodhouse,* 59 Conn., 569: "The delivery of a deed implies the parting with the possession and a surrender of authority over it by the grantor at the time, either absolutely or conditionally. But it is essential, characteristic, and an indispensable feature of its delivery, whether absolutely or conditionally, that there must be a parting with the possession of the deed, and with all power and control over it, by the grantor for the benefit of the grantee, at the time of delivery." This case also cites with approval *Tarlton v. Griggs,* and other earlier cases. To same effect 9 A. & E. (2 Ed.), 155-157, and cases cited. There are numerous decisions in other States to same effect, but it is useless to add to what is so clearly stated in our own authorities.

The court left the defendant nothing to complain of when he told the jury as follows, which is a clear statement of the law: "If you find that Henry Weaver retained the control of it (the deed), and retained the right to go there and get it and destroy it, if he desired to do so during his lifetime, that would not be delivery of it, and you (22) will answer the third issue 'No.'"

"If you find that Henry Weaver absolutely parted with the deed when he delivered it to Mr. Deaton or 'Squire Linn, and did not retain any control over it, and it was to be delivered to Peter at his death, that would be a good delivery, and you will answer the third issue 'Yes.'"

Indeed, the question is fully discused and settled in *Fortune v. Hunt,* 149 N. C., 358, where the Court held: "The execution and delivery of a deed by the maker to a third person must be accompanied by an unqualified instruction to deliver, to make such delivery effectual; and when the testimony of the subscribing and only witness tends but to show that the maker signed the deed, and gave it to a third person with instruction to deliver it to the proper person if he never called for it, and that it was not delivered to the grantee in the lifetime of the maker, the presumption of delivery from the unexplained possession of the grantee and its registration is rebutted. When the maker of a deed gives it to a third person to deliver, but qualifies his instructions so as to retain control over it, and dies while this condition exists, in law his death revokes the authorty thus given; otherwise when the delivery is complete in grantor's lifetime, for then it relates back to the time of its delivery to the third person."

No error.

Cited: Buchanan v. Clark, 164 N. C., 69; *Huddleston v. Hardy, ib.,* 212; *Trust Co. v. Sterchie,* 169 N. C., 22.

C. P. HARMON v. FERGUSON CONTRACTING COMPANY ET AL.

(Filed 17 April, 1912.)

1. Contracts — Independent Contractor — Master and Servant — Respondeat Superior.

The employer is not liable for the negligence of his independent contractor unless the work contracted to be done is so inherently dangerous that it could not be let out to another without incurring liability for his negligence.

2. Same—Duty of Master—Safe Appliances—Safe Place to Work—Supervision.

When the relation of independent contractor has not been established both the employer and contractor are liable to an employee of the latter for an injury caused to him by the negligence of another employee of the contractor in doing the work contracted to be done, or by defective machinery or appliances furnished by the contractor, which defect the exercise of ordinary care by him would have removed.

3. Contracts—Independent Contractor—Supervision—Direction—Master and Servant—Respondeat Superior.

When a railroad company contracts with another for the construction of its roadbed, and reserves, under the contract, control and direction over the work through its engineer, with the power of discharging any foreman or employee "who is unskillful or remiss in the performance of the work," the material, etc., to be furnished under the direction of the railroad company's engineer, the relation of independent contractor is not established, and the rule of *respondeat superior* applies.

4. Master and Servant—Safe Appliances—Patent Defects—Fellow-servant—Negligence—Evidence.

The plaintiff was employed by the defendant in the construction of a railroad bed, and there was evidence tending to show that he was injured by the breaking of a rope, patently defective, and used in operating a pile driver with power furnished by a steam engine, and by the improper operation of the pile driver by another employee: *Held*, that the evidence was sufficient, upon the issue of defendant's negligence, to be submitted to the jury, and the rule of the fellow-servant does not apply. Revisal, sec. 2647.

5. Master and Servant—Duty of Master—Delegation of Duty—Negligence—Respondeat Superior.

It is the primary duty of the master, for which he cannot escape liability by delegating it to another, to exercise ordinary care in supplying his servant with reasonably safe tools and implements and a reasonably safe place in which to perform his work, and, also, to make such reasonable inspection as a man of ordinary prudence would make under similar conditions and circumstances.

6. Instructions—Verdict Directing—Phases of Evidence—Appeal and Error.

A request for special instruction which asks that the court direct an answer to an issue in a certain way in the event of certain findings of the jury, is properly refused, if it leaves out of consideration certain phases of the evidence which have a material bearing upon the issue.

7. Appeal and Error—Matters of Law—Superior Court—Verdict—Weight of Evidence.

The trial court alone has the power to set aside a verdict if rendered against the weight of the evidence, the province of this Court being confined to the correction of errors of law committed on the trial.

APPEAL from *Daniels, J.*, at November Term, 1911, of DAVIDSON. (24)

This action was brought to recover damages for injuries to the plaintiff, alleged to have been caused by the negligence of the defendants, while he was in their employ at Whitney, N. C. Plaintiff complained as follows:

1. The plaintiff, at the time of the injuries hereinafter set out and at the time of the institution of this action, was a resident of the State of

North Carolina, and the defendant the Ferguson Contracting Company was a corporation and was doing business, at the time, near the town of Whitney, N. C., and the defendant the Winston-Salem Southbound Railway Company is a corporation organized and doing business under the laws of this State, being engaged, at the time of the injury to plaintiff hereinafter described, through its codefendant, the Ferguson Contracting Company, in the construction of its roadbed, near the said town of Whitney.

2. That on or about the 6th day of June, 1910, while in the employment of the Ferguson Contracting Company near the town of Whitney, the plaintiff was injured under the following circumstances: Plaintiff, with a force of hands, was excavating on the south side of a hollow, for the purpose of putting in pedestals, preparatory to the erection of trestles for a bridge at Harper's Fill trestle in Stanly County, and that one Dobbin was, with a force of hands, in charge of a pile driver, and at work for the same company on the other side of the hollow, about three hundred feet away; that the pile driver was operated by means of two ropes, one a manila rope and the other a wire rope; that about the
(25) hour of 9 a. m. one of the ropes broke while the pile driver was being lifted by the engine, and flew with great force and wrapped itself around the plaintiff's neck, jerking him into a pit some fifteen feet deep and severely injuring his back, right shoulder, and left hip, and permanently disabling him; at the time of the injury the plaintiff was standing some five or ten feet from the line of the rope, on a mixing board at work.

3. That the plaintiff's injuries were caused by the carelessness and negligence of the said Dobbin, manager of the pile driver of the defendant Ferguson Contracting Company, in that the rope or cable which broke was defective, some of the strands being worn or broken, and further by his carelessness and negligence in that the pulley over which the said rope runs was not high enough to raise the pile driver, and said pile driver and frame over which the rope ran and on which the pulley was located, being too near on a level, producing too great a strain on the rope and causing it to break.

4. That the said injuries of the plaintiff were brought about by the carelessness and negligence of the defendant the Winston-Salem Southbound Railway Company, in that it failed to keep supervision of the dangerous work being done by Dobbin, and in employing incompetent and unskillful servants and agents to operate the pile driver, and in allowing the said servants and agents to use defective and dangerous machinery and apparatus in pursuit of their work, which brought about injuries to the plaintiff, as above set out, and for which both the defendants are liable as joint tort feasors. That prior to his injuries plaintiff

was a skillful and experienced workman, commanding high wages, and earned a salary of from $100 to $200 per month, but since said injuries the plaintiff has been unable and unfit for active work and suffers great mental and bodily pain at all times, to his permanent damage in the sum of $25,000.

The defendants filed separate answers, denying the alleged negligence and averring that the pile driver and two ropes were in good condition and had been properly inspected. They pleaded specially that defendant had been duly warned by Dobbin that they were about to pull on the ropes for the purpose of lifting the pile driver, and to move (26) out of the way of danger, as the ropes might break under the heavy strain put upon them, which plaintiff failed to do, in his own wrong, and was injured. There was evidence to support the allegations of the respective parties.

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

E. E. Raper and McCrary & McCrary for plaintiff.

F. C. Robbins, Phillips & Bower, and Watson, Buxton & Watson for Railway Company.

Morrison & McLean for Ferguson Contracting Company.

WALKER, J. It seems to us that the charge explained the law and the evidence to the jury as clearly as it could be done. One of the main issues between the parties related to the character in which the construction company was doing the work for the railway company, the other to the question of negligence. If the construction company was an independent contractor, the other company was not liable for its negligence, unless the work was so inherently dangerous that it could not be let out to another without incurring responsibility for his negligence. We need not discuss this aspect of the case, as we do not think the construction company was an independent contractor, but a servant of its codefendant, the railway company, and, therefore, the latter is liable for its negligence or that of its employees.

The rule as to fellow-servants does not apply. Pell's Revisal, sec. 2647 and note. If the injury to the plaintiff was caused by the negligence of the servant, Dobbin, or by reason of defective machinery or appliances, which defect the exercise of ordinary care would have removed, the defendants are liable: the railway company because the other company was its servant, and the construction company because it had undertaken to do the work and employed Dobbin, as its servant, to assist in doing it. In several respects the contract between the railway company and the construction company plainly reserves control and direction over the work, through its engineer, with the power of discharg-

(27) ing any foreman or employee "who is unskilled or remiss in the performance of his work," and it is provided that a certain part of the work, when ordered to be done by the engineer in charge and representing the railway company, shall be performed and the material therefor furnished "under and according to his direction." The general scope and purpose of the contract indicates an intention and understanding that the railway company should not be considered as having parted with its authority and supervision over the work.

The court, in this case, submitted the question to the jury and required them to find, under the evidence, whether or not the construction company was an independent contractor, giving the jury correct instructions as to what was necessary to constitute one an independent contractor. This matter was fully considered in *Denny v. Burlington,* 155 N. C., 33; *Thomas v. Lumber Co.,* 153 N. C., 351, and *Johnson v. R. R.,* 157 N. C., 382, where the cases are collected.

Generally stated, an independent contractor is one who, in the exercise of an independent employment, contracts to do a piece of work according to his own methods, without being subject to his employer's control, except as to the results of the work, and this we understand to have been substantially the definition given by the court to the jury. Another very terse definition we find in *Smith v. Simmons,* 103 Pa., 32: "Where one who contracts to perform a lawful service for another is independent of his employer in all that pertains to the execution of the work, and is subordinate only in effecting a result in accordance with the employer's design, he is an independent contractor, and in such case the contractor alone and not the employer is liable for damages caused by the contractor's negligence in the execution of the work." And in 26 Cyc., 970, will be found the following statement of the rule: "One who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely in accordance with his own ideas or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is an independent con-
(28) tractor and not a servant." In *Beal v. Fiber Co.,* 154 N. C., 147, *Justice Hoke* said: "If the proprietor retains for himself or for his agent (*e. g.,* architect and superintendent) a general control over the work, not only with reference to results, but also with reference to methods of procedure, then the contractor is deemed the mere agent or servant of the proprietor, and the rule of *respondeat superior* operates to make the proprietor liable for his wrongful acts or those of his servants, whether the proprietor directly interfered with the work and authorized and commanded the doing of such acts or not. It is not necessary, in such a case, that the employer should actually guide and

control the contractor. It is enough that the contract vests him with the right of guidance and control." Read and construed in the light of the authorities, the contract in this case does not establish that independence of service in the construction company which is required to exonerate the railway company from liability for its negligence, and the rule of *rsepondeat superior* applies.

Upon the question of negligence, there was evidence to show that the rope was defective and insufficient. It is a primary duty of the master to exercise ordinary care in supplying his servant with reasonably safe tools and implements and a reasonably safe place in which to perform his work, and he cannot escape responsibility for the proper discharge of this duty by selecting some one else to perform it. He must see that his duty is performed, and it not being delegable, he cannot shift the obligation to another. *Reid v. Rees,* 155 N. C., 230; 26 Cyc., 1097. And there is also the duty of the master to make such reasonable inspection as a man of ordinary prudence would make under similar conditions and circumstances. *Womble v. Grocery Co.,* 135 N. C., 474; *Cotton v. R. R.,* 149 N. C., 227.

There was also evidence tending to show that the pile driver had not been properly handled by Dobbin. These questions were fairly submitted to the jury with proper instructions as to the law. If the plaintiff was injured by reason of a defect in the rope, which was discoverable by ordinary inspection and was not latent, or by the negligence of Dobbin, he was entitled to recover damages. It does not appear that the defect in the rope was latent, or, to state it a little differently, (29) there is evidence tending to show that it was not, which the jury had the right to consider. It seems to have been suspected of being unsafe or unreliable, as the defendant alleges contributory negligence on the part of the plaintiff, upon the ground that he had been warned of the danger, if the rope should break, and failed to take care of himself. Besides, the prayers for instruction of both defendants as to the defectiveness of the rope are confined to that single act of negligence, and leave out of consideration the other charge of negligence on the part of Dobbin, and therefore the court could not have instructed the jury to answer the first issue, as to negligence, in the negative, without omitting an important phase of negligence from the instruction. The prayers did not take in all the facts going to prove negligence. A careful perusal of the prayers and the charge leads us to the conclusion that the judge substantially responded to all proper prayers and instructed the jury fully and correctly upon the different matters involved in the case, including the question of contributory negligence. We can only correct

errors in law, and not any miscarriage by the jury in finding the facts. This must be left to the supervision of the trial judge, who has the power to set aside the verdict, if against the weight of the evidence.

No error.

P. J. HUNYCUTT & CO. v. WILLIAM THOMPSON.

(Filed 17 April, 1912.)

1. Infants—Necessaries—Father's Wrongful Conduct—Emancipation of Son—Father's Liability.

A father is responsible for necessaries furnished his son when he has wrongfully driven him from home and forced him to earn his own living; for though the father's act may have emancipated his son to the extent of depriving him of his right to the earnings of the son, it does not extend to his responsibility for necessaries furnished the son arising from conditions brought about by his own wrong.

2. Same—Funeral Expenses.

The responsibility of a father for necessaries furnished his son, whom he has driven from home and forced to make his own living, extends to funeral expenses of the son, necessarily incurred, which the father had not authorized.

(30) APPEAL from *Daniels, J.*, at September Term, 1911, of STANLY.

This action is to recover $40 alleged to be due plaintiff for the burial expenses of the son of the defendant.

The son was a minor, and was living apart from the defendant at the time of his death, and was in the enjoyment of his own earnings, but the plaintiff offered evidence tending to prove that the defendant wrongfully drove him from home.

It was in the evidence that the son owned personal property of the value of $60 or $70, which was disposed of by his relations, and there was no evidence that the defendant expressly authorized the expense incurred.

At the conclusion of the evidence the defendant moved for judgment of nonsuit, which was denied, and the defendant excepted. Exceptions were also taken to the charge of his Honor, but they are all involved in the motion for judgment of nonsuit.

The following verdict was returned by the jury:

1. Had the deceased, William Thompson, Jr., been emancipated by his father, and was he still emancipated at the time of his death? Answer: No.

2. In what amount, if any, is the defendant indebted to the plaintiff? Answer: $35.

Judgment was entered on the verdict in favor of the plaintiff, and the defendant appealed.

A. C. Huneycutt for plaintiff.
I. R. Burleyson and R. L. Smith for defendant.

ALLEN, J., after stating the case: It is conceded, on the one hand, that the defendant would have been liable for the burial expenses of his son, a minor, incurred without his express authority, if the son had been living with the defendant at the time of his death, and, on the other, that there is no liability if the son left the home of the (31) father voluntarily and without fault on the part of the father. The point in debate, therefore, is whether the defendant can avoid liability when he has wrongfully driven his child from home.

The position taken by the defendant's counsel is sound, that "If a father neglects and refuses to support or maintain his son during his minority, and denies him a home, so that he is forced to labor abroad and procure a living for himself, he is not entitled to the earnings of such son, as, under such circumstances, the law will imply that the father has emancipated his son from his service and conceded to him the right to enjoy the fruits of his own labor"; but it does not necessarily follow that the father is relieved from all responsibility because he has not the right to control the earnings of his son.

The objection to such a conclusion is that it would permit the father to take advantage of his own wrongful act, and to relieve himself from responsibility by conduct which the law condemns, and in our opinion the charge of his Honor was a clear and accurate statement of the law. He said: "The mere fact that a child is living away from home, with the consent of the parent, does not relieve the parent from liability for necessaries furnished to the child, and the parent is liable where his misconduct or abuse has driven the child to leave him; but, ordinarily, where there is no fault upon the part of the parent, a child who voluntarily abandons the parent's home for the purpose of seeking its fortune in the world or to avoid parental discipline and restraint, forfeits the claim to support, and the parent is under no obligation to pay therefor. A boy may be emancipated for some purposes and may not be emancipated for others. There may be a total emancipation or a partial emancipation. If the plaintiff's contention is true in this case, the father ran the boy off and permitted him to go to work, and to earn wages and to collect his money. That would be emancipation for certain purposes. That would authorize the boy to make contracts, collect the money, and

spend the money. The father couldn't then come and collect his money. That would be an emancipation for that purpose. But if the father was in fault, if he ran the boy away from home, then there could be no
(32) emancipation which would relieve the father from the duty of providing necessitites for the son in the event he was down sick and died. I charge you, that if the plaintiff has satisfied you by the greater weight of the evidence that the defendant drove his young son, William Thompson, away from his home, you will answer the first issue 'No.' The first issue is, 'Had the deceased, William Thompson, Jr., been emancipated by his father, and was he still emancipated at the time of his death?' So, then, if you find from this evidence, and by the greater weight of it, that his father drove him away from home, and he remained away, according to the evidence, twelve months or sixteen months, or whatever you may find to be the time, and was taken sick and died, your answer to the first issue will be 'No,' because that didn't emancipate, didn't relieve the father from his duty to look after and protect and care for his son—because he was in fault, if you find that he ran him away from home. But if you find that the boy left of his own volition, because he wanted to go, because he was tired of home and wished to escape parental control and correction and seek his fortune in life for himself, and was earning money and had on hand at the time of his death this buggy, which sold for $37.50, according to the testimony, and the watch, which sold for $5, and this balance in the hands of Mr. Efird of $16.20, then you would find, gentlemen, the answer to this first issue to be 'Yes.'"

The authorities are not uniform on this question, but they fully sustain the charge. 2 Kent Com., 193; Tyler on Infancy, 114; 29 Cyc., 1609; *Owen v. White,* 30 Am. Dec., 573; *Weeks v. Merrow,* 40 Me., 151; *Bennette v. Gillette,* 74 Am. Dec., note on page 782.

In 2 Kent, *supra,* the author says: "If a father suffers the children to remain abroad with their mother, or if he forces them from home by severe usage, he is liable for their necessaries."

In Tyler on Infancy, *supra:* "If the parent turn away his child from home, or so cruelly treat him that he cannot remain under the parental roof, or abandon him without adequate provision, the rule is well settled that such parent may be made to pay for necessaries furnished such infant child."

(33) In Cyc., *supra:* "The mere fact that a child is living away from home with the consent of the parent does not relieve the latter from liability for necessaries furnished the child, and the parent is liable where his misconduct or abuse has driven the child to leave him."

In *Owen v. White, supra,* the Court says: "If a child leave his father's house to seek his fortune in the world, or to avoid domestic discipline and restraint, or escape from justice, the authority of the father to purchase necessarise is not implied. But if a father abandon his duty to his infant child, so that he is forced to leave home, he is liable for a suitable maintenance. And the principle of the distinction is that in one case the father is blameless and in the other blamable." And in *Weeks v. Merrow, supra:* "If a minor is forced out into the world by the cruelty or improper conduct of the parent, and is in want of necessaries, such necessaries may be supplied and the value thereof collected of the parent, on an implied contract."

It follows, therefore, as there was evidence that the defendant had driven his minor son from home, there was no error in denying the motion for judgment of nonsuit, and the charge being in accordance with law and justice, the judgment is affirmed.

No error.

Cited: Howell v. Solomon, 167 N. C., 592.

SALLIE THORP v. DURHAM TRACTION COMPANY.

(Filed 17 April, 1912.)

1. Carriers of Passengers—Street Railways—Alighting Passengers—Negligence—Evidence—Questions for Jury.

In an action for damages for a personal injury inflicted by a street railway company on its passenger, evidence is sufficient, upon the question of defendant's negligence, which tends to show that the plaintiff, on boarding the car, showed the conductor her transfer from another car, informed him of her intended stop, and after the stop had been called, and when the car had slowed down, arose from her seat for the purpose of alighting, and was injured by a sudden and unexpected movement of the car; and a judgment of nonsuit should not be allowed.

2. Carriers of Passengers—Street Railways—Alighting Passengers—Contributory Negligence—Rule of the Prudent Man—Questions for Jury.

It is not negligence *per se* for a passenger on a street car to arise from his seat and go towards the door with the purpose of getting off, when the car is approaching, and has slowed down for a regular stopping place where he intends to alight; and an instruction in this case was correct which substantially charges the jury that it would not be contributory negligence as a matter of law if the passenger, in so doing, was led to believe, as a person of reasonable care and prudence, that the

car was about to stop, or that it had actually stopped, if he was injured in his effort to alight by the car being suddenly moved or jerked forward by the defendant or its employees in charge.

(34) APPEAL from *O. H. Allen, J.*, at October Term, 1911, of DURHAM.

Civil action to recover damages for personal injuries caused by alleged negligence of defendant company.

On the three ordinary issues in an action for negligence there was verdict for plaintiff and awarding damages in the sum of $500. Judgment on the verdict, and defendant excepted and appealed.

Bryant & Brogden for plaintiff.
W. L. Foushee and P. C. Graham for defendant.

HOKE, J. There was evidence on the part of plaintiff tending to show that on 5 January, 1911, between 6 and 7 o'clock in the evening, she was a passenger on the street car of defendant company, and in handing her transfer ticket to the conductor she informed him that she desired and intended to alight at Dillard Street, and he replied, "All right." That as the car approached this crossing the conductor called out "Dillard Street" as much as three times, and on the last call the car stopped at Dillard Street. That a white passenger named Reid sitting just behind witness got up and went toward the door of the car, and plaintiff and her young son, also a passenger, followed. That Reid got off on the north side of the car and plaintiff was endeavoring to get off from the south side, and as she made a step in the effort to alight,
(35) the car, without any warning, gave a sudden jerk, causing plaintiff to fall in the street and by which she was severely and painfully injured. The attending physician testified that plaintiff was severely bruised and hurt, was rendered unconscious and had to be sent to the hospital for treatment.

There was testimony on the part of defendant in contradiction of this evidence and tending to show that the car moved across Dillard Street at a slow and even pace, stopping at the usual place, and there was no sudden jerk of the car made and that plaintiff was hurt in the effort to get off the car when same was in motion.

Considering this testimony under the rules applicable in such cases, the plaintiff's evidence, if accepted by the jury, made out *prima facie* a cause of action against defendant company, and the motion for nonsuit was therefore properly overruled. *Kearney v. R. R.*, 158 N. C., 521; *Morarity v. Traction Co.*, 154 N. C., 586; *Darden v. R. R.*, 144 N. C., 1; *Clark v. Traction Co.*, 138 N. C., 77; and on the way that the testi-

mony should be considered and dealt with on motions of this character, see, among other cases, *Reid v. Rees Co.*, 155 N. C., 230; *Horne v. R. R.*, 153 N. C., 239; *Deppe v. R. R.*, 152 N. C., 80.

It was chiefly urged for error on the part of defendant that the court, after directing the jury in general terms that plaintiff could not recover if she was injured in endeavoring to alight from the car when in motion, qualified the proposition in a later portion of the charge as follows: "If you find from the evidence in this case that defendant's car at the time of the alleged injury slowed down for the stop at Dillard Street, and the conductor called out Dillard Street and was running very slowly, and was about to stop for passengers desiring to get off at that point to alight, and find the plaintiff was a passenger at said time, then it would not necessarily be negligent for her to get up from her seat, if she were sitting down, in order that she might be ready to alight, nor would it necessarily be negligence for her to move towards the platform of the car for the purpose of being ready to alight, or to attempt to alight, not necessarily." And further: "If you find from the evidence in this case, and by it greater weight, that before the car came to a full (36) stop at Dilliard Street it slowed down in such a way as to cause a person of reasonable care and prudence to believe that it had really stopped, when it had not, for passengers to alight, and the conductor called out Dillard Street, and that the plaintiff, reasonably believing it was about to stop, attempted to move from the inside of the car to the platform, and in doing so acted as a person of reasonable care and prudence would have done under similar circumstances, and that while acting so there was a sudden and unexpected movement of the car forward, and that such movement was the real cause of her injury, under these findings the defendant would be guilty of negligence, and you would answer the first issue 'Yes,' in considering that phase of the evidence, that is, as to whether the car was moving, if the plaintiff has not satisfied you by the greater weight of the evidence that she got off when it stopped. I have already said to you that ordinarily a passenger should not get off a moving car. There are some exceptions, and this last instruction is intended to embrace an exception, and it is for you to say whether the facts come under it or not."

There were facts in evidence upon which to base these excerpts, and in so far as they embody the proposition that it is not negligence *per se* for a passenger to arise from his seat and move towards the door with a view of getting off when the car is approaching the station where he intends to alight and after it has slowed down for the purpose, the charge is in full accord with the authorities, and the principle finds direct support in our own decisions. *Suttle v. R. R.*, 150 N. C., 668; *Tillett v. R. R.*, 118 N. C., 1031; Thompson on Negligence, sec. 3591. And the charge may well be sustained in directing the jury as it did, in effect,

that although the car was in motion at the time, the plaintiff would not be barred of recovery if she went out on the platform after the conductor had called the street where she was to get off and the car had slowed down in such a way and to such an extent as to lead a person of reasonable care and prudence to believe that it was about to stop or that it actually had stopped, and plaintiff, acting as a reasonable and prudent person in so doing, was injured in her effort to alight by the car
(37) being suddenly moved or jerked forward by defendant or its employees in charge. A passenger injured is not always as a matter of law barred of recovery because injured in the attempt to board or alight from a moving car. As applied to the facts suggested and made the basis of his Honor's charge, the correct doctrine is very well stated in Thompson on Negligence as follows: "Where the car has been brought to a stop, or where it has been slowed so that its motion is very slight, and the passenger attempts to alight, and, while making the attempt, the car is suddenly started, so that the passenger is thrown down, negligence will not be imputed to the passenger as matter of law, but the question of the negligence, both of the carrier and the passenger, will go to the jury; but this presupposes that the passenger has in some way given the trainmen notice of his intention to alight. A passenger is not imputable with contributory negligence as a matter of law, from the mere fact that he commences the act of alighting from the car before the car has come to a full stop. But if, while he is in the act of alighting, the car is negligently started forward with a sudden jerk, whereby he is thrown down and injured, the cause of the injury will be imputed to the negligence of the carrier, and not to his own negligence"; and the statement is approved by decisions of the courts here and elsewhere. *Darden v. R. R.*, 144 N. C., 1; *Whisenhant v. R. R.*, 137 N. C., 349; *Hodges v. R. R.*, 120 N. C., 555; *Nance v. R. R.*, 94 N. C., 619; *R. R. v. Harman*, 147 U. S., 571. There is nothing in *Shaw v. R. R.*, 143 N. C., 312, or *Denny v. R. R.*, 132 N. C., 340, or *Brown v. R. R.*, 138 N. C., 34, or in the other authorities cited in conflict with this position on the facts as presented and embodied in this charge.

In *Shaw's case* recovery was denied because the passenger was on the platform of a moving railroad train contrary to the rules of the company made under express authority of a statute, and it was held that there was no evidence that the company or its agents had done anything to abrogate or waive the operation and effect of the rule. See the interpretation of *Shaw's case* appearing in *Borden's case, supra.*

(38) In *Denny v. R. R., supra,* the nonsuit of defendant's cause was sustained, the court being of opinion that there was nothing in the circumstances to warn or notify defendant's engineer that plaintiff was or would be on the platform in violation of the company's rules

made and posted in pursuance of this same statute, and for that reason there were no facts upon which the negligence could be imputed.

But in both of these cases and in that of *Browne v. R. R.*, 108 N. C., 34, while the general rule is approved that a passenger injured while attempting to alight from a moving train or car has no cause of action, it is also recognized that under exceptional conditions recovery is not necessarily denied.

We agree with his Honor, that on the facts as suggested the case may be properly considered as coming within the exceptions to the rule and that no reversible error to defendant's prejudice is presented. After careful consideration of the entire record, we are of opinion that the cause has been correctly tried and that the judgment in plaintiff's favor should be affirmed.

No error.

Cited: Kearney v. R. R., 158 N. C., 555.

RALPH W. PAGE v. WILLIAM V. MCDONALD.

(Filed 17 April, 1912.)

1. Attachment—Process—Amendments—Discretion of Courts.

When a warrant of attachment and summons by publication on a nonresident defendant are returnable to the trial court in term, giving the date, any informality in the process may be cured by amendment, if allowed by the court. Revisal, secs. 507 and 509.

2. Same—Notice.

The proper publication of summons for a nonresident defendant whose property has been attached gives the defendant notice that he can vacate the warrant, if insufficient, and upon his failing to move to vacate the process, he will not be held to be prejudiced by a subsequent judgment.

3. Process—Pleadings—Amendments—Interpretation of Statutes.

It is the policy of our Code system to be liberal in allowing amendments of process, pleadings, and proceedings, so that causes may be tried upon their merits, and to prevent a failure of justice for reasons which may be technical or frivolous, not affecting the substantial rights of the parties. Revisal, sec. 507.

4. Process—Returns — Jurisdiction — Amendments, Effect of — Procedure—Practice.

Where process is erroneously made returnable before the clerk, instead of to the term of the court, the court at term, having acquired jurisdiction, may make all necessary amendments of the process and proceedings,

in order to give it effectual jurisdiction, if no intervening and vested right is injuriously affected; and when the process is thus amended, it justifies the original service of any official action previously taken under it.

5. Attachment—Process—Affidavits, Sufficiency of—Interpretation of Statutes.

Affidavits for publication of the summons and notice of attachment are sufficient when they show that the defendant cannot, after due and diligent search, be found in this State, that he is a nonresident and has property here of which the court has jurisdiction, and that the plaintiff has a cause of action against the defendant arising out of contract by which he expressly promised to pay a specific sum to the plaintiff for services rendered at his request, which sum is still due and owing. Revisal, secs. 759, 442.

6. Attachments—Process—Publication—Defense After Judgment—Matter of Right—Court's Discretion—Interpretation of Statutes.

A nonresident defendant in attachment proceedings, against whom judgment has been rendered under service of summons by publication, and who had not had actual notice of the action until after the judgment had been rendered, may, as a matter of right, upon showing that he has a good and meritorious defense, have the judgment vacated by motion within the statutory period, and he can avail himself of any defense he originally had.

7. Attachments—Defense After Judgment—Cause of Action—Questions of Law.

What is a sufficient cause to permit a nonresident defendant to vacate a judgment obtained by publication of summons in attachment proceedings is a matter of law for the court.

8. Attachments—Defense After Judgment—Appeal and Error—Practice.

The court having erroneously refused to vacate a judgment obtained in proceedings in attachment against a nonresident defendant by publication of summons, the judgment appealed from is ordered to be set aside and the defendant allowed to answer or file other pleadings within a reasonable time, to be fixed by the trial court. The property attached will remain in the custody of the court to await the determination of the action, unless replevied under the provisions of the Revisal, secs. 774, 775.

(40) APPEAL by defendant from *Justice, J.*, at January Term, 1912, of MONTGOMERY.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

Jerome & Price for plaintiff.
J. A. Spence for defendant.

WALKER, J. This is an action by the plaintiff to recover $500 for professional services, as an attorney at law, rendered to the defendant, at his request, and for which he promised to pay the said sum. The

defendant is not a resident of this State. The action was commenced by issuing a summons returnable to September Term, 1909, of the Superior Court of Montgomery County, upon which the sheriff returned that the defendant could not be found in his county. Upon affidavit filed, a warrant of attachment was issued and levied by the sheriff upon property of the defendant in said county. The action was commenced too late to publish the summons before September term of the court, but upon affidavit filed after the term, publication of the summons and warrant of attachment was made for the defendant, returnable to the next term. It is objected by the defendant that there are irregularities in the proceedings which are sufficient to vitiate the attachment, and, therefore, he is not properly before the court, and the judgment rendered for the debt is void. He entered a special appearance for the purpose of moving to set aside the judgment and the attachment and dismissing the action because of said defects.

We think it sufficiently appears that the warrant of attachment was returnable to the court in term, as the date of the beginning of the term is given, and the summons is expressly made returnable to term, the corresponding date being also given. This being so, the process can be amended, if necessary, so as to cure the informality. Revisal, secs. 507 and 509. Besides, the publication gave defendent sufficient (41) notice that the warrant could be vacated by him at January Term, 1910, if it was insufficient. No real right of his has, therefore, been prejudiced. It is the policy of our Code system that amendments of process, pleadings, and proceedings should be liberally allowed, so that causes may be tried or heard upon their merits, and to prevent a failure of justice for reasons, sometimes technical, if not frivolous, which do not affect the substantial rights of the parties. Pell's Revisal, sec. 507, and cases cited in the note. "The court or judge thereof shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Revisal, sec. 509. Where, in a proceeding of attachment, it appears from the *whole* record that the provisions of the statute have been substantially complied with, the action will not be dismissed nor the attachment dissolved. *Grant v. Burgwyn,* 79 N. C., 513; *Best v. Mortgage Co.,* 128 N. C., 351. Where process is erroneously made returnable before the clerk, instead of to the term of the court, the court at term, having afterwards acquired jurisdiction, may make all necessary amendments of the process and proceedings in order to give effectual jurisdiction, and such amendment may be considered as made if no intervening and vested right is injuriously affected. *Elliott v. Tyson,* 117 N. C., 114; *Ewbank v. Turner,* 134 N. C., 77. The process, when

amended, justifies the original service or any official action previously taken under it, if the intervening rights of innocent persons are not prejudiced. *Elliott v. Tyson, supra.* But it appears by reasonable intendment, in this case, that the process of attachment is and was made returnable to the term of the court, and if this were not so, the slight informality will be removed by amendment or disregarded, and the court has ample power and discretion in the premises. These objections to the form of the process and the right of amendment are fully met and answered in *Grant v. Burgwyn* and the other cases cited *supra,* and especially by *Bank v. Blossom,* 92 N. C., 695, where it was held
(42) that the court in the exercise of its discretion may order a new publication to be made and defects to be cured by amendment. Nor do we think the objection to the affidavits, upon which the attachment was issued, is sound. The statute was sufficiently followed in this respect (Pell's Revisal, sec. 759 and note); and the affidavit for publication was also sufficient. Revisal, sec. 442. The affidavits show that the defendant cannot, after due and diligent search, be found in this State, and is a nonresident thereof, and has property in this State; that the court has jurisdiction of the action, and that the plaintiff has a cause of action against the defendant, arising out of contract, by which he expressly promised to pay a specific sum, $500, for professional services rendered at his request, which is now due and owing. What *Chief Justice Smith* said in *Bank v. Blossom* is peculiarly appropriate to be repeated here: "It is a singular coincidence that the defendant makes a special appearance, as he may do according to the rules of practice, and comes into court complaining of the disregard of some technical provision necessary to give him legal notice of what his presence and motion show he already, in fact, knows, and then objects to the plaintiff being permitted to give him legal notice." He has lost no right by any irregularity in the course of the proceeding, but will have his day in court and can set up his defense, if he has a meritorious one, and defeat the plaintiff's recovery, as will be shown hereafter.

We now come to the serious and really the only material question in this case. Defendant requested the court to set aside the judgment and allow him to defend the action. This application was made upon affidavit, which alleged that the defendant has a good and meritorious defense to the action, and the judge substantially so finds as a fact, and that the defendant had no actual notice of the pendency of the action until after the judgment was rendered therein. The judgment was given at January Term, 1910, and the motion to vacate it was made on 21 March, 1910, within the time fixed by statute. The statute requires that a nonresident, upon good cause shown, *must* be allowed to defend after judgment, if his application to do so is made within one year after

notice of the judgment, and within five years after its rendition, (43) preserving the rights acquired by innocent purchasers. Pell's Revisal, sec. 449. We cannot imagine any better cause for setting aside a judgment recovered upon constructive or substituted service than that which is assigned by the defendant in this case. He had no knowledge of the judgment and was not guilty of any laches, and he has a good defense. The right to be let in for the purpose of defending the action does not depend upon the exercise of the judge's discretion. The terms of the statute are mandatory, and the judge must set aside a judgment and permit a defense if good cause can be shown, and what is sufficient cause must be a question of law. *Bacon v. Johnson,* 110 N. C., 114. There was no neglect shown, excusable or inexcusable. In *Rhodes v. Rhodes,* 125 N. C., 191, the Court took this view, wherein the present *Chief Justice* said: "The object of this section is to enable a nonresident who has not been personally served with summons to come in within the prescribed time after judgment and assert his rights as fully in every respect as he could have done before judgment, had he been personally served, saving, as the section provides, the rights of any one who has bought the property in good faith under the decree of sale in the cause. The defense intended to be allowed one who has not been actually, but only constructively, in court, is not confined to those matters which, if pleaded in apt time, would defeat the action. Being a remedial statute, a just construction is that it allows the party against whom a judgment has been taken to set up also any exception which would have prevented or modified the judgment." The judge sustained the attachment proceedings, but refused to set aside the judgment and to permit the defendant to come in and make good his defense. In the latter ruling there was error. The judgment will be vacated, and defendant will be allowed to defend the action, and for that purpose will be given a reasonable time, to be fixed by the court, for filing his answer or other pleading. The property attached will remain in the custody of the court, to await the determination of the action. This secures the plaintiff, if he has a good cause of action and is able again to obtain a judgment. He is not, in law or equity, entitled to any more. It is unnecessary, after what has been said, to consider defendant's objection that the (44) judgment by default was irregularly entered, there having been no proper proof of the indebtedness under Revisal, sec. 556, as we have ordered the judgment to be vacated on another ground. Defendant may release his property from the attachment by complying with the provisions of Revisal, secs. 774 and 775. The case is remanded, with direction to proceed as herein indicated.

Error.

LUVENIA HOLMAN, ADMINISTRATRIX, v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 10 April, 1912.)

Railroads—Negligence—Persons Drunk on Track—Admissions in Pleadings—Evidence—Questions for Jury.

In an action for the negligent killing of plaintiff's intestate by defendant railroad company, a motion for nonsuit should be denied when the defendant's answer alleges that the intestate was lying drunk upon the track when struck and killed, and the evidence tends to show that he should have been seen by defendant's engineer and fireman in time to have avoided the killing; that had the speed of the train been within that allowed by the town ordinance the train could have been stopped in time; that the train was running through a papulous part of a town and where pedestrians were accustomed to walk upon the track, especially Saturday and Sunday nights, and that the intestate was killed on Saturday night.

APPEAL by plaintiff from *O. H. Allen, J.*, at October Term, 1912, of DURHAM.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

Manning & Everett for plaintiff.
Guthrie & Guthrie for defendant.

(45) CLARK, C. J. This was an action for wrongful death. The plaintiff appealed from a judgment of nonsuit. The evidence tended to prove that plaintiff's intestate was killed shortly after 9 o'clock at night in the corporate limits of Durham, and his body was found lying on the east side of the defendant's track, partly on the ends of the cross-ties and with his skull fractured. He was unconscious when found, and died soon after. The defendant's passenger train from Lynchburg passed about 9 o'clock, running about 30 miles an hour, which was greatly in excess of the speed limit (8 miles) permitted by the ordinances of the city. The railroad track was down grade and curved to left going into Durham, but the sharpest part of the curve was some distance beyond where the body of the deceased was found. The skull was fractured just above the left ear. The railroad track had been used for many years by the public generally as a walkway, and especially by the operatives in the mill going and returning from work. The place was in the city limits and in a populous community. A man lying on the track or sitting on the end of a cross-tie at the point where the plaintiff's body was found could be seen under the headlight of the engine 125 yards and the defendant's train that night could have been stopped

within that distance from the spot, if running at the rate of not over 8 miles per hour, the speed allowed by the ordinance. The evidence for the plaintiff showed that, though there is a street crossing a short distance south of the spot where the body was found, no bell was rung or whistle sounded; that the place was within the corporate limits, and the train was moving about 30 miles an hour.

The defendant's answer, which was offered in evidence, averred that the deceased entered on defendant's track while drunk and in an intoxicatd condition and substantially admits that the deceased was killed by the engine.

The above evidence taken in the most favorable light for the plaintiff, as must be done on a nonsuit (*Cotton v. R. R.*, 149 N. C., 229), tended to establish the admission by defendant that plaintiff's intestate was drunk and intoxicated and was on the track when struck and killed by defendant's train; that he could and ought to have been seen by the engineer or fireman on the train in time to have prevented killing the deceased, especially if the train had been running within the speed permitted by the city ordinance; that the train was running at a speed very much faster than that permitted by the ordinance; (46) that the defendant's track at that place had been used for many years as a walkway by the public, especially Saturday nights and Sundays; that the deceased was killed on Saturday night; that the place of the accident was within the city limits and in a populous community, and that no bell was rung or whistle sounded nearer than half a mile.

Upon the above evidence the case should have been submitted to the jury. *Pickett v. R. R.*, 117 N. C., 637; *Clark v. R. R.*, 109 N. C., 446; *Fulp v. R. R.*, 120 N. C., 525; *Cox v. R. R.*, 123 N. C., 604; *Powell v. R. R.*, 125 N. C., 370; *Whitesides v. R. R.*, 128 N. C., 229.

In *Snipes v. R. R.*, 152 N. C., 42, the Court says: "It is well established that the employees of a railroad company in operating its trains are required to keep a careful and continuous outlook along the track and the company is responsible for injuries resulting as the proximate consequence of their negligence in the performance of their duty." To same effect are *Arrowood v. R. R.*, 126 N. C., 629; *Lea v. R. R.*, 129 N. C., 459; *Bessent v. R. R.*, 133 N. C., 934; *Stewart v. R. R.*, 136 N. C., 389; *Sawyer v. R. R.*, 145 N. C., 29; *Edge v. R. R.*, 153 N. C., 214-217; *Guilford v. R. R.*, 154 N. C., 607.

Upon the authorities cited the judgment of nonsuit must be Reversed.

Cited: *Shepherd v. R. R.*, 163 N. C., 521; *Barnes v. R. R.*, 168 N. C., 514.

(47)

IRENE J. COOK v. JOHN M. COOK.

(Filed 17 April, 1912.)

1. Pleadings—Plea in Bar—Former Action—Answer—Joinder—Demurrer—Practice.

A defendant may demur to a complaint from which it appears that another action is pending between the same parties for the same cause, Revisal, sec. 475 (3); and when it does not so appear, the objection may be taken by answer to the merits joined with a plea in bar. Revisal, 477.

2. Same—Appeal and Error—Harmless Error.

In an action for divorce the answer set up a plea in abatement that an action was then pending between the same parties for the same cause, and further answered to the merits: *Held*, error for the trial judge to require the defendant to withdraw his answer to the merits before considering his plea in abatement, but harmless when it appears on appeal that his plea was bad.

3. Pleadings—Former Action—Plea in Bar—Waiver.

The right to plead the pendency of another action between the same parties for the same cause before judgment had is, to a large extent, a rule founded on convenience, and same may be waived or cured by dismissing the prior action at any time before the hearing.

4. Divorce — Cross-action — Affirmative Relief — Jurisdictional Affidavits — Practice.

While a defendant in an action for divorce may, by cross-action or petition, obtain a divorce on his own account, he must file an affidavit required by statute in such causes in order to confer jurisdiction on the court.

5. Divorce—Cross-action—Affirmative Relief—Counterclaim—Practice.

The doctrine that a party sued is not required, as a rule, to set up a counterclaim existent in his favor, but allowed to assert it in a different or a subsequent action, applies to a defense set up in an action of divorce, unaffected by the fact that the status of the parties is necessarily therein involved.

6. Same—Former Action—Abatement—Same Cause—Independent Action.

The wife, being party defendant in an action commenced by the husband for a divorce, answered denying the facts relied upon by plaintiff, but without asking affirmative relief, and without making the affidavit required in actions for divorce. In another jurisdiction she subsequently brought an independent action for divorce for abandonment, in which the defendant moved to vacate upon the ground of the pendency of the former action for divorce brought by him: *Held*, the present plaintiff is not the actor in the former suit, and the relief sought by her is not the same as that involved in the other issue and is not altogether dependent upon the same state of facts, and the pendency of the husband's action for divorce is not a bar to that of his wife subsequently brought.

CLARK, C. J., and WALKER, J., dissenting.

COOK *v.* COOK.

APPEAL from *Peebles, J.,* at October Term, 1911, of WAKE. (48)

Civil action for divorce *a mesna,* etc. The present action was instituted 26 August, 1911, and summons therein was personally served on defendant 1 September, 1911. Plaintiff filed her complaint to September Term, 1911, for divorce from bed and board on account of abandonment, "unlawfully and without just cause," the complaint being accompanied by the formal affidavit required by the statute. Defendant thereupon answered, denying the alleged abandonment, and answered further, in bar of plaintiff's right to maintain her action, that the defendant had theretofore commenced an action for divorce *a vinculo* for cause specified in subsec. 5, Revisal sec. 1561, that is, because the parties had lived separate and apart for ten successive years, had resided in the State for that period, and there were no children born of the marriage, etc.

It appeared that defendant's action returnable to Superior Court of Alamance County had been commenced 24 September, 1910, summons personally served on plaintiff 1 October, 1910, complaint filed November Term, 1910, and defendant therein, that is, the present plaintiff, had appeared in that suit and made formal denial of complaint, and as a part of such denial had averred a wrongful abandonment by her husband in August, 1900, and prayed judgment that plaintiff's suit be denied him. This answer was verified in ordinary form of answers in civil actions, but not in the form required in actions for divorce. When the present case was called for trial in Wake Superior Court, it was admitted by plaintiff that the action by defendant in Alamance was still pending, and before the jury was impaneled defendant moved to "abate the action and dismiss the same" by reason of the pending of the Alamance case, and the court held that on the facts the pendency of the action in Alamance County was not necessarily a bar to this, and that the answer to the merits destroyed the plea in abatement, and offered defendant opportunity to withdraw his plea in bar and file a plea in abatement, which was declined, and defendant excepted.

The jury was then impaneled, and the following verdict was rendered:

1. Were the plaintiff and the defendant married on 22 March, (49) 1900? Answer: Yes.

2. Did the defendant abandon the plaintiff, as alleged in the complaint? Answer: Yes.

3. Has the plaintiff been a resident of the State of North Carolina for two years next preceding the filing of the complaint? Answer: Yes.

4. Is the defendant a resident of the State of North Carolina? Answer: Yes.

5. Was the plaintiff a resident of Wake County, North Carolina, at the time this action was commenced? Answer: Yes.

Judgment on the verdict, and defendant excepted and appealed.

R. N. Simms for plaintiff.

Parker & Parker, Long & Long, Dameron & Long, and Holding & Snow for defendant.

HOKE, J., after stating the case: Under our present procedure, a defendant is allowed to demur, when it appears on the face of the complaint that there is another action pending between the same parties for the same cause (Rev. 1905, sec. 475, subsec. 3), and where this does not appear from the complaint the objection may be taken by answer (Revisal, 477); and it has been held with us that an objection of this character may be joined with plea in bar or an answer on the merits. *Blackwell v. Dibrell,* 103 N. C., 270, citing on this position Pomeroy's Remedies, sec. 721. The judge below, therefore, had no right to require defendant to withdraw his answer on the merits as a condition for having his plea in abatement considered and passed upon. We hold, however, that the verdict and judgment should not be disturbed on this account, being of opinion that the pendency of defendant's suit in Alamance County in which the husband is seeking to obtain a divorce *a vinculo,* is not necessarily a good plea against the present prosecution of plaintiff's suit for divorce from bed and board. As a general rule, this right to plead the pendency of another action between the same parties, before judgment had, is regarded to a large extent as a rule of convenience, resting on the principle embodied in the maxim, *"Nemo debet bis vexare,"* etc. The defect is one that can be waived, and it may also be cured by dismissing the prior action at any time before the hearing (1 Cyc., p. 25; *Grubbs v. Ferguson,* 136 N. C., 60), and the plea presenting it is usually confined to suits in which the same litigant is plaintiff or is at least an actor seeking the same relief. *Long v. Coal and Iron Co.,* 233 Mo., 714; *Rodney v. Gibbs,* 184 Mo., 1, 10; *Craig v. Dougherty,* 45 Mo., 294; *Mattel v. Conant,* 156 Mass., 418; *Washburn v. Scott Co.,* 22 Fed., 711; *Wadsworth v. Johnston,* 41 Cal., 61; *Screw Co. v. Blevin,* Blackford C. C., p. 240.

(50)

In the case before us the present plaintiff is not the plaintiff in the action pending in Alamance County, nor is she an actor in that suit seeking affirmative relief. She asks for no judgment there and has not filed the affidavit required by our law in divorce proceedings and which we have often held is jurisdictional in its nature. *Johnson v. Johnson,* 142 N. C., 462; *Hopkins v. Hopkins,* 132 N. C., 22.

In divorce proceedings a defendant sued is allowed, with us, to ask for and obtain a divorce on his own account, but he can only do so by

cross-action or petition, accompanied by this jurisdictional affidavit and coming within the definition of the general term counterclaim, as it is understood and used in The Code. *Smith v. French,* 141 N. C., 7, citing Green on Code Pleadings and Practice, sec. 815. It is well recognized here that a party sued is not required as a rule to set up a counterclaim existent in his favor, but is allowed to assert the same in a different or a subsequent action. *Shakespeare v. Land Co.,* 144 N. C., 521; *Mauney v. Hamilton,* 132 N. C., 303; *Manufacturing Co. v. McElwee,* 94 N. C., 425. It is urged that while this rule may hold in ordinary actions, it should not obtain in divorce proceedings, because the status of the parties is then necessarily involved. It would seem, however, to be especially insistent in such proceedings where a party may not desire to presently seek affirmative relief, in the hope that a different course would more likely lead to a reconciliation; and assuredly we think the reluctance or failure to take such course from such a motive should not be held to defeat or prejudice the right of a defendant to bring his cause (51) before the court at another time. The plea, upon which defendant now relies to defeat plaintiff's recovery, is referred to in 1st Pl. and Pr., p. 750, as available when there is a former suit pending in the same jurisdiction between the same parties for the same cause of action and for the same relief. Not only is present plaintiff not an actor in the suit in Alamance County, but the relief sought by her is not the same as that involved in the other issue, nor is it dependent altogether on the state of facts. And authority seems to favor the position that the pendency of an action seeking one kind of divorce does not necessarily forbid the maintenance of a suit to secure a divorce of a different kind. *Simpson v. Simpson,* (109 Cali., 1), Cal., Sept., 1895; *Stevens v. Stevens,* 42 Mass., 279; *Monroy v. Monroy,* 1 Edw. Chan., 382; *Thornton v. Thornton,* 11 Pro. Div., 1886, p. 176; 2 Bishop on Marriage and Divorce, sec. 565; 1 Cyc., 31; 9 Amer. & Eng. Ency. (2 Ed.), 840. In this last citation the author says: "It is not a bar to a suit for separation that another suit is pending for an absolute divorce, and the courts will under some circumstances refuse to stay the former proceedings until the latter is determined." Pursuing this statement, if it should be made to appear that a prior suit was pending between the same parties which embraced the same issue and involved to a large extent the same state of facts, a court would and should, if right and justice would be thereby best promoted, stay the proceedings until the results of the former suit could be attained; but as we have endeavored to show, there is nothing in this case that requires such a course as a matter of law, and nothing appears of record to justify it as a matter of discretion.

After a full and fair trial, in which defendant, having answered, was present in court, the plaintiff has established that she was abandoned by

defendant wrongfully and without just cause, and we find nothing in the law or the facts of the case to justify the Court in depriving the plaintiff of her verdict and the rights which flow from it under the law.

No error.

(52) CLARK, C. J., dissenting: The defendant brought an action against his wife, the plaintiff herein, for an absolute divorce in Alamance County, which was the place of his residence, at that date, September, 1910. The present plaintiff, the defendant in that action, appeared and filed an answer. Subsequently she instituted this action in Wake, in August, 1911. The defendant herein moved to abate this action by reason of the pendency of his prior action which had been brought in Alamance. This motion should have been granted.

In *Smith v. Morehead,* 59 N. C., 360, the Court held that the domicile of the husband was the domicile of the wife, and that proceedings in the divorce instituted by the wife against the husband must be brought in the county where the husband resided.

But independently of that, an action for divorce is *sui generis,* and is to determine the *status* of the parties. Hence, there can be nothing in the nature of a counterclaim. In *Bidwell v. Bidwell,* 139 N. C., 409, *Hoke, J.,* says: "Actions for divorce deal with the status of the parties," and held that, there having been a decree of divorce between the parties, a subsequent action would be barred, though it might set up matters which would have affected the former decree, if pleaded in time.

In the present case, even if this action had been properly brought by the wife in Wake, the judgment decreeing her a divorce from bed and board was a determination that such was the legal status of the parties at the date of that judgment. Hence, in the further prosecution of plaintiff's suit in Alamance, which he had a right to bring in that county, and which he did bring therein nearly a year prior to the institution of the present suit by his wife in Wake, he will be estopped by the judgment in this case from further prosecuting this action. He can only bring a new action, and only as to causes arising subsequent to the date of the judgment in this. He is estopped by the judgment in this case. As the husband instituted his action in Alamance prior to the beginning of this action, he had a right to prosecute it to judgment, and the action in this case in Wake should have been dismissed, for the wife could have had her full remedy by a defense to the action in Alamance which was already pending for the purpose of determining the status of the parties.

(53) In *DeHaley v. DeHaley,* 74 Cal., 489, the point is expressly decided, the Court holding that while an action for divorce is pending, one of the parties thereto cannot maintain a subsequent action

for divorce against the other, but that all matters affecting the *status* of the parties should be determined in the action first brought, and not by a new action setting up matters in recrimination or defense. In 2 Nelson Separation and Divorce, sec. 745, it is said: "The term *counterclaim* is not applicable to a cause for divorce, which is neither a tort nor a breach of contract, but is a cause of action unlike all other causes."

The husband having brought his prior action in Alamance, the wife should have tried out her grounds of defense or her claims for relief in that action.

The test of a counterclaim is that its decision is not necessarily involved in the pending action, and the claimant can bring his counterclaim on it even after judgment. If the plaintiff in the Alamance case, which was first brought, had obtained judgment of absolute divorce, the defendant in that case could not have brought her action for divorce from bed and board. *Bidwell v. Bidwell,* 139 N. C., 409. It follows that she could not bring such suit pending the Alamance action. Her demand is not a counterclaim, but a recrimination, and would be barred by a decision granting the demand in the plaintiff's action against her, for it is a matter necessarily involved in the decree in the action against her which would determine her status. *Tyler v. Capeheart,* 125 N. C., 64.

WALKER, J., concurs in this dissent.

Cited: Brock v. Scott, post, 575; *Cook v. Cook,* 164 N. C., 274; *Barnett v. Mills,* 167 N. C., 584.

HATTIE CAUDLE ET ALS. v. SARAH CAUDLE ET ALS.

(Filed 17 April, 1912.)

Wills—Devises—Indefinite Description—Division of Lands—Tenants in Common—Partition—Parol Evidence.

Under a devise of testator's lands in different portions to his children, to one of them "the old home place where I now live," it appearing that the sum of all the portions equaled the acreage of all of his lands, the children named took as tenants in common, except as to "the old home place" specifically devised. The lands may be divided among them in proceedings for partition in accordance with the number of acres each was to take under the will. The number of acres being equal to all the testator owned, would make the admission of parol evidence unnecessary to fit the lands to the devise, which otherwise would have been competent.

APPEAL from *Justice, J.,* at January Term, 1912, of STANLY. (54)

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

Jerome & Price and R. E. Austin for plaintiff.
R. L. Smith for defendant.

CLARK, C. J. The testator devised to his daughter Sarah "60 acres of land"; to his daughter Eliza "40 acres"; to his daughter Henrietta "40 acres"; to his son S. J. "125 acres"; to his son R. E. "82 acres," the latter to include "the old home place where I now live." It was admitted in the trial below that the testator died seized and possessed of 347 acres of land.

The plaintiffs are the other heirs of the testator, who have brought this proceeding against the devisees above named, alleging that the testator left 347 acres of land, and asking for a partition of the same among themselves and the defendants in equal shares. The clerk adjudged that the defendants were sole tenants in common of said 347 acres under the will. On appeal, this judgment was affirmed by his Honor, and the plaintiffs appealed.

The court was correct in holding that the devisees were tenants in common of the 347 acres. If the testator had devised one-fifth of his land to each of said devisees, it could not be questioned that they were entitled to take as tenants in common and could make partition between themselves, or apply to the courts to order partition, and that one-fifth be set off and allotted to each devisee. It being admitted here that the testator left 347 acres of land, it follows that instead of giving one-fifth thereof to each of said devisees, the testator devised 40-347ths to one; 40-347ths to another; 60-347ths to another; 125-347ths to another;
(55) and 82-347ths to the other. The testator left it to the said devisees to use their own pleasure as to making partition among themselves in that proportion, with no restriction save that one of the devisees named should have the home place as his 82 acres.

It may be that these devisees may prefer to continue as tenants in common, or they may set apart and allot in severalty to each the specified number of acres, if they can agree. If they cannot do so, then they may apply to the court to appoint commissioners to make and allot to each his share in severalty. The plaintiffs are the other heirs of the testator for whom other provision is made in the will. They have no interest in said 347 acres of land, and their petition for partition thereof was properly denied.

In *Harvey v. Harvey,* 72 N. C., 570, the testator devised to one son 250 acres of land and to another 250 acres of land, and then provided that the remainder should be sold. The court held that it was competent to appoint commissioners to allot to each son 250 acres of land, so as to make that certain which before was uncertain. The present is a much stronger case in favor of the devisees, as the testator had only 347 acres

and the acreage devised to the five devisees named foots up exactly 347. It thus appears that the title to the entire tract went to the five devisees as tenants in common, and that it is for them, should they wish, to make partition. This case was cited with approval in *Jones v. Robinson,* 78 N. C., 400, and *Wright v. Harris,* 116 N. C., 465.

In the latter case the testator devised 50 acres of land to a family servant, and it was held that he was entitled to have 50 acres of land allotted to him by metes and bounds out of the 1,200 acres left by the testator. This decision was reaffirmed in *Harris v. Wright,* 118 N. C., 423.

Parol evidence of surrounding circumstances is competent in the interpretation of a deed or will to enable the court to ascertain the intention of the parties. *Ward v. Gay,* 137 N. C., 397; *Boddie v. Bond,* 154 N. C., 359. But in this case it is not even necessary to do this. It is admitted that the testator owned 347 acres only, and the will shows on its face that he devised that number of acres, in proportions stated, to five of his children. The will specifies that one of the devisees is (56) to have that part of the tract on which the "home place stood," and the residuary clause shows that the testator understood that he had disposed of all his realty.

The judgment of the court below is

Affirmed.

LILLIE A. HAMILTON v. ELI S. NANCE.

(Filed 17 April, 1912.)

1. Slander—Issues—Exact Words—Substance—Appeal and Error.

In an action for slander, it is reversible error for the judge to submit an issue under a charge that requires the jury to find that the defendant used the slanderous words exactly as set out in the complaint; for a recovery may be had if the defendant had used the words complained of in substance.

2. Slander—Utterances—Present Conditions—Actionable per se.

The utterance of defendant, that the plaintiff had (at the time of the utterance) a certain loathsome venereal disease, is actionable slander. As to whether at the time of the utterance it would have been actionable if it referred to the past, *Quœre.*

3. Slander—Utterances—Malice Presumed—"Reports"—"News."

The law will presume malice, in an action for slander, from the statement of the defendant that the plaintiff has a certain loathsome venereal disease (referring to the time of the statement), whether it was made in the form of a "report," or "news," or a direct charge.

4. Slander—Measure of Damages—"News"—"Reports"—Evidence.

When a plea of justification is not interposed in defense to an action for slander, the defendant may offer evidence in mitigation to the issue as to the damages tending to show that his slanderous utterances were in the form of a "report" or "news."

5. Slander—Issues—Justification—Verdict—Malice Presumed—Actual Malice—Measure of Damages—Punitive Damages.

In an action for slander, where justification is not pleaded and privilege is not claimed, the jury, upon finding an affirmative answer to the first issue, implies, as a matter of law, that the charge complained of is false and malicious, and compensatory damages should be awarded; and additional punitive damages may also be given if the jury find actual malice. The proper issues and legal inferences in actions for slander where justification is and where it is not pleaded, set out and discussed by MR. JUSTICE ALLEN.

(57) APPEAL from *Cooke, J.*, at October Term, 1911, of UNION.

This is an action to recover damages for slander.

The first issue submitted to the jury as to the utterance of the words alleged in the complaint was answered in favor of the defendant, and the plaintiff excepted and appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE ALLEN.

Adams, Armfield & Adams and Stack & Parker for plaintiff.

Redwine & Sikes, McNeeley & Brooks, and Robinson & Caudle for defendant.

ALLEN, J. The complaint alleges that the defendant charged that the "news" was that the husband of the plaintiff "had" a venereal disease, naming it, and "has given it to his wife." The answer admits that he said the "report" was that the husband of the plaintiff "has had" the disease named in the complaint, and "has given it to his wife."

The plaintiff tendered the following issue, which the court refused to submit, and the plaintiff excepted: "1. Did the defendant wrongfully and falsely speak of and concerning the plaintiff language imputing that the plaintiff was afflicted with a venereal disease, as alleged in the complaint?"

His Honor submitted the issue, "Did the defendant wrongfully and falsely speak of and concerning the plaintiff" (and then follows the words set out in the complaint), and charged the jury that if the plaintiff had not satisfied them by the greater weight of the evidence that the defendant spoke those words, to answer the first issue "No," and the plaintiff excepted.

In our opinion, the ruling was erroneous and entitles the plaintiff to a new trial.

In an action to recover damages for slander the plaintiff is not required to prove the utterance of the exact words set out in the complaint, but he must prove the words in substance, and His honor should have so instructed the jury. The issue submitted could not have (58) been answered in favor of the plaintiff under the instructions of the court if the jury found that the defendant used all the language set out in the complaint, except that he used the word "report" instead of the word "news," which would be contrary to the practice under our system of pleading. Revisal, 515 and 516.

Issues are approved in *McCurry v. McCurry,* 82 N. C., 296; *Wozelka v. Hettrick,* 93 N. C., 10, and in *Rice v. McAdams,* 149 N. C., 29, submitting the inquiry to the jury as to whether the defendant spoke the words set out in the complaint "or words of the same substance," and it is generally held that proof of the words in substance is sufficient. 18 A. and E. Enc. L., 1078; 13 Ency. Pl. and Pr., 63; 25 Cyc., 484; *Pegram v. Stoltz,* 67 N. C., 148.

The authorities seem to agree that charging that another *has* a loathsome disease such as that described in the complaint is actionable (*Koucher v. Blinn,* 23 Am. Rep., 729; *Joannes v. Burt,* 83 Am. Dec., 626; *Watson v. McCarthy,* 46 Am. Dec., 380; *Williams v. Holdridge,* 22 Barb., 398; *McDonald v. Nugent,* 122 Iowa, 652; *Bloodworth v. Gray,* 49 E. C. L., 334; *Irons v. Field,* 9 R. I., 217; *Nichols v. Guy,* 2 Ind., 82), but that no action can be maintained if the charge is that he *had* the disease in time past (Cooley Torts, 387; Hale Torts, 301; Jaggard Torts, 509; Newell S. and L., 198; Odgers S. & L., 62; *Pike v. Van Worman,* 5 How. Pr., 176; *Carlslake v. Mapleborum,* Dunf. & East, 474; *Golderman v. Sterne,* 73 Mass., 182; *Bruce v. Soule,* 69 Me., 566; *Williams v. Holdridge,* 22 Barb., 398; *Irons v. Field,* 9 R. I., 217; *Nichols v. Guy,* 2 Ind., 82), to which last proposition we do not commit ourselves without qualification, but if the first is true, it would seem that the answer substantially admits the allegations of the complaint, as the defendant therein says the husband had the disease and "has given it to his wife," which at least admits of the construction that it referred, at the time of the utterance, to the present.

If the defendant made the charge that the plaintiff had the disease at the time he was speaking, the law would presume malice, and the burden would be on the defendant to prove the truth of the (59) charge under the plea of justification (*Ramsey v. Cheek,* 109 N. C., 273), and no such plea is relied on, the only issue in that event remaining for the jury to consider would be the one as to damages, and under this issue the defendant could offer evidence in mitigation. The fact that the charge is made in the form of a "report" or "news," instead

of a direct charge, does not relieve the defendant. *Hampton v. Wilson,* 15 N. C., 468; *Johnson v. Lance,* 29 N. C., 457.

The correct issues in actions to recover damages for slander where the words alleged are actionable *per se* and in which justification is not pleaded and privilege is not claimed, are:

(1) Did the defendant speak of and concerning the plaintiff the words in substance alleged in the complaint?

(2) If so, what damage is the plaintiff entitled to recover?

If the first issue is answered "No," the case is at an end. If answered "Yes," the law, in the absence of justification, says that the charge is false and malicious, and it is then the duty of the jury to award compensatory damages, and they may, in addition, award punitive damages if there is actual malice, which may be inferred by the jury in some cases from the circumstances. *Stanford v. Grocery Co.,* 143 N. C., 419.

If justification is pleaded the issues are:

(1) Did the defendant speak of and concerning the plaintiff the words in substance as alleged in the complaint?

(2) If so, were they true?

(3) What damages, if any, is plaintiff entitled to recover?

If the first issue is answered "No" or the second "Yes," there can be no recovery; and if the first is answered "Yes" and the second "No," the jury may award damages. This is true because the utterance of words actionable *per se* implies malice, and in the absence of a plea of justification, or when the plea is entered and the issue is answered against the defendant, the law says the words are false.

There are many exceptions to evidence, which it might be well to consider, but we cannot do so without referring to the evidence, and it is so revolting that it ought not to be in our reports except from absolute necessity.

New trial.

Cited: Barringer v. Deal, 164 N. C., 248; *Ivie v. King,* 167 N. C., 177.

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(60)

R. A. PEELE ET AL. v. NORTH AND SOUTH CAROLINA RAILWAY COMPANY.

(Filed 17 April, 1912.)

1. Arbitration and Award—Agreement in Pais—Enforcement by Judgment.

Except by statutory provision a court has no power to enter summary judgment on an arbitration and award arising by agreement *in pais* and not an incident to a pending suit.

2. Same.

Where suit is pending between the parties, and more especially after issue joined, and there is an agreement to arbitrate, the award to be made a rule of court, the award may be enforced by judgment entered in the cause.

3. Same—Fraud—Objection and Exception—Trial by Jury—Practice.

After an action has been commenced and issue joined, and an agreement to arbitrate has been made by the parties out of court, containing a stipulation that "the award shall be entered as judgment in the cause," the award may be entered and enforced by final process if it is otherwise valid, giving the parties opportunity to except thereto on the ground of fraud, etc., and have the issues thus raised to be determined by a jury.

4. Same.

After suit commenced and issue joined between the parties for damages against a railroad company for alleged negligence in injuring plaintiff's lands by fire from defendant's passing locomotive, they entered an agreement to arbitrate, out of term, with the stipulation that the defendant should promptly pay "all awards made by the arbitrators, and the same shall be entered as judgment in the cause so as to become binding between the parties." After the award had been rendered and when the cause was called for trial, the defendant filed affidavits tending to impeach it for fraud and partiality on the part of the arbitrators. On the issues thus joined the jury found for the plaintiff. Judgment on the verdict was *Held*, no error.

APPEAL from *Cooke, J.*, at October Term, 1911, of SCOTLAND.

The plaintiffs alleged that the defendant was a corporation, doing and carrying on the business of a railroad and common carrier, and that on 26 October, 1909, it ran its locomotives on its railroad and negligently permitted sparks of fire to be emitted from its locomotives, and that the said sparks of fire ignited the property of (61) the plaintiffs, which was situated contiguous to or near the railroad, and set fire to and damaged the plaintiffs' property in the sum of $360.

The defendant, answering the complaint, denied that it was guilty of any negligence as alleged in the complaint, and denied that the plaintiff was entitled to any recovery against this appellant.

After the cause was at issue, and out of term, the parties entered into a written agreement, duly signed, to arbitrate the question at issue and on the amount of damages. The agreement recited and referred to the suits pending, provided for arbitration by arbitrators selected and sworn, etc., and concluded with the stipulation that defendant "shall promptly pay all awards made by said arbitrators, and the same shall be entered as judgment in the cause so as to become fully binding on all parties hereto." The arbitrators, having been selected and sworn as

per agreement, and notice having been duly served, met and made award that the amount of damages due from defendant to plaintiffs was in the sum of $360. When cause was called for trial at October Term, 1911, these facts were made to appear by affidavit, and plaintiff moved for judgment according to the award, and defendant filed counter-affidavits tending to impeach the award for fraud and partiality on part of umpires, etc., and thereupon, over defendant's objection, issues were submitted to the jury and the following verdict was rendered:

1. Was there an arbitrament and award as to the amount of damages in which plaintiffs are entitled to recover in this action? Answer: Yes.

2. Were the arbitrators thereof wrongfully and corruptly biased and prejudiced in favor of the plaintiffs? Answer. No.

Defendant duly excepted.

There was judgment on the issues and the award for the amount of verdict, and defendant further excepted and appealed.

(62) *Coxe & Dunn for plaintiff.*
W. H. Neal for defendant.

HOKE, J., after stating the case: Except by statutory provision, a court has no power to enter summary judgment on an arbitration and award arising by agreement *in pais* and not as incident to a pending suit. Where suit is pending between the parties, and more especially after issue joined, and there is an agreement to arbitrate, the award to be made a rule of court, in such case the award may be enforced by judgment entered in the cause. There is also ample authority for the position that on action pending and issue joined, though the agreement to arbitrate be made out of court, if the agreement contains the stipulation, as in this case, "That the award shall be entered as judgment in the cause," the award, if otherwise valid, may be so entered and enforced by final process. *McCall v. McCall,* 36 S. C., 80-85; *Farrington v. Hamblin,* 12 Wendell, 212; *Corrigan v. Rockefeller,* 67 Ohio 354; *Rodgers v. Nall,* 25 Tenn., 29; *Wear v. Ragan,* 30 Miss., 83; 11 Enc. Pl. Pr., p. 1049.

It would seem that the decisions of this State have been against this position, though in much the larger number of them, as in *Jackson v. McLean,* 96 N. C., 474; *Metcalf v. Guthrie,* 94 N. C., 449; *Monie v. Austin,* 85 N. C., 179, cited and relied on by the defendant, the question was not really presented, as the agreement in those cases did not contain the stipulation that the award should be made the judgment of the court in the pending cause; and in *Long v. Fitzgerald,* 97 N. C., 39, where this provision did appear, there judgment upholding the award

was affirmed. The only case we find with us which directly sustains the view that an award pursuant to agreement made by the parties out of court may not be entered as judgment in the cause, though containing stipulation that this might be done, is *Simpson v. McBee,* 14 N. C., 531. The learned judge in that case recognizes that a different practice may have then prevailed in England under a statute from the time of 9 and 10 William III., ch. 15, and we think that the contrary view presented and sustained by the authorities heretofore cited should prevail in such cases, and, if the award is otherwise valid, that (63) judgment thereon should be entered in the pending cause. This ruling requires and is predicated on the position that the parties are to be afforded opportunity to object to the award and its validity by exceptions and the issues so arising to be determined by the jury if that mode of trial is insisted upon. This was the course pursued in the present case and we find no reason for disturbing the result of the trial.

No error.

VENNIE TEMPLETON v. P. B. BEARD, P. A. MARKHAM ET AL., COMMISSIONERS OF ROWAN COUNTY.

(Filed 24 April, 1912.)

1. County Commissioners—Bridges, Delay in Building — Negligence — Discretion.

Damages for injuries received in crossing a creek in a conveyance, in an action alleging the crossing to have been dangerous, and caused by the negligence of the county commissioners in not having a bridge over it erected under their contract in a reasonable time, are not recoverable, the matters complained of being discretionary with the commissioners, and not reviewable in the courts.

2. County Commissioners—Negligence—Individual Responsibility — Corruption and Malice—Pleadings—Evidence.

To recover individually of county commissioners for their acts or omissions as such, involving an exercise of discretionary powers, it is necessary to allege and prove that they acted or failed to act "corruptly or of malice," and that principle is not affected by the fact that in other and many instances they act ministerially.

3. County Commissioners — Penalty — Jurisdiction — Justice of the Peace—Appeal.

An action against a county commissioner for the penalty of $200 prescribed by Revisal, sec. 3590, for neglecting to perform the duties required of him, and to be paid to the party suing therefor, etc., is *ex contractu,*

and is originally cognizable in a court of the justice of the peace, and hence is not open to a party seeking its recovery originally in the Superior Court.

(64) APPEAL from *Ferguson, J.*, at January Term, 1912, of IREDELL.

There was judgment sustaining demurrer to the complaint, and plaintiff excepted and appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE HOKE.

Z. V. Turlington for the plaintiff.
L. C. Caldwell for the defendant.

HOKE, J. The plaintiff instituted suit against P. B. Beard and four others, and for her cause of action alleged "that, during the period referred to, defendants were the duly qualified and acting Commissioners of Rowan County, N. C. That on the....day of May, 1909, the public road leading east from Mount Ulla, in Rowan County, was and had been for several months past in a dangerous and unsafe condition at the point where it crosses Back Creek, and was a menace to the public passing over said road because of the great need of a bridge across said creek, which fact was well known to defendants above named and was negligently, carelessly, and wantonly, without due regard to the safety of the public, allowed to remain in said dangerous condition. That the defendants above named well knew the dangerous condition of the road and the need of a bridge at that place and had assumed the responsibility therefor, and had agreed to build a bridge at that place and had let the contract for the building of said bridge, but carelessly, negligently, and recklessly failed to have said bridge built for a long period of time after the contract for same had been let, to wit, for the period of about six months, well knowing that the safety of the public was imperiled by this long delay. That on or about the ....day of May, 1909, Miss Vennie Templeton, while attempting to cross the said creek at the point above named, drove her horse into the said ford, when her horse, on account of the dangerous condition of the aforesaid ford, lost his life and the said plaintiff in this action was greatly damaged, to wit, in the sum of $300."

(65) On these facts alleged in the complaint and made the basis of plaintiff's demand, the county of Rowan is not liable, on the principle declared and approved in the well-considered case of *White v. Commissioners,* 90 N. C., 437, and many others of like purport. Nor will the action lie against the members of the board as individuals, because there is no averment that defendants acted or failed to act

"corruptly or of malice." The case presented is one involving the exercise of discretionary powers conferred upon the board for the public benefit, and it is very generally recognized in such case that in the absence of statutory provisions even ministerial officers, acting on questions arising properly within their jurisdiction, are not liable to suit by individuals without an averment of that kind. In such cases the officers are sometimes termed *"quasi*-judicial," and the general principle applicable is stated by Mechem on Public Officers as follows: "The same reasons of private interest and public policy which operate to render the judicial officer exempt from civil liability for his judicial acts within his jurisdiction apply to the *quasi*-judicial officer as well, and it is well settled that the *quasi*-judicial officer cannot be called upon to respond in damages to the private individual for the honest exercise of his judgment within his jurisdiction, however erroneous or misguided his judgment may be. The name applied to the office or the officer is immaterial. The question depends in each case upon the character of the act. If it be judicial or *quasi*-judicial in its nature, the officer acts judicially and is exempt. Neither is it material that the officer usually or often acts ministerially. In those cases in which he does act judicially he is, nevertheless, exempt. A statement approved in numerous decisions here and elsewhere. *Hudson v. McArthur,* 152 N. C., 107; *Raysford v. Phelps,* 43 Mich., 342; *Baker v. State,* 27 Ind., 485; 28 Cyc., 466. Section 3590 of the Revisal enacts: "If any county commissioner shall neglect to perform any duty required of him by law as a member of the board, he shall be guilty of a misdemeanor, and shall also be liable to a penalty of $200 for each offense, to be paid to any person who shall sue for the same." And it may be that unless barred by the statute of limitation, the plaintiff on the facts stated in the complaint might be allowed to recover against each commissioner the penalty of $200 as provided by the (66) statute. *Staton v. Wimberly, supra; Bray v. Barnard,* 109 N. C., 44; *Bray v. Creekmore,* 109 N. C., 49. But under our authorities, an action of this character is held to be one *ex contractu,* and original jurisdiction for such a claim is within the jurisdiction of a justice of the peace, and the position is therefore not open to plaintiff on this record. *Katzenstein v. R. R.,* 84 N. C., 688.

The judgment sustaining the demurrer must be

Affirmed.

MOCKSVILLE LODGE, NO. 134, A. F. AND A. M., v. G. R. GIBBS ET AL.

(Filed 24 April, 1912.)

1. Contempt of Court—Facts Found—Evidence—Appeal and Error.

The facts found by the trial judge in making a ruling for contempt of court for the disobedience of its restraining order, when supported by evidence, will not be reviewed on appeal.

2. Contempt of Court—Service of Process—Knowledge.

It is not necessary to show legal service of a restraining order to attach a party for contempt for its violation, for it is sufficient to prove circumstances from which it can be reasonably inferred that the respondents had knowledge of the fact that the order had been issued.

3. Same—Evidence Sufficient.

The expressed intent of respondent, in proceedings for contempt of an order of court, to run a merry-go-round, in spite of a restraining order, with evidence that the order had been issued on the day previous to its running in violation thereof; and on that day the respondent had an interview with his attorney, who was present in the clerk's office when the order was filed, and immediately thereafter a bill of sale to a third party was made, alleged to be fictitious, who ran the merry-go-round at the time complained of; that the order was read to respondent's wife, a copy of which she refused to receive, and which evidently thereafter, and before the commission of the offense by the vendee, the respondent had seen, a copy also having been left with his vendee; that the parties were traveling together in an amusement troupe, etc., is sufficient to sustain the findings of the trial court upon which the conviction for contempt was entered.

4. Contempt of Court—Disavowed Intent—Evidence—Conviction.

The mere sworn disavowal of any intention on the part of one attached for contempt of an order of court is not sufficient for him to demand his discharge, when from his acts or conduct it may be seen that he was guilty thereof. *Weston v. Lumber Co.*, 158 N. C., 270, cited and applied.

(67) APPEAL from order of *Daniels, J.*, rendered at chambers, 29 August, 1911; from DAVIE.

The summons in this action was issued on 7 August, 1911, and on the same day an order was signed by the judge holding the courts of the Tenth District, restraining the defendant, G. R. Gibbs, his agents and employees, from operating a merry-go-round or other device upon the grounds described in the affidavit, on 10 and 12 August, 1911, and from doing or permitting to be done by himself, his agents or employees, anything tending to the annoyance or disturbance of the picnics to be held on those grounds on those days.

The restraining order was filed in the clerk's office at Mocksville on 9 August, 1911, and was issued on that day.

The merry-go-round referred to in said order was operated on the 10th day of August, but the respondents, Gibbs and Emington, claim that on 9 August, 1911, before notice of the restraining order, the said Gibbs sold said merry-go-round to said Emington, in good faith and for value, and that it was operated on the 10th by Emington as his own property, while the plaintiff claims that both Gibbs and Emington knew that the restraining order had been issued before said sale; that the sale was fictitious, and that Emington was acting as the agent of Gibbs on 10 August, 1911.

On 17 August, 1911, a notice was issued to the respondents to appear and show cause why they should not be attached for contempt, and upon the hearing of the same the following order was made:

This cause coming on to be heard before his Honor, F. A. Daniels, judge, at chambers in Salisbury, N. C., on 29 August, 1911, upon a rule issued by his Honor against A. T. Grant, Jr., G. R. Gibbs, (68) and Thomas Emington, to show cause why they should not be attached as for contempt in disobeying the restraining order issued by this court in the above action at chambers in Statesville, N. C., on 7 August, 1911, and the writ of injunction issued thereunder on 10 August, 1911, by the clerk of the Superior Court of Davie County, N. C., and the rule now being heard upon affidavits and other proofs offered in evidence, and it appearing that an order was made by his Honor at chambers in Statesville, N. C., on 7 August, 1911, restraining the defendant, G. R. Gibbs, his agents and employees, from operating a merry-go-round or other device on the grounds described in the affidavits filed on 10 and 12 August, 1911, and from doing or permitting to be done by himself, his agents or employees, anything tending to the annoyance or disturbance of the picnics to be held on those grounds on those days; and it further appearing that the respondents had a full knowledge of the filing of said order, the same having been served on them; and a rule to show cause why they should not be attached for contempt for disobeying said order having been issued by his Honor at chambers in Lexington, N. C., on 15 August, 1911, and returnable before his Honor, F. A. Daniels, in chambers in Salisbury, N. C., on 20 August, 1911, when and where said respondents appeared and made answer:

The court finds the following facts: That respondent A. T. Grant, Jr., is not guilty of any contempt of this court or of any willful disobedience of any order or process issued by the court in this cause; and it is further ordered and adjudged that said rule be discharged as to the said A. T. Grant, Jr., and that he recover his costs.

The court finds the further facts, to wit: That the respondents G. R. Gibbs and Thomas Emington had notice of said restraining order so

issued by the court as aforesaid, copies of the same having been duly served on them, and that respondents G. R. Gibbs, and Thomas Emington whom the court finds was the agent of the said Gibbs, after said notice, did operate said merry-go-round on the lands described
(69) in the petition on the said 10 August, 1911, in willful disobedience of said restraining order of the court, and that after said Gibbs and Emington had notice of the granting of the restraining order in this cause, but before it had been served on either of said respondents, the said Gibbs made a pretended sale of his merry-go-round to said Emington with intent to violate and evade said restraining order.

It is further considered, ordered, and adjudged by the court that respondents G. R. Gibbs and Thomas Emington are guilty and in contempt of this court, and that respondents G. R. Gibbs and Thomas Emington each pay a fine of $50, and that they pay all the costs of this proceeding, to be taxed by the Clerk of the Superior Court of Davie County.

The said G. R. Gibbs and Thomas Emington are committed to the custody of the Sheriff of Rowan County until this judgment is complied with.

F. A. DANIELS,
Judge Presiding, Tenth Judicial District.

The respondents excepted and appealed, and assigned the following as errors:

1. That his Honor held that respondents should pay all costs, including that incurred by A. T. Grant, Jr.

2. That there was no sufficient evidence to support the findings of facts as made by his Honor.

3. That his Honor held that respondents had not purged themselves of the contempt alleged to have been committed.

4. That his Honor held that respondents were guilty of contempt, and adjudged that they should pay a fine of $50 each.

T. B. Bailey and E. L. Gaither for plaintiff.
Graham & Devin and D. G. Brummitt for defendant.

ALLEN, J. The facts found by his Honor and incorporated in his order are ample to support the conclusion he reached, and they are not reviewable, if supported by evidence. *Young v. Rollins,* 90 N. C., 125; *In re Denton,* 105 N. C., 59; *Green v. Green,* 130 N. C., 578.

The respondents do not contest the correctness of this rule, but, admitting it, they say there is no evidence to support the findings
(70) that they had notice of the restraining order before 10 August,

1911, on which day it is alleged it was violated, or that the respondent Emington was the agent of the respondent Gibbs, or that the sale to Emington was not made in good faith and for value.

We must, then, consider the evidence, not for the purpose of reviewing the findings of his Honor, but to see if there is any evidence to support them, and in doing so will be guided by the principle that it is not necessary to show legal service of the restraining order before 10 August, 1911, and that it is sufficient to prove circumstances from which it can be reasonably inferred that the respondents had knowledge of the fact that the order had been issued, in accordance with the rule stated in High on Injunctions, sec. 1421: "In considering the question of a defendant's liability for a breach of injunction, it is to be borne in mind that the injunction becomes operative from the time of the order being made, and not from the date of the writ itself, or from the time of its being drawn up. The mandate of the court being effectual upon all parties having notice thereof from the time it is given, to fix defendant's liability for a violation it is only necessary to show that he was actually apprised of the existence of the order at the time of committing the acts constituting the violation"; and again in section 1422: "Any means of information whereby notice of the order is actually brought to the knowledge of the parties enjoined would seem sufficient to meet the requirements of the rule above laid down. And the courts have uniformly held that it is not requisite that a defendant, against whom an injunction has been issued, should be officially apprised of its existence, or be served with process in the cause to render him liable in contempt in committing a breach of the injunction. If defendant is informed of the exstence of the order, although not yet served with process, it becomes operative upon him, and he will not be allowed to disregard or violate it. It is enough to show that he has had actual notice of the existence of the writ, or of the order of the court that it should issue."

What, then, are the circumstances established by the evidence, if the plaintiff's affidavits are believed?

(1) The summons was issued on 7 August, 1911, and was served on the respondent Gibbs on 8 August, 1911, and on the night of (71) that day he (Gibbs) said, in the presence of J. H. Bruce, "that the plaintiffs thought they had fixed to stop him from running his merry-go-round, and that he intended to run his machine anyway," and that "he had a lawyer to do his fighting."

(2) The restraining order was signed on 7 August, 1911, and was filed in the office of the clerk of the Superior Court in Mocksville, about 9 o'clock of the morning of 9 August, 1911, in the presence of A. T. Grant, attorney for the respondents.

(3) The said attorney went from the clerk's office to his law office and in a few minutes the respondent Gibbs was in the law office in conference with his attorney; and the bill of sale from Gibbs to Emington was signed about 10 o'clock of the morning of the same day.

(4) The restraining order was executed by reading and delivering a copy thereof to A. T. Grant, Jr., Esq., as attorney for G. R. Gibbs and wife, 9 August, 1911; by reading to Mrs. G. R. Gibbs and offering to leave a copy with her, which she refused to receive, not being able to find her husband, he being gone, 9 August, 1911; by reading to T. Emington and leaving a copy of same with him, 9 August, 1911; by defendant Gibbs accepting service of order without reading, as he had read the copy served on his wife, Mrs. G. R. Gibbs, and by leaving a copy with him. This 10 August, 1911, 9 p. m.

(5) The merry-go-round was shipped to Mocksville in the name of the "Gibbs Amusement Company," and was shipped from Mocksville to Graham, on 12 August, 1911, in the same name; and when it was shipped to Graham ten tickets were bought for the Amusement Company, on one of which the respondent Gibbs traveled.

(6) The respondent Emington went to Mocksville as a member of the Amusement Company, and left as such.

(7) The respondent Gibbs continued to exercise control over the merry-go-round after he claims he made the sale to Emington, and on 11 August, 1911, boasted in the presence of Emington, and with-
(72) out contradiction on his part, that some kind of legal papers had been executed against him for the purpose of prohibiting the operation of the merry-go-round on the previous day at Mocksville, but that he had very cleverly transferred the ownership of this property and had shown the Masons of Mocksville that they could not bluff him, and that when another year came round he would have a new outfit and would put it over them again.

There was much evidence on the part of the respondents which, if accepted by the court, would have exonerated them from all blame, but the circumstances we have enumerated are supported by evidence, and from them it was not unreasonable to infer and find that the respondents knew of the restraining order on 9 August, 1911, and that the pretended sale to Emington was not in good faith, and was for the purpose of evading and defeating the restraining order, and the court having so found, we cannot disturb the judgment.

Again, the respondents contend that having disavowed any intention to disregard the order of the court, having "purged themselves of the contempt," they must go free.

If this position can be maintained the force and effect of a restraining order will be measured by the conscience of the party against whom

it issues, and if that is sufficiently elastic, he can always violate the order, and then escape liability by swearing he did not intend to show disrespect for the order of the court.

Such a conclusion would practically destroy the efficiency of this important branch of equity jurisdiction, and is not, we think, supported by reason or authority.

The question was considered in *Baker v. Cordon,* 86 N. C., 121, and in answer to the contention that the disavowal of the intent purges the contempt and exonerates the party, the Court there says: "This objection rests upon a misapplication of the rule laid down and acted on in the matter of *Moore and others,* 63 N. C., 397. That rule is confined to the 'class of cases,' in the language of the *Chief Justice,* who delivers the opinion, *'where the intention to injure* constitutes the gravamen' of the offense. The violation of a judicial mandate stands upon different ground, and the only inquiry is whether its requirements have been willfully disregarded. If the act is intentional, (73) and violates the order, the penalty is incurred whether an indignity to the court, or contempt of its authority, was or was not the motive for doing it. A party is not at liberty, by a strained and narrow construction of the words and a disregard of the obvious and essential requirements of the order, to evade the responsibility which attaches to his conduct. In an honest desire to know the meaning and to conform to its directions, a mistaken interpretation of doubtful language would be a defense to the charge, but when its language is plain and the attempt is made to escape the force and defeat the manifest purposes of the order, by indirection, the penalty must be enforced or the court would be unable to perform many of its most important functions."

This case has been approved, in *Weston v. Lumber Co.,* 158 N. C., 270, in which *Justice Walker,* speaking for the Court, says: "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, 41 Am. Rep., 448."

Upon a review of the whole record, we are of opinion there is no error.

Affirmed.

(74)

R. L. McLEOD, EXECUTOR OF LEVI S. WARNER, v. MRS. MATTIE JONES ET AL.

(Filed 24 April, 1912.)

1. Wills—Latent Ambiguity—Intended Donee—Extrinsic Evidence.

When there is a latent ambiguity in the expression used in a will to denote the donee of a gift, extrinsic evidence is competent to apply the description to the intended donee, when it does not otherwise alter or affect the construction of the writing.

2. Same—Religious Institutions.

One who was an active member of a Baptist church in a certain locality, and during his life contributed to its foreign, home, and State missions, its orphanage, and other causes; devised and bequeathed certain of his property to (*a*) the Home Missions of the Baptist denomination; (*b*) to the Foreign Missions of the Baptist Church; (*c*) to the Thomasville Orphanage: *Held*, it was competent to show by parol or extrinsic evidence that the intended donees were, (*a*) the Home Mission Board of the Southern Baptist Convention; (*b*) the Foreign Mission Board of the Southern Baptist Convention; (*c*) the Trustees of the Thomasville Baptist Orphanage; and that these were the only institutions of the church of which he was a member that he could have intended as the beneficiaries under his will.

APPEAL from *Ferguson, J.*, at September Term, 1911, of MOORE.

Civil action to obtain the construction of the last will and testament of Levi S. Warner, deceased, and assure the proper distribution of his estate.

It appeared that the testator made the will in question and died without wife or children, leaving some sisters and children of others surviving as his next of kin and heirs at law; that the action was instituted by the executor named in the will and for the purposes indicated and the persons above referred to, and the Home Mission Board of the Southern Baptist Convention and the Foreign Missionary Board of the Southern Baptist Convention and the Trustees of the Baptist Church at Carthage, N. C., and the trustees of the Thomasville Baptist Orphange, were made parties defendant; that the will, after making several devises and bequests to his sisters who survived the testator,

(75) and the children of those deceased, contained the following items, which are the special subjects of controversy:

8th. I will and bequeath one-third of all the proceeds of the balance of my real and personal property of every description and kind to Home Missions of the Baptist denominaton.

9th. I will and bequeath one-third of all the proceeds of the balance after item 7 of all real and personal property of every description and kind to Foreign Missions of the Baptist denomination.

10th. I will and bequeath the remainder of all my real and personal property of every description and kind to the Thomasville Orphange.

And it appeared that there would be several thousand dollars affected by the items, as stated.

After being charged by the court, the jury rendered, in reference to these items, the following verdict:

1. Did testator, by the words in item 8 of his will, "Home Missions of the Baptist denomination," intend "the Home Mission Board of the Southern Baptist Convention," as alleged? Answer: Yes.

2. Did testator, by the words in 9 item of his will, Foreign Missions of the Baptist denomination," intend "the Foreign Mission Board of the Southern Baptist Convention," as alleged? Answer: Yes.

3. Did the testator, by the words in 10 item of his will, "Thomasville Orphange," intend "The Trustees of the Thomasville Baptist Orphange," as alleged? Answer: Yes.

Upon this verdict and on the matters now in controversy between the parties, the court entered judgment as follows:

1. That the plaintiff, as executor of the last will and testament of Levi S. Warner, be and he is hereby instructed, directed, and decreed to pay the bequest and devise mentioned and set forth in item 8 of the last will and testament of his said testator to the defendant "the Home Mission Board of the Southern Baptist Convention."

2. That the plaintiff, as executor of the last will and testament of Levis S. Warner, be and he is hereby instructed, directed, and decreed to pay the bequest and devise mentioned and set forth in (76) item 9 of the last will and testament of his said testator to the defendant, "the Foreign Mission Board of the Southern Baptist Convention."

3. That the plaintiff, as executor of the last will and testament of Levi S. Warner, be and he is hereby instructed, directed, and decreed to pay the bequest and devise mentioned and set forth in item 10 of the last will and testament of his said testator to the defendant, "the Trustees of the Thomasville Baptist Orphange," . . . And from said judgment the heirs at law and next of kin appealed.

H. F. Seawell for the plaintiff.

R. L. Burns and G. H. Humber for the defendants.

HOKE, J., after stating the case: Under our decisions, the facts in evidence present an instance of a latent ambiguity, requiring and permitting the reception of extrinsic evidence; not to alter or affect the construction, but to apply the description to the intended donee, as designated by the language appearing in the will. *Keith v. Scales,* 124 N. C.,

597; *Tilley v. Ellis,* 119 N. C., 235; *Simmons v. Allison,* 118 N. C., 765; *Institute v. Norwood,* 45 N. C., 66. And in such case and for such purpose, authority here and elsewhere is to the effect that the surrounding circumstances as well as the declarations of the testator are relevant to the inquiry, and especially where, as in this case, they were made at the time the will was executed. *In re Hering's will,* 152 N. C., 258; *Holt v. Holt,* 114 N. C., 241; *Morgan v. Burrows,* 45 Wis., 211; *Griscom v. Evans,* 40 N. J. L., 402; *Coulan v. Doul,* 153 U. S., 216; *Covert v. Sebern,* 73 Iowa, 564; *Vernor v. Henry,* 43 Pa. (3 Wells), 585; *Chappell v. Missionary Society,* 3 Ind. App., 356; *Allen v. Allen,* 40 Eng. Common Law, 92; Chamberlain's Best on Evidence, 232; 1 Williams on Executors, 424; Jones on Evidence (2 Ed.), sec. 479; Gardner on Wills, pp. 387-391-395.

It appeared in evidence that "Foreign Missions" was a well-recognized and beneficent charity, established and administered by the Missionary Baptist Church of the South through the "Foreign Mis-
(77) sion Board of the Southern Baptist Convention," an agency incorporated for the purpose, and that "Home Missions" was a like charity, administered by like agency, entitled "The Home Mission Board of the Southern Baptist Convention"; that collections and donations for these charities had and made by the local churches were remitted to Mr. Walters Durham, the Treasurer of the State Baptist Convention, at Raleigh, and he, in turn, remitted the Home Mission money to the Treasurer of the Home Mission Board at Atlanta, Ga., and the Foreign Mission money was sent to the Treasurer of the Foreign Mission Board at Richmond, Va.; that the testator attended and was for a long time a member of the Baptist Church at Bethlehem, Moore County, N. C.; taught in the Sunday-school and made gifts and subscriptions to its church work, including foreign missions, home missions, State missions, orphanage, and other causes, the witness stating "that this church at Bethlehem was the Missionary Baptist Church, and that he knew of no other Baptist church among the white people in that section of the State." It was made to appear, further, that the Missionary Baptists of the State maintained an orphanage at Thomasville, N. C., incorporated under the style and title of "The Trustees of the Thomasville Baptist Orphanage," the only orphanage of any kind maintained at Thomasville, and, on consideration of the facts in evidence, the habits and customs of the testator, his church affiliation, and his direct declarations referred to, there is no room for doubt as to the testator's mind and will and that the intended donees have been correctly ascertained and declared by the verdict.

We were referred by counsel to several decisions in this State and elsewhere, as in *Bridgers v. Pleasants,* 39 N. C., 26; *Methodist Church*

v. Baker, 91 Md., 539, to the effect that when a testator has evinced an evident desire to create or establish a trust, and the will is so indefinite in its scheme or as to the beneficiaries who are contemplated that a court is unable, either from the terms of the will or by aid of extrinsic evidence, to ascertain or enforce the mind and purpose of the testator, such a provision, so expressed, must fail. These and like cases are referred to by the present *Chief Justice* in the well-considered (78) opinion of *Keith v. Scales,* as follows: "There are numerous cases where the testator does not select the object of his bounty, but attempts to leave it to his executors or trustees to select the purpose or class, and this is too indefinite and the devise is void because no one can appoint another to make a will for him." In the present case there is no trust declared or contemplated (*St. James v. Bagley,* 138 N. C., 384), but it is a direct bequest in absolute ownership to a lawful, beneficent, and well-ascertained charity, established and administered by one of the great religious denominations of the country, and, as stated, the facts in evidence leave no doubt as to the intended beneficiaries of the testator's bounty. The case is controlled by the authorities cited, and *Gilmer v. Stone,* 120 U. S., 586, is also a direct authority in approval of the decision. There is

No error.

Cited: *Fulwood v. Fulwood,* 161 N. C., 602.

SOUTHERN PANTS COMPANY v. ROCHESTER GERMAN INSURANCE COMPANY.

(Filed 1 May, 1912.)

Insurance, Fire—Corporations—Receivers—Policies—Nonalienation Clause—Forfeitures—Title—Interest—Possession—Interpretation of Statutes.

A receiver of a corporation holds the title to the corporate property, under Revisal, sec. 1224, as the agent of the court for the beneficial owner, in no wise changing the interest of the owner in the property; and hence, when a policy of fire insurance has been taken only by a corporation and subsequent to the appointment of a receiver a loss occurs, the benefits under the policy are not forfeited under the nonalienation clause in the policy contract.

APPEAL from *Adams, J.,* at October Term, 1911, of MECKLENBURG.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

(79) *Burwell & Cansler for plaintiff.*
Maxwell & Keerans for defendant.

CLARK, C. J. This action is to recover against nine insurance companies for loss admitted by them to have been sustained in the destruction by fire of a stock of merchandise. The only controversy raised is as to the validity of said policies by reason of the fact that a receiver having been appointed of the Southern Pants Company, prior to the fire, the defendants contend that he was in actual possession of the property at the time of the fire, and thus they claim the insurance was forfeited under the clause in the policies against change in the "interest, title, or possession" of the property insured.

The mere appointment of a receiver does not have the effect to work such a change either in the interest or title of property as will forfeit insurance thereon under the nonalienation clause in the standard fire insurance policies. This has often been decided. In *Thompson v. Insurance Co.,* 136 U. S., 287, the Court held: "The title to the property in the hands of a receiver is not in him, but in those for whose benefit he holds it." Nor in a legal sense is the property in his possession. It is in the possession of the court by him as its legal officer. In *Insurance Co. v. Bartlett,* 91 Va., 305, the Court said: "The utmost effect of the appointment of a receiver is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title or even the possession in the property," citing *Bank v. Bank,* 136 U. S., 236. In *Insurance Co. v. Baker,* 94 Md., 545, the Court held that the appointment of a receiver does not have the effect to invalidate a policy under the nonalienation clause.

In Vance on Insurance, sec. 161, it is said: "The appointment of a receiver does not constitute such a change of interest as violates this condition (the alienation clause in the standard policy), nor does a change of receivers, when the policy was procured by a former receiver."

The defendants, however, strenuously contend that this was changed by Revisal, 1224, which vests the title of the property in a re-
(80) ceiver upon his appointment and divests it out of the corporation. That section by its terms applies only to *insolvent* corporations, which is not the case here. But even if it were insolvent, we do not think that the meaning of the section is to make the receiver the sole owner of the corporate property. He is vested, it is true, with the title, but that is for the purpose of executing the trust, and is in no way such an alienation as impairs the validity of an insurance policy. The receiver has the legal title, but he holds it for the benefit of the equitable owner, the corporation, whose property is to be administered by him

under the orders of the court. In *Insurance Co. v. Bartlett, supra,* the Court says: "This condition in the policy against alienation refers only to such sale or disposition of the property as caused all interest of the assured in, or control over, the property to cease."

This court has always looked upon the receiver of a corporation as simply an agent of the court to hold and manage the property under its direction. In *Farris v. Receivers,* 115 N. C., 600, and *Grady v. R. R.,* 116 N. C., 952, the Court held: "Service upon the receivers is service upon the corporation as fully as if made upon the president and superintendent, whose duties they are temporarily discharging." The receiver, therefore, is simply temporarily substituted for the president or other manager of the corporation.

As to the possession, it was said in *Gordon v. Insurance Co.,* 120 La., 442: "It is universally held that the mere taking possession of property by a receiver is not a change of possession to avoid the policy."

Numerous authorities can be cited to the above effect. We think it clear that while the appointment of a receiver vests the legal title in him (Revisal, 1224), he holds the same, and takes possession also, as the agent of the court for the beneficial owner, under the direction of the court. Such appointment in no wise invalidates the policy under the provisions of the nomination clause in the standard policies. The interest of the owner is in no wise changed by the appointment of a receiver. The legal title and possession is held by him for the owner and the property is to be administered under the orders of the court. There is no alienation from the owner till the property (81) is sold and sale is confirmed. Till then the property still belongs to the insured.

No error.

Cited: Roper v. Insurance Co., 161 N. C., 159.

W. T. SPRINKLE v. J. H. SPRINKLE.

(Filed 24 April, 1912.)

1. Pleadings—Limitation of Actions—Burden of Proof.

Upon defendant's plea of the statute of limitation in an action upon contract, the burden of proof is upon the plaintiff to show that his cause of action is not barred.

2. Arbitration and Award—Contracts—Seals—Limitation of Actions.

An agreement to submit a controversy to arbitration is a contract between the parties, and an action thereon, when it is not under seal, in respect to the running of the statute of limitations, is governed by the three-year statute, Revisal, sec. 395.

APPEAL from *Lyon, J.*, at December Term, 1911, of FORSYTH.

This is an action to recover the sum of $1,407.37, with interest from 28 January, 1898, said indebtedness being evidenced by an award. The matters giving rise to the arbitration were the result of mutual dealings and transactions between the parties, who had been engaged in various kinds of business as partners.

The award was introduced in evidence, and is as follows:

AWARD.

Arbitration between W. T. Sprinkle and J. H. Sprinkle has this day been settled as follows:

That J. H. Sprinkle shall pay W. T. Sprinkle the sum of $3,000 as his part of the business, and $750 as his part of undivided profits to 15 July, 1897, subject to a credit of $2,342.63, as agreed upon.

This 28 January, 1898.

P. T. LEHMAN
W. S. MARTIN,
J. F. GRIFFITH (SEAL).

(82) The following indorsement is on the award:

"From settlement with J. H. Sprinkle on the 10th day of March, 1903, page No. 180, I am due J. H. Sprinkle $261.89, which I place on this arbitration as credit."

Among other defenses, the defendant pleaded the three- and ten-year statutes of limitation. The plaintiff, to repel the application of the ten-year statute, pleaded a payment, and introduced evidence tending to prove that the indorsement on the award was made with the consent of the defendant.

No evidence was introduced as to the character of the submission to arbitration, and so far as appears it was in parol.

Nor was there any evidence that the arbitrators, Lehman and Martin, adopted the seal following the name of the arbitrator Griffith, and there is no finding to this effect.

The summons was issued 20 January, 1911.

The jury returned the following verdict:

1. Did the defendant agree that the credit of $261.89 should go as a credit on the award, as alleged, of the date 10 March, 1903? Answer: Yes.

2. In what amount, if any, is defendant indebted to plainitff? Answer: $2,110.61.

His Honor held upon the admitted facts that the cause of action was barred by the statute of limitations, and the plaintiff excepted and appealed.

Jones & Patterson for plaintiff.
Manly, Hendren & Womble for defendant.

ALLEN, J., after stating the case: The defendant having pleaded the statute of limitations, the burden was on the plaintiff to prove that the cause of action accrued within the time limited for bringing it. *Hussey v. Kirkman,* 95 N. C., 66; *House v. Arnold,* 122 N. C., 222.

If he relied on the fact that the submission to arbitration was under seal, or that the arbitrators, Lehman and Martin, adopted the seal, following the name of the arbitrator Griffith, it was incumbent on him to offer evidence of these facts, and having failed to do so, we must consider the case upon a submission and an award, not under sale, and in so considering it, the nature of the obligation imposed on the (83) defendant will aid in determining whether the statute of limitations of three years or of ten years applies.

If it is a liability established by contract, or is an obligation arising out of contract, express or implied, the contract not being under seal, it would seem to follow that the limitation of three years, prescribed by Revisal, sec. 395, subsec. 1, would be applicable, which is as follows: "An action upon a contract, obligation, or liability arising out of a contract, express or implied."

In *District of Columbia v. Bailey,* 171 U. S., 170, *Mr. Justice White* quotes with approval from Morse on Arbitration and Award, that "a submission is a contract," and that "the submission is the agreement of the parties to refer. It is, therefore, a contract, and will in general be governed by the law concerning contracts"; and from *Witcher v. Witcher,* 49 N. H., 176, that "A submission is a contract between two or more parties, whereby they agree to refer the subject in dispute to others, and be bound by their award, and the submission itself implies an agreement to abide the result, even if no such agreement were expressed."

The question is discussed in *Tullis v. Sewell,* 3 Ohio, 513, and the Court says: "The liability of the defendant originates in the contract of submission that necessarily must precede the award. It is from this contract that the arbitrators derive their authority as judges whose decision is to

bind the parties. . . . It is the submission, therefore, that is the foundation of the right claimed by the plaintiff, and it is only in virtue of the submission that the subsequent proceedings have a binding force. The action originates in the submission, and ought to correspond in character with it. If it is by deed, the remedy should be by debt or covenant. If by parol, or writing not under seal, it may be by *assumpsit.*"

We conclude, therefore, that the cause of action by the plaintiff is one arising out of a contract, not under seal, and as more than three years elapsed after the date of the alleged payment, before the commencement of this action, that the right of recovery is barred.

The case of *Ronk v. Hill,* 37 Am. Dec., 483 (2 W. & S., 70
(84) Pa.), principally relied on by the plaintiff, seems to be in point, but the decision was upon the authority of *Hodsden v. Harridge,* 2 Saund., 64 b., which was an action upon an award under seal, and in which it was held that the action was not barred under the Statute of 21 Jac. I., ch. 16, providing that "All actions of debt grounded upon any lending or contract without specialty shall be sued within six years," and this statute was in force in Pennsylvania. *Wickersham v. Lee,* 83 Pa., 422.

The English case was based on the language of the statute, and as the award was under seal and it did not appear that the cause of action was "grounded upon any lending or contract without specialty," the plea of the six-year statute of limitation was not sustained, and the Pennsylvania case first referred to depended upon a construction of the same language.

In our opinion, his Honor decided correctly that, upon the facts in this record, the limitation of three years is applicable and that recovery on the cause of action is barred.

No error.

Cited: Cutler v. Cutler, 169 N. C., 484; *Garland v. Arrowood,* 172 N. C., 594.

W. T. SPRINKLE v. J. H. SPRINKLE.

(Filed 24 April, 1912.)

Evidence excepted to not considered, as new trial is granted in plaintiff's appeal.

APPEAL by defendant from *Lyon, J.,* at December Term, 1911, of FORSYTH.

Jones & Patterson for plaintiff.
Manly, Hendren & Womble for defendant.

ALLEN, J. The judgment of the Superior Court was in favor of the defendant, and he appeals from an adverse ruling in the admission of evidence, which it is not necessary for us to consider, as the judgment is affirmed on the plaintiff's appeal.

Appeal dismissed.

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(85)

BANK OF MOUNT AIRY v. GREENSBORO LOAN AND TRUST COMPANY.

(Filed 1 May, 1912.)

1. Banks—Certificates of Deposit—Bills and Notes—"Indorsements Guaranteed"—Words and Phrases.

The indorsement on a certificate of deposit by a forwarding bank, sent to its correspondent bank for collection, reading "indorsements guaranteed," is merely to satisfy the bank issuing the certificate of the genuineness of the indorsements.

2. Banks — Certificates of Deposit — Bills and Notes—Indorsers—Presentment for Payment—Laches—Debtor and Creditor.

A bank to whom a certificate of deposit had been sent by another bank for collection did not present the certificate of deposit to the payor bank for thirty-six days, but remitted promptly to the forwarding bank; and upon failure of the payor bank to redeem the certificate, demanded the amount thereof of the forwarding bank, and upon payment being refused, brings its action thereon, the defense being that the delay in presentment for payment had released a solvent indorser: *Held*, the delay of the plaintiff bank in presenting the paper for payment released the defendant bank from all obligations thereon, and the plaintiff having paid the certificate, could not, without the consent of the defendant, make itself the creditor of the latter, and recovery was properly denied it.

APPEAL by plaintiff from *Lyon, J.*, at August Term, 1911, of SURRY.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

S. P. Graves and Folger & Folger for plaintiff.
Douglas & Douglas for defendant.

CLARK, C. J. On 23 November, 1910, the First National Bank of Mount Airy issued a certificate of deposit to J. T. Cook for $500 and bearing 4 per cent interest, if held three months. The same was indorsed:

"Pay any bank or banker or order; prior indorsements guaranteed. 17 January, 1911. Greensboro Loan and Trust Company, Greensboro, N. C., W. E. Allen, cashier." Above this indorsement was written the name of J. T. Cook, duly witnessed, and D. Marks. This certificate with the above indorsements was sent to the plaintiff, Bank of
(86) Mount Airy, by the defendant, the Greensboro Loan and Trust Company, 17 January, 1911, "for collection," with instructions to "return promptly, if not honored." On the next day the plaintiff remitted the defendant the amount of the certificate, $500, less $1.25 exchange, to wit, $498.75. The plaintiff did not present the certificate to the First National Bank of Mount Airy, which had issued the certificate, till 23 February. It refused acceptance and payment; thereupon the plaintiff notified the defendant that it would look to the defendant for payment.

The evidence in the case is that the indorsement of J. T. Cook was genuine, but that he was insolvent and prior to 18 January had drawn out all of his deposit except $170. The defendant relies upon the fact that it sent the certificate of deposit to the plaintiff for collection and with instruction to report immediately; that the indorser, D. Marks, was solvent, and that if the plaintiff had promptly presented this certificate and it had not been paid it would have looked to Marks for payment. The defendant contends that the plaintiff did not make prompt presentation for payment and took the risk because it desired to receive the accruing interest for three months, which became due on 23 February.

The defendant sent the certificate of deposit to the plaintiff for collection, and it guaranteed the signatures of the indorsers merely to satisfy the bank issuing the certificate, and the evidence is that those signatures are genuine. The plaintiff could not make itself the creditor of the defendant without the latter's consent. There was no laches on the part of the defendant and there was negligence on the part of the plaintiff in not presenting the certificate at once for payment, and also in remitting to the defendant when it had not collected the sum due on the certificate which had been sent to it, not as purchaser, but merely for collection. In *Bank v. Kenan,* 76 N. C., 340, it was held that when commercial paper is sent to a bank for collection it is the duty of the bank to make presentment for payment at maturity. If it is not then paid, the bank must fix the liability of the drawer by protest and notice of dishonor, and if it fails in any of these duties it becomes liable
(87) in damages. It was held in that case that it was no excuse that if the check had been presented for payment it would not have been paid. The failure of the bank to present for acceptance and payment made the check its own, and it was liable for the amount thereof.

Here the plaintiff received this paper for collection on 18 January, and did not present it for payment till 23 February, a delay of thirty-six days. This would have made it liable, if it had not remitted the amount to the defendant, and having remitted, it certainly cannot recover back.

The judgment directing a nonsuit must be
Affirmed.

STATE EX REL. D. A. JONES v. GEORGE W. FLYNT.

(Filed 1 May, 1912.)

1. Elections, Contested—Referee—Findings of Fact—Evidence—Evidential Matters—Appeal and Error.

When by consent an order is entered by the court in an action involving title to office, that a certain named referee shall hear and determine the controversy, his finding of facts to be final, and he has filed his report finding the votes cast in certain precincts, resulting in the election of one of them, stating what weight he had given to certain testimony, the issues are those of facts, and his statements as to the weight he has given certain phases of the testimony leading to his final conclusions are not reviewable; and it is not material that he states he has grave doubts as to the competency of certain evidence which he has admitted and considered.

2. Elections—Board of Canvassers—Returns—Evidence—Prima Facie Case—Interpretation of Statutes.

The finding by the board of canvassers as to the number of votes received by a contestant in an election is *prima facie* correct. Revisal, sec. 4356.

3. Pleadings—Allegations—Burden of Proof.

The burden of proof is on the relator in a contested election for office, who alleges that the defendant is in possession and that he, the relator, received the majority of votes cast.

4. Elections, Contested—Referee—Election Returns—Findings—Evidence.

The referee to whom has been referred the determination of facts in an action between contesting parties in an election has the power to determine which of several election returns, in evidence, is the original; and when the referee has identified, in his findings, the original, it will be deemed *prima facie* correct.

5. Elections, Contested — Referee — Findings—Objections and Exceptions—Evidence—Principal Issue—Appeal and Error.

An objection to the report of a referee, who was to find the facts relative to a contested election, for failure to find what occurred when the votes

were counted out on the night of the election, is not well taken, as these incidents are merely evidenciary on the principal issue of the number of votes cast for the relator and defendant, the referee acting as a jury with power to find the facts, and it being his duty to weigh the evidence and to determine on which side it preponderated, and to pass on the credibility of the witnesses.

6. Elections, Contested—Returns Telephoned—Called by Another—Evidence. In an action involving the correct number of votes cast for each of the parties in a contested election, evidence of a witness, that at a certain precinct, on the night of the election, he had another to read from a report the number of votes cast there for one of the contestants, as he telephoned the report in, is incompetent, the one who read the list for the purpose of telephoning not having been examined as a witness, and there being no evidence that it was correctly read.

(88) APPEAL by plaintiff from *Lyon, J.*, at October Term, 1911, of FORSYTH.

This is an action brought to try the title to the office of Sheriff of Forsyth. At the election held in said county in November, 1910, D. A. Jones and George W. Flynt were opposing candidates for said office.

The board of county canvassers declared said Flynt elected by twelve votes, and he was accordingly inducted into office.

Summons was issued returnable to February Term, 1911, of the Superior Court of said county, and complaint and answer were thereafter duly filed. The case turned upon the number of votes cast for (89) the relator and for defendant, respectively, in Broadbay Township and in Middle Fork Precinct, No. 1, in said county.

Relator alleged that in Broadbay Township he received 443 votes, and his opponent 214 votes. Defendant claimed that in said township relator received 433 votes only, while he received 214.

In Middle Fork (Precinct No. 1) relator alleged that he received 196 votes and his opponent 49 votes. Defendant claimed that at said precinct relator received only 186 votes and that he received 49.

The board of county canvassers accepted the contention of defendant as to both these precincts and declared him to have been elected sheriff by a majority of 12 votes.

At May Term, 1911, by consent of parties, the case was referred to F. C. Robbins, Esq. The order of reference is as follows:

"This cause coming on to be heard before the undersigned judge of the Superior Court: it is now, by consent of parties, ordered that the said cause be and the same is hereby referred to F. C. Robbins, who shall, as soon as may be, proceed to hear and determine said cause, and who shall make and file herein his findings of fact and conclusions of law separately, his findings of fact to be final and the conclusions of law to be subject to reveiew upon exception and appeal as provided by law.

"It is, by consent of the parties, further ordered that said referee shall consider and determine only the number of votes actually cast for the office of sheriff of said county in the township of Middle Fork, Precinct No. 1, and the township of Broadbay, in said county, for the relator and for the defendant, respectively, at the election of 1910, it being agreed that outside of said precincts in said county, at said election, there were actually cast for said relator 2,305 and for said defendant 2,673 votes for said office, as appears from the returns from the precincts, and that all other questions of law and fact raised by the pleadings are waived."

It was in evidence that there were four papers before the county board of canvassers, purporting to be returns from Broad- (90) bay Township, all of which were signed by the judges of election and the registrar, and they are referred to as Exhibits Nos. 10, 2, 3, and 4.

In Exhibit No. 10, the vote of the relator is 443, in writing and in figures.

In Exhibits Nos. 2 and 3, his vote is 433, in figures and in writing.

In Exhibit No. 4, his vote is 443 in writing, and 433 in figures.

Exhibits Nos. 2 and 3 are referred to in the evidence as the long sheets, and are the official papers sent out to the election officers upon which to make their returns. One of these was returned to the board of canvassers and the other to the county board of elections.

Exhibits Nos. 10 and 4 are referred to as the short sheets, which were not sent to the election officers on which to make returns. J. F. Reynolds, a supporter of the relator, filled out Exhibits Nos. 10, 3, and 4.

There was evidence on the part of the relator tending to prove that Exhibit No. 10 was returned to the county board of canvassers, and evidence on the part of the defendant that it was not seen by the board until the day it met to canvass the returns, and that the said Reynolds then took it from his pocket.

There was also evidence that on the night of the election the votes were called out and counted, and the result marked on tally-sheets made by George Clodfelter and others, and that the number of votes were marked on tickets from the tally-sheets, and that 443 votes were cast for the relator.

The tally-sheets were not in evidence, and the defendant introduced evidence tending to prove that they were left on the table where the election was held, at the request of said Reynolds, and that he said they had been destroyed, and also that Reynolds and others were drinking on the night of the election, and that there was some confusion; all of which was denied by Reynolds.

(91) George Clodfelter, who kept a tally-sheet, testified, among other things, that after the vote for the relator and the defendant was counted, some one marked the number of votes on a ticket, and that he took the ticket and went to a store nearby to phone the result to Winston; that when he reached the store it was dark and he could not see, and he handed the ticket to Luther Snyder, who called out the number of votes from the ticket, and he gave the vote over the phone to Winston.

He also testified that he did not remember the figures on the ticket, nor the vote given by him over the phone; and Luther Snyder was not introduced as a witness.

The relator offered to prove by two witnesses that Snyder called out 443 votes for the relator, and that Clodfelter phoned that number to Winston. This evidence was excluded, and the relator excepted.

The referee found that the relator received 433 votes in Broadbay Township, and it is conceded that if this finding stands, the defendant was elected by a majority of two votes, and if he received 443 votes, the relator was elected by a majority of eight votes.

The referee states his impression of the evidence and his findings are as follows:

"Having considered and weighed all of the evidence with care, I here state as briefly as possible some of the points in it which have led me to the conclusion reached.

"Plaintiff's Exhibit 10, showing 443 votes for Mr. Jones, written and in figures, and 214 for Mr. Flynt, written and in figures, is signed and certified by the election officers, and Mr. J. F. Reynolds testifies that he made it out and that it was the first one, and put it in an envelope and Mr. Rominger took it; and Mr. Glenn Hoover, one of the judges, testifies that after they got through signing returns, Mr. Rominger took charge of them; Sidney Teague, the other judge, testifies that he don't know whether Exhibit 10 was given to Rominger or not. Mr. Rominger brought the sealed envelope of the county vote to the canvassing board, and Mr. Bynum, secretary, testifies that he took out of that envelope defendant's Exhibit 2; that there was no other in it, and that
(92) Exhibit 10 was not in it, and Mr. Foy testifies that he saw Mr. Bynum take Exhibit 2 out of the envelope.

"Reynolds further testifies, on his direct examination, that he made out but two returns, plaintiff's Exhibit 10 and defendant's Exhibit 3, and perhaps one other for Congress; but on cross-examination, when confronted with defendant's Exhibit 4, he admits that he filled out that also. He also testifies that while making out Exhibit 10 he did not say 'It is easy to think one thing and write another,' in which he is contra-

dicted by Sidney M. Teague, one of the judges; and Mr. Langston also testifies that he thinks Mr. Reynolds made that remark.

"Also, when he came in before the canvassing board, he testifies that he walked up to the table, and one of the board, he thinks, passed up to him Exhibit 10, and he said, 'There is nothing wrong about this,' and he also denies pulling out of his pocket Exhibit 10; whereas several witnesses for Mr. Jones, to wit, May, Tavis, Savage, and Boyles, and several witnesses for Mr. Flynt, to wit, Foy, Shamel, Conrad, Goode, Hinshaw, and others, all testify that he first got hold of the regular return, defendant's Exhibit 2, and said, 'It is not right,' or 'It is wrong,' or some such words, and Mr. Beroth and Mr. Stafford testify that he did not get it (Exhibit 10) off the table nor was it handed to him from the table, but that he pulled it out of his pocket—Mr. Stafford saying, out of his left breast coat pocket, and Mr. Hinshaw testifies that when Mr. Reynolds got halfway to the table, on coming in, he saw the paper in his (Reynolds') hand; and Mr. Crouse testifies that that paper was not on the table prior to that time. This, with other evidence on that point, shows, by the greater weight of evidence, that Exhibit 10 was brought in before the board by Mr. Reynolds.

"In filling out defendant's Exhibit 3, he testifies he did not say, 'Now, Doc (M. E. Teague), ain't that right?' and 'Is that right?' but Mr. Langston testifies that he did say it.

"It seems to me a matter of some weight, if not of considerable weight, that Mr. Reynolds suggested that the tally-sheets, especially that of Mr. Clodfelter, be left on the table at the counting of the votes on the night of the election, as Mr. Clodfelter testifies that he did; and (93) again, when it was suggested before the canvassing board, in the dispute about the vote at Broadbay, that the tally-sheets be sent for, Mr. Reynolds said they were destroyed, so Mr. Foy testifies, and Mr. Bynum says he thinks Mr. Reynolds said they were destroyed. Basing his contention that Mr. Jones received 443 votes upon his inspection of that tally-sheet, and several of his party friends also pointing to that tally-sheet as the source of their entries on tickets, it is little short of amazing that Mr. Reynolds did not see to it that that tally-sheet was safely preserved.

"He is also contradicted about drinking liquor that night, and about asking some gentlemen to go by his house for Wilkes County corn, and on other minor points which appear in the evidence, but which I do not stop to mention.

"It is also very significant that, after admitting that he took great interest in the election, and while contending that 443 for Mr. Jones is right because he had so written it that night from Mr. George Clodfelter's tally-sheet, as he says, Mr. Reynolds then wrote out defendant's Exhibit

3, which shows for Mr. Jones 433, written and in figures, and for Mr. Flynt 214, written and in figures, and then another, defendant's Exhibit 4, which shows for Mr. Jones 443 written and 433 in figures.

"It seems to me that these contradictions and this sort of action can only be accounted for on the ground that Mr. Reynolds' memory is treacherous, and on the further ground that, being anxious for Mr. Jones' election, under the impulse of partisan zeal to run his vote up, he somehow or other got these figures, 443, into his head, and under the force of the same zeal now wishes to maintain them.

"A number of witnesses on both sides testify that Mr. Reynolds claimed that Mr. Rominger knew how the vote was and insisted on his being examined before the board, and yet it is significant that Mr. Rominger, after being sworn as a witness for Mr. Jones, was not examined, although he was one of the election officers who, Mr. Reynolds claimed, knew all about how the vote was and whether Mr. Jones received 443 votes; and it is also noticeable that neither of the
(94) judges of election, Mr. Hoover and Mr. Sidney Teague, testified as to what the vote for Mr. Jones was, although both were examined for Mr. Jones.

"These two judges testify that they heard no declaration of the result of the vote when the counting was completed. The statute says, 'The counting of the votes shall be continued without adjournment until completed and the result thereof declared'; but I have not been able to find any decision defining the meaning and purpose of the words, 'the result thereof declared.' Whatever its meaning, I do not think it can mean simply a declaration made by one tally-man to another, as Mr. Clodfelter says he did to Mr. Teague alone, as they added up the tally-sheets, although it may have been overheard by three or four men standing around, Mr. Reynolds, Mr. Charlie Teague, Mr. Sides, and Mr. Stewart, as appears from their testimony.

"Andrew Stewart (Ex. 14), Cicero Jones (Ex. 15), S. A. Sides (Ex. 16), and J. F. Reynolds (Ex. 17), all testify that they saw the tally-sheet of Mr. George Clodfelter, as he ran up the vote, and it showed 443 for Mr. Jones, and that they severally took it down on said exhibits. While it seems to me that it would be competent evidence for one present at the counting and figuring by the judges and who saw and heard what they said at the time of the counting and figuring and saw what they actually did, to testify to it, yet it will be observed that the testimony clustering around said exhibits and the entries on the tickets are based on what Mr. Clodfelter, a tally-man, said and did, and, in the absence of the tally-sheet, I am in grave doubt whether such evidence is competent at all, and if competent, its weight is quite another matter, and declarations by bystanders and excited partisans, and entries made by

them on tickets under such circumstances, are, I think, entitled to but little weight. W. A. Hege testifies that he got the vote from Mr. Clodfelter's ticket, 443, and it seems to me that this had less weight than the ones last above mentioned. What J. A. Nicholson testifies he heard George Clodfelter phone, and what Charlie Clodfelter heard him say in the store, is excluded as hearsay. Mr. Cicero Jones testifies that, independent of the ticket, he remembers the vote was 443 for (95) Jones and 214 for Flynt, but how he got his information does not appear.

"Mr. M. E. Teague, the other tally-man, and supporter of Mr. Jones, and who must have known what his own tally-sheet showed, filled out the official returns (defendant's Exhibit 2) sent in to the county board of canvassers, signed and certified by election officials, showing for Mr. Jones 433 votes, written and in figures, and for Mr. Flynt 214 votes, written and in figures; and Mr. Reynolds filled out defendant's Exhibit 3, showing for Mr. Jones 433 votes, written and in figures, and for Mr. Flynt 214 votes, written and in figures; and both of these, Exhibits 2 and 3, were filled out and signed some hours after the entries on the tickets as aforesaid.

"The sworn election officers, when they signed and certified the official return, defendant's Exhibit 2, notwithstanding some carelessness in signing and certifying too many papers, must have known and seen to it that they were sending up a correct return of the votes cast for Mr. Jones and Mr. Flynt, to the county board of canvassers, at this precinct, Broadbay, which return shows for Mr. Jones 433 votes, written and in figures, and for Mr. Flynt 214 votes, written and in figures.

"After a careful consideration and weighing of all the evidence, that particularly specified and all the other offered by Mr. Jones, I am forced to the conclusion that he has failed, by a preponderance of the evidence, to overthrow the *prima facie* case made in favor of Mr. Flynt on said return passed upon by the canvassing board.

"I therefore find as a fact that D. A. Jones, relator of plaintiff, received four hundred and thirty-three (433) votes, and that George W. Flynt, defendant, received two hundred and fourteen (214) votes, at Broadbay Precinct."

The referee sustained the contention of the relator as to Middle Fork Precinct, No. 1.

The judge confirmed the report of the referee, and rendered judgment in behalf of the defendant, and the relator excepted and appealed.

The assignments of error relied on in applicant's brief are:

(1) That the referee held that the decision of the board of canvassers made out a *prima facie* case in favor of the defendant, (96)

and that the burden of proof was on the relator, and that he had not overcome the *prima facie* case by a preponderance of the evidence.

(2) That the referee held that Exhibit No. 2 was the original return, and, when passed on by the board of canvassers, made out a *prima facie* case for the defendant.

(3) That the referee failed to state what the facts were as to counting the votes and declaring the result on the night of the election.

(4) That the referee gave no weight to the evidence of certain witnesses, who are named.

(5) That the referee held that the evidence of certain witnesses, who are named, was entitled to but little weight.

(6) That the referee admitted certain evidence offered by the relator, and said he had grave doubts as to its competency.

(7) That the referee said he thought the evidence of one witness introduced by the relator was entitled to less weight than the evidence of another of his witnesses.

(8) That there was no more evidence to show that Exhibit No. 2 was the original return than that Exhibits Nos. 10, 3, and 4 were such.

(9) That as there were four returns, and they were not alike, there could be no *prima facie* case in behalf of the defendant.

(10) That the referee excluded the evidence as to what occurred when George Clodfelter phoned to Winston.

(11) That the referee found that the relator received 433 votes in Broadbay Township.

(12) That the referee declared that the defendant had been elected sheriff.

A. E. Holton, Lindsay Patterson, W. P. Bynum, and R. C. Strudwick for plaintiff.

C. B. Watson, E. B. Jones, A. H. Eller, and G. H. Hastings for defendant.

(97) ALLEN, J., after stating the case. The controversy between the parties is such that a full statement of facts is necessary, and when this is considered, in connection with the assignment of error, it demonstrates that the issue in dispute is one of fact, and not of law, and that this has been decided against the relator by the tribunal selected by the plaintiff and the defendant.

The board of canvassers were acting under a statute (Revisal, sec. 4356) which made it their duty "to judicially determine the result of the election," and having found as a fact that the relator received 433 votes in Broadbay, and that the defendant was duly elected, the referee

properly held that this made out a *prima facie* case for the defendant. *Bynum v. Commissioners,* 101 N. C., 412; *Gatling v. Boone,* 98 N. C., 573; *Wallace v. Salisbury,* 147 N. C., 58.

In any event, however, the burden of proof was on the relator, because he commenced the action to recover the office of sheriff, and he alleges that the defendant is in possession of the office and that he, the relator, received a majority of the votes cast, and having made these allegations, the burden was on him to prove them.

The statute (Revisal, sec. 4348) seems to contemplate but one original return, and it was as competent for the referee to determine which was the original, when four exhibits were in evidence, each of which might be claimed to be the original, as it was for him to determine any other fact, and when identified by the finding of the referee, the original was *prima facie* correct.

In speaking of an election return, in *Roberts v. Calvert,* 98 N. C., 585, the Court says: "It was not conclusive, but it was official and strong evidence; it appearing to be regular, proved the pertinent facts stated in it *prima facie.* It put the burden on him who alleged the contrary, to prove it clearly."

It was not essential to the integrity of the report for the referee to find the facts as to what occurred when the votes were counted on the night of the election, as these incidents were merely evidentiary on the principal issue of the number of votes cast for the relator and the defendant. The referee was acting as a jury, with power to find the facts, and it was his duty to weigh the evidence, and to determine on (98) which side it preponderated, and to pass on the credibility of witnesses.

In order to find the ultimate fact as to the number of votes cast it was necessary and proper for him to settle in his own mind whether the evidence in behalf of the relator preponderated; whether the evidence of certain witnesses was entitled to no weight; whether the evidence of other witnesses was entitled to but little weight; whether the evidence of one witness was entitled to less weight than that of another; and the fact that he told what he thought, cannot affect the report, nor is it material that he had grave doubts as to the competency of certain evidence which he admitted and considered.

The evidence as to what occurred when George Clodfelter phoned to Winston was properly excluded. George Clodfelter kept a tally-sheet, and after the votes were counted some one marked the votes for sheriff on a ticket, and he took the ticket to a store to phone the result to Winston. It was so dark in the store that he could not read the figures on the ticket, and he handed it to Luther Snyder, who called out some figures, and Clodfelter phoned to Winston.

Luther Snyder was not a witness and there was no evidence that he called out the figures as they appeared on the ticket, and George Clodfelter testified that he did not remember what the figures were on the ticket, nor the figures called out or phoned by him.

The relator offered to prove the figures called out by Snyder and phoned by Clodfelter, and this was excluded.

The case of *Propst v. Mathis,* 115 N. C., 526, seems to be directly in point. In that case the plaintiff relied on a will as a part of his title, of date 1853. He offered evidence of the destruction of the records in the clerk's office of Burke County, in 1865, and then offered to prove that he went to the clerk's office in 1853, and that the clerk read the will to him from the record, and its contents, and the court held this evidence inadmissible.

The case of *Hart v. R. R.,* 144 N. C., 91, relied on by the re-
(99) lator, is clearly distinguished, because in that case the party on whose statements the paper in controversy was made up was examined as a witness, and testified that his statements were correct, and the decision rests upon the principle that, "Where a witness testifies that he has truly stated to a third person, of his own knowledge, a fact which he has since forgotten, the testimony of such third party as to what the statement was is competent."

The remaining assignments are to the finding as to the number of votes cast for the relator, which we cannot review, and to the conclusion that the defendant was duly elected, which follows as a matter of course from the facts found.

No error.

E. S. REID v. CHARLOTTE NATIONAL BANK AND E. J. HEATH.

(Filed 1 May, 1912.)

Banks—Contracts—Deposits as Payment on Debt—Mortgages—Trusts and Trustees—Equity—Cancellations.

A customer of a bank being indebted to it under an agreement that his deposits were to be considered as a payment, the indebtedness increasing as the checks exceeded the deposits, made a trust deed as a further collateral to secure his indebtedness in the sum of $5,000 for the period of one year, without agreeing to a novation thereof after that period. At that time the bank held notes secured by collateral for the full indebtedness, which it thereafter canceled. Subsequent deposits of the customer far exceeded the amount of his indebtedness for the time named. Under the principle that "the first money paid in is the first money paid out," the $5,000 intebtedness under the deed of trust was paid, and, in equity, cancellation of the note and mortgage should be decreed.

APPEAL by plaintiff from *Lyon, J.*, at January Term, 1912, of MECKLENBURG.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

Clarkson & Duls, Morrison & McLain for plaintiff. (100)
Pharr & Bell, Stewart & McRae for defendants.

CLARK, C. J. This is an action to enjoin the foreclosure of a deed in trust executed by the plaintiff to E. J. Heath, trustee, to secure loans and advances to be made by the Charlotte National Bank to the Heath-Reid Jobbing and Commission Company during twelve months from 8 June, 1901, to an amount not exceeding $5,000. The exact language of the mortgage is: "The said Reid has agreed that if the said Heath-Reid Jobbing and Commission Company shall fail to pay the said bank within twelve months from this date all amounts for which it is in any manner liable, then the said Reid will pay the balance that may remain due at the end of the twelve months aforesaid, not exceeding the sum of $5,000, however," with the further provision that if the Commission Company failed to pay said bank the balance due, and if said Reid failed to pay said $5,000, then it should be the duty of said Heath, trustee, to advertise and sell. The final clause of the mortgage is: "It being the intention of the said Reid to secure the ultimate payment to said bank of the sum of $5,000, or so much thereof as may remain unpaid at the end of twelve months." At the end of twelve months the total indebtedness of the Commission Company to the bank was $27,000, but the bank had ample collateral of the company to protect such indebtedness. After 8 June, 1902, the Commission Company continued to do business with the bank two years longer, depositing and taking out money to the amount of several millions of dollars. On 8 June, 1902, there was an outstanding note of $30,000 which had then been executed to the bank by the Commission Company and a credit of $3,000 cash on deposit with the bank. The cashier of the bank testified that on 5 January, 1904, the said $30,000 note, together with two other later notes, were marked paid and canceled and delivered up to the Commission Company. Three new notes aggregating $75,000 were executed and $40,000, being two of these notes, were afterwards paid.

The bank kept a running account with the commission house, all deposits being treated as payments and the indebtedness being reduced as deposits were made and increased as the checks exceeded the deposits. There was no application of any deposits as payments (101) to any specified part of the indebtedness by either party.

No note was given by the plaintiff for the $5,000 mentioned in the mortgage, but the mortgage was merely to secure any balance that might be due on 8 June, 1902, not to exceed $5,000.

There was no extension or renewal asked or assented to by the plaintiff. In *Boyden v. Bank,* 65 N. C., 13, it is said: "The ordinary relation subsisting at common law between a bank and its customers on a general deposit account is simply that of debtor and creditor. A deposit by a customer, in the absence of any special agreement to the contrary, creates a debt, and the payment by the bank of the customer's checks discharges such debt *pro tanto.* The bank or customer may at any time discontinue their dealings, and the balance of the account between them can be easily ascertained by a simple calculation. The general rule in adjusting a running account between a bank and its customer is, 'The first money paid in is the first money paid out.'" This case has been often cited and followed since. See Anno. Ed.

At the end of the twelve months, on 8 June, 1902, when this $5,000 liability on the part of the plaintiff, by its terms, became due, the Commission Company was indebted to the bank far more than the $5,000 and the bank held the note of the Commission Company for $30,000. This $30,000 note was canceled and surrendered in January, 1904. This is evidence that the said $5,000 had been paid, which is further shown by the fact that during the two years succeeding 8 June, 1902, the dealings between the Commission Company and the bank amounted to millions. It follows that very soon after 8 June, 1902, the deposits paid in (which in the absence of any agreement to the contrary were applied by the law to the oldest indebtedness) paid off the $5,000 for which the plaintiff was responsible on 8 June, 1902, and there being no agreement on his part to a renewal, the amount for which the plaintiff was liable was paid off. The indebtedness which the Commission Company now owes the bank cannot possibly include the $5,000 which was dis-
(102) charged by the deposits first made after 8 June, 1902, whenever such deposits amounted to $27,000. It is in evidence without contradiction that the deposits amounted to several millions. The cancellation of the $30,000 note January, 1904, without any agreement or evidence tending to show a novation on the part of the plaintiff, is conclusive that said indebtedness of $5,000 was paid when the note was canceled. The mortgage on the part of the plaintiff was not a continuing guarantee, but by its terms was to secure not to exceed $5,000, if so much should be due "at the end of twelve months," *i. e.,* on 8 June, 1902.

On the principle of "the first money paid in is the first money paid out," said indebtedness must have been paid even long before the $30,000 note was canceled. The injunction should have been made perpetual, or

rather upon the uncontradicted testimony it should have been adjudged that the liability of the plaintiff had been discharged and the mortgage should have been ordered to be canceled and surrendered to plaintiff.

Error.

Cited: *Bank v. Walser,* 162 N. C., 58, 62.

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(103)

L. A. WICKER v. HAYES JONES ET AL.

(Filed 1 May, 1912.)

1. Deeds and Conveyances — Alterations — Legal Definition — Words and Phrases.

The legal acceptation of the term "an alteration in writing" implies a change made after its execution, and while an erasure or interlineation may be an alteration, it is not such if made before the final execution of the writing.

2. Deeds and Conveyances—Material Alterations—Questions of Law—Time—Questions for Jury.

When an alteration in a deed is established it avoids the instrument if it is material, the question of its materiality being one of law, exclusively for the court, to be determined upon whether it affects the identity of the instrument or the rights and obligations of the parties to it, leaving the question of the time when the alteration was made a fact to be determined by the jury.

3. Deeds and Conveyances—Alterations—Time—Questions for Jury—Evidence.

In determining when an erasure or interlineation in an instrument has been made, which involves the question of title at issue, between the parties to the action, the jury should consider, under proper evidence, any difference in ink and handwriting and other relevant circumstances; and if the deed has been withheld from registration, this fact should, in the absence of explanation, have more or less weight with them according to the lapse of time, and viewed in connection with any change made in the condition of the parties to the deed.

4. Same—Burden of Proof.

The party claiming title under a deed is entitled to introduce it in evidence, upon proof of its execution, and then the burden of proof is on the party assailing it on account of erasures or interlineations appearing on its face, to satisfy the jury by the greater weight of the evidence that the interlineations or erasures were made after the execution of the deed.

5. Deeds and Conveyances—Alterations—Void Conveyances—Strangers to Conveyance—Title.

When the title to lands is in dispute, a party who is not claiming under a deed which he seeks to have declared invalid for erasures or interlineations cannot avail himself of that position.

6. Deeds and Conveyances—Plats — Description — Expert Evidence—Direct Evidence—Harmless Error.

In an action involving title to lands, a plat was shown a witness, who was a surveyor, and, reading from a deed in the chain of title, the witness was asked, as a surveyor, if he could say whether or not the *locus in quo* lay within certain lines marked on the plat, which made for the defendant's contention. The witness replied in the affirmative, and it is *Held*, the evidence is competent; especially as afterwards this witness testified, without objection from the plaintiff, that the deed of the defendant covered the land in controversy.

7. Deeds and Conveyances—Plaintiff's Title—Affirmative Judgment—Appeal and Error.

In an action to recover land the plaintiff must recover upon the strength of his own title, and the judgment rendered upon the verdict in this case is modified to the extent that it adjudicates "that the defendant is the owner and entitled to the possession of the lands," there being nothing admitted by the pleadings or found by the jury which supports this affirmative judgment for defendant.

8. Same—Estoppel.

The judgment in defendant's favor in this action, involving title to lands, is an estoppel upon plaintiff in the further prosecution of an action for the same cause, though it is held that the defendant is not entitled to a judgment that he is the owner and entitled to the possession of the *locus in quo*.

(104) APPEAL from *Cooke, J.*, at July Term, 1911, of LEE.

This was originally a processioning proceeding, and it appearing that title to the land was in controversy, it was transferred to the civil-issue docket by consent of all parties, and pleadings were filed.

The plaintiff complained for the possession of certain lands alleged to be in possession of defendants, and for a judgment clearing the title of certain other parts of the same tract alleged to be in plaintiff's possession.

The defendants admitted possession of a portion of the land described in the complaint, which part was described by metes and bounds in the answer, and claimed title thereto.

Nearly all the land in controversy was on the west side of Juniper Branch, and the remainder on the east side.

The plaintiff offered evidence that Elisha Wicker, his father, was dead, and introduced the following deeds:

Deed from Daniel McGilvary to A. H. McLeod, dated 19 October, 1867, registered in office of Register of Deeds of Moore County, in Book 82, page 558, on 5 November, 1867.

Deed of Alexander H. McLeod and wife to Elisha Wicker, dated 16 September, 1874, registered in the office of the Register of Deeds of Lee County, in Book No. ...., page ....., 19 July, 1911.

The plaintiff also offered evidence tending to prove that the deeds covered the lands in controversy, and other land, and that he and those under whom he claimed had been in possession of the same for more than thirty years; but he admitted that his home was on the land in the deeds outside of the dispute, and that he had not cultivated continuously the land in controversy.

The defendant introduced the following deeds, which were admitted without objection: (105)

Deed of Daniel Hall and wife, Mary Hall, to Mary J. Jones, dated 15 April, 1879, registered in Moore County, 30 September, 1885, in Book No. 56, page 361.

The courthouse was burned in that county and the deed was reregistered 18 January, 1908, in Book No. 40, page 50.

Deed from Daniel Hall and wife to Mary J. Jones, dated 29 April, 1882, registered in the office of the Register of Deeds in Moore County, 29 September, 1885, Book No. 56, page 359, and reregistered in Moore County on 5 September, 1898, in Book No. 18, page 470.

Deed of W. C. Edwards to Daniel Hall, dated 2 April, 1876, registered in Lee County, 19 June, 1911, in Book of Deeds No. 5, page 118.

Deed of J. W. Burns to Daniel Hall, dated 31 December, 1878, registered in the office of Register of Deeds of Lee County, 16 March, 1909, Book of Deeds No. 1, page 292.

There were erasures and interlineations, in material part, on the first and second of these deeds, and the plaintiff introduced evidence tending to prove that the erasures and interlineations were not in the same handwriting as the body of the deed, that different ink was used, and that they were not made at the date of the deed, but afterwards.

The defendant also introduced evidence tending to prove that said deeds covered the lands in controversy, and that she had been in possession thereof for thirty years, and had, during that time, cultivated continuously five or six acres of the land.

The home of the defendant was not in dispute.

John B. Cameron, a surveyor, was asked the following question:

Q. Examine that plat and see if you can locate this description (attorney reading deed of Daniel Hall and wife to Mary J. Jones, dated 15 April, 1876); also this tract (Daniel Hall and wife to Mary J. Jones, dated 29 April, 1882). State whether or not, as a surveyor, you can say

whether or not this land on the west side of Juniper Branch, within that line running from 5 to "B," "B" to "C," and from "C" to Juni-
(106) per Branch, and Juniper Branch to the beginning, is contained in that description? (Objection by plaintiff. Overruled. Exception.) A. According to your papers, it does. I didn't survey that. I platted it.

This witness afterwards testified, without objection, that the deeds of the defendant covered the land in controversy.

Defendant introduced certified copies of the plat of division of the lands of Elisha Wicker, father of the plaintiff.

Objection by plaintiff. Overruled. Plaintiff excepted.

Also certified copy of mortgage of L. A. Wicker to Elisha Watson, dated 20 March, 1891.

Objection by plaintiff. Overruled. Plaintiff excepted.

The western line of the land in the division and of the land in the mortgage is Juniper Branch. The plaintiff testified that all the land he owned was not embraced in the mortgage.

The only part of his Honor's charge excepted to is as follows: "Now, in respect to the two deeds put in evidence by the defendants, and purporting to be made to Mary J. Jones—one dated 15 April, 1879, and the other dated 29 April, 1882—the plaintiff contends that, according to the evidence on the face of the deeds, there has been, since the execution and delivery of the deeds, a change in the grantee, and that the name of Mary J. Jones has been by such change made the grantee in such deed. Now, the burden of showing this, and that such change was made by the grantee or some one in her interest, or the interest of the defendants, or that it was not made by the grantor or by his consent, is upon the plaintiff."

The following verdict was returned by the jury:

1. Is the plaintiff the owner of and entitled to the possession of the lands included in the following lines: C to D to 3 to 4 to 5 to B and to C, or any part thereof? Answer: No.

The court rendered the following judgment:

This cause coming on to be heard, and being heard before his Honor, C. M. Cooke, judge, and a jury, and the following issues having been submitted to the jury:

1. Is the plaintiff the owner of and entitled to the possession
(107) of the lands included in the following lines: C to D to 3 to 4 to 5 to B and to C, or any part thereof?

2. And if a part, what part?

3. Are the defendants in the wrongful possession of said lands?

4. What damage, if any, is the plaintiff entitled to recover against the defendants?

And the jury having answered the first issue "No," it is therefore considered, ordered, and adjudged, that the plaintiff is not the owner nor entitled to the possession of the lands within the following lines, C to D to 3 to 4 to 5 to B and to C, as shown on the map on file in this cause, but that the defendants are the owners and entitled to the possession of said lands.

It is further adjudged that the defendant recover of the plaintiff and D. D. Buie, surety on the prosecution bond filed in this cause, their costs, to be taxed by the clerk of the court.

The plaintiff excepted and appealed.

A. A. F. Seawell for plaintiff.
Hoyle & Hoyle and D. E. McIver for defendant.

ALLEN, J. When we speak of an alteration in a writing, we refer to the legal acceptation of the term, which implies a change made *after its execution,* and while an erasure or interlineation may be alteration, it is not such if made before the final execution of the writing.

Under the rule of the ancient common law, as illustrated in its earliest decisions, it was held that any alteration, however insignificant, rendered the writing void, and that the judge must pass on the whole question (*Pigot's case,* 11 Rep., 26b), but this was modified even in the time of *Lord Coke,* to the extent that the alteration must be material, and that the question as to the time when made should be submitted to a jury.

In Co. Litt., 225b, it is said that "Of ancient time, if the deed appeared to be rased or interlined in places material, the judges adjudged upon their view the deed to be void; but of the latter time the judges have left that to the jurors to try whether the rasing or interlin- (108) ing were before the delivery."

Modern authority in England and in the United States has further modified the doctrine until it is now generally agreed that when an alteration is established it avoids the instrument, if it is material; that the materiality of the alteration is a question to be decided by the court, without the aid of a jury; that any alteration is material if it affects the identity of the instrument or the rights and obligations of the parties to it, and that the question of the time when the alteration was made is a fact to be determined by the jury.

It is also held in all the States, except Missouri and New Jersey, that an immaterial alteration does not affect the validity of the writing.

An alteration by a stranger, without the knowledge of the grantee or obligee, while it cannot enlarge the obligations of the grantor or obligor, does not affect the right to enforce the writing as it was originally executed, and the intent with which the alteration is made is immaterial, unless it is fraudulent, in which event a court will not lend its aid.

The cases supporting these principles are collected in the valuable note to *Burgess v. Blake,* 86 Am. St., 79, and in the learned and comprehensive article on Alteration of Instruments, by Judge John F. Dillon, in 2 Cyc., 150.

Many other questions may arise as to the effect of the alteration of instruments, but in the midst of much conflict of authority we confine ourselves to those necessary to the consideration of the principal question presented by the appeal, which is, whether the burden is on the party claiming under a deed, on which an erasure or interlineation is apparent, to prove that it was made at the time of or before the execution of the deed, or is the burden on the party attacking the deed to prove that it was made after its execution.

The question is important, and many titles may depend on its correct solution, as it will frequently arise after the parties to the transaction are dead.

If it is held that the burden is on him who urges that the deed is void because of the erasure or interlineation, it may furnish the opportunity to the grantee to withhold the deed from registration, after he (109) has altered it, until the evidence is lost by which the wrongful act can be proven, and thus secure the title to property which was not conveyed to him; and if it is decided that the burden is on the party claiming under the deed, he may lose property for which he has paid, because of inability to prove that the erasure or interlineation was on the deed when delivered.

A brief summary of all the North Carolina cases bearing on the alteration of instruments which we have been able to find after diligent research shows that the question has not been settled in this State.

In *Nunnery v. Cotton,* 8 N. C., 222, it was held that any alteration by the obligee in a bond, whether material or not, avoided it. In this case the alteration was the cutting off the name of a witness on the bond.

In *Pullen v. Shaw,* 14 N. C., 238, held, that an alteration by the obligee in a bond avoids whether material or not, and by a stranger does so, if material. If no evidence is introduced, the question whether the alteration was made before or after execution is dependent on whether the alteration is favorable to the obligee or not.

In *Sharp v. Bagwell,* 14 N. C., 115, held, that equity would not relieve one who had cut off the name of a witness from the bond in ignorance of its effect.

In *Mathis v. Mathis,* 20 N. C., 60, the action was on a bond for $12.50, and the proof was that the bond was given for $7.40. Held, that the plaintiff could not recover $7.40, but that if he had sued for $7.40 he could have recovered that amount, as the alteration was made by a stranger.

In *Blackwell v. Lane,* 20 N. C., 113, held, that the addition of the name of a subscribing witness to a bond, without the consent of the obligor, is not an alteration, because not material.

In *Davis v. Coleman,* 29 N. C., 426, held, cutting off the name of one obligor and adding another avoided the bond as to all who did not consent to the change.

In *Simms v. Paschall,* 27 N. C., 276, that the fraudulent expunging of a credit on a bond was no alteration, because the (110) credit was no part of the bond.

In *Smith v. Eason,* 49 N. C., 38, held, that an alteration in a material part of a bond avoids it.

In *Dunn v. Clements,* 52 N. C., 59, held, that retracing the name of the obligor, which had faded, does not avoid, although the name was misspelled in retracing, the sound of the name being the same.

In *Norfleet v. Edwards,* 52 N. C., 457, the action was on an instrument to pay money, and the signature was that of a partnership. Two seals after the partnership name were erased and the word "witness," at the left of the paper, stricken out. The judge charged the jury that the burden was on the plaintiff to show that the erasures were made before or at the time of the execution. Held, error, because as the paper was signed by the partnership, the erasure was made to fix its character. The Court says: "In most if not in all the cases in which the contrariety of decision may be seen it will be observed that the erasures, interlineations, or rather alterations, were made in deeds, negotiable securities, or other instruments, whose nature and character were determined upon or fixed—that is, they either were intended to be, or were, at the time when the alterations were made, deeds or negotiable securities or instruments of some other particular kind. The instrument in the present case differs from them all in this particular, that the alteration was made for the very purpose of determining and fixing its character. With a seal it would be a deed, while if that were erased it would become a promissory note. If it were executed as a deed it could not bind all the partners, but if made as a promissory note it would have that effect. . . . Under such circumstances is it not a fair presumption that the seal was erased at the time when the instrument was given by the one party and accepted by the other?"

In *Darwin v. Rippey,* 63 N. C., 319, held, that the addition of the words "in specie," after "dollars," in a bond, with the consent of the payee and the principal, avoided the bond as to the surety.

In *Long v. Mason,* 84 N. C., 16, held, that the addition of the words "at 10 per cent," in a bond, by the principal, without the knowledge of the payee, a guardian, or of the surety, but with the consent of the ward, avoided the bond as to the surety. (111)

In *Respass v. Jones,* 102 N. C., 5, held, that where the vendee struck out his name in a deed and inserted that of his wife, to defraud his creditors, no title passed, and a court of equity would not aid him.

In *Cheek v. Nall,* 112 N. C., 370, a husband raised the amount of a bond signed by him and his wife; held, that the bond was void as to the wife. It was also held that an immaterial alteration would not avoid, such as changing the recited consideration in a mortgage, the description of the debt in the mortgage remaining unchanged.

In *Howell v. Cloman,* 117 N. C., 77, a note and mortgage were for $500 when signed, and for $1,000 when registered; held, that the burden was on the plaintiff to prove that the defendant consented to the change.

In *Martin v. Buffaloe,* 121 N. C., 35, held, that the insertion of the name of the attorney and the amount of his fee in a deed to secure creditors, with the consent of the grantor after he signed it, did not avoid the deed, because it was not a clause necessary to the operation of the deed.

In *Wetherington v. Williams,* 134 N. C., 279, the question was one of fact as to the time of the change, and the question of the burden of proof was not raised.

In *Gaskins v. Allen,* 137 N. C., 426, a married woman, while under age, signed a deed. After she became of age she signed another deed to the same party for the same land. Both deeds were registered under one probate, the commission authorizing it being dated before, and the date of probate after, she was twenty-one. A charge was approved placing the burden on the plaintiff, a subsequent grantee, to prove that the date of the probate had been changed.

In *Perry v. Hackney,* 142 N. C., 368, the grantee after probate struck out his name from a deed and inserted the name of his wife, without the consent of the grantor, and it was held that no title passed.

The authorities elsewhere are in hopeless confusion as to the (112) burden of proof.

Judge Freeman says, in the note to *Burgess v. Blake,* 86 Am. St., 128: "Among the almost innumerable decisions, and the conflict of authorities upon the subject of the presumptions arising from alterations apparent upon the face of the instrument, there seems to be but one principle upon which the authorities are in harmony. That is, where an alteration in an instrument is alleged to have been made, and such alteration is not apparent upon the face of the instrument, the burden of showing that the latter has been altered is upon the party who alleges it. This, however, seems to be the single note of harmony. Where the alteration is apparent, the authorities are hopelessly divided as to the presumptions arising from such apparent alteration. Any attempt to reconcile them would be useless, and an accurate classificaion of their varying views is impossible. They seem to fall, however, into four gen-

eral classes, each of which is representative of a view opposed to that of the others: (1) One line of cases holds that no presumption arises from an alteration apparent on the face of the instrument, but that the entire question of the time when the alteration was made is for the jury to consider in the light of all the evidence, intrinsic and extrinsic; (2) another holds that an alteration apparent on the face of the paper raises a presumption that it was made after execution and delivery: (3) a third line of authorities holds that the presumption that the alteration was made after execution arises only where the alteration or the facts surrounding it are suspicious; and, finally, it is held by another group of courts: (4) that an alteration apparent on the face of the paper is, without explanation, presumed to have been made before delivery. This classification of the authorities is, at best, approximate only, as many of the courts have taken compromise positions, holding the presumption to depend upon various matters, such as denial under oath that the paper was executed, the nature of the instrument, *i. e.*, whether a specialty or not, etc."

As eminent authority may be found for either position, and as we have no precedent in this State to guide us, we must adopt that rule which, in our opinion, accords with the habits and customs of our people and which will, in the majority of cases at least, be (113) conductive to the settlement of controversies of this character according to the right.

A very large percentage of the deeds executed in this State are never seen by a lawyer until some question is raised as to title; they are written, in many instances, by men who know little or nothing of legal rules and who are not expert penmen, and the materials used—pen, ink, paper —are such as are gathered in the household, and frequently not the best.

Under these circumstances a mistake in writing the deed may be expected, and when discovered an erasure or interlineation follows naturally, without thought of the consequences. If two kinds of ink are present they would be used indiscriminately, and the draftsman would not hesitate to ask one sitting by to make a necessary change.

We do not doubt that 99 per cent of the erasures and interlineations that appear in deeds are made in this way, and from honest and proper motives, and if this is true it would seem to be wise and just to adopt a rule which will tend to preserve and sustain titles acquired by such deeds, although under it an injustice may occasionally result, and in our opinion it is safer, and in accord wth the better public policy to hold, as we do, that the party claiming under a deed is entitled to introduce it in evidence, upon proof of its execution, and that the burden is on the party who assails it, on account of erasures or interlineations

appearing on its face, to satisfy the jury by the greater weight of the evidence that the erasures or interlineations were made after the execution of the deed.

A discussion of the numerous authorities in favor of this rule (and there are, perhaps, as many against it) would be useless, and we content ourselves by reference to a small number selected from many.

In *Tatum v. Calomore,* 71 E. C. L., 746, Lord Campbell says: "In Co. Litt., 225b, it is said that 'Of ancient time, if the deed appeared to be raised or interlined in places material, the judges adjudged upon their view the deed to be void. But of latter time the judges have left that to the jurors to try whether the raising or interlining were (114) before delivery.' In a note upon this passage in Hargrave and Butler's edition of Coke upon Littleton it is laid down: ''Tis to be presumed that an interlining, if the contrary is not proved, was made at the time of making the deed.' This doctrine seems to us to rest upon principle. A deed cannot be altered, after it is executed, without fraud or wrong; and the presumption is against fraud or wrong."

This language was quoted with approval in *Little v. Herndon,* 77 U. S., 26, and the Court says, after citing *Tatum v. Calomore, supra:* "In the absence of any proof on the subject, the presumption is that the correction was made before the execution of the deed." And this last case was approved in *Hanrick v. Patrick,* 119 U. S., 156, the Court, after discussing the charge of the judge, saying: "At any rate, the presumption was that the erasure was made before the execution of the deed."

In *Wilkes v. Caulk,* 5 Md., 41, the Court says: "It is incumbent on the party who wishes to avoid a deed by its erasure to prove that the alteration was made after its execution and delivery"; and in Hopkins on Real Property, 429, it is said: "Where alterations or interlineations are present in a deed, the presumption is that they were made before the deed was delivered, though there are cases holding the contrary."

To the same effect see *Hagan v. Insurance Co.,* 81 Iowa, 330; *Neil v. Case,* 37 Am. Rep., 259; *Wilson v. Hayes,* 12 A. S., 761; 2 Cyc., 233 and 235.

This presumption is greatly strengthened by the facts appearing in this record that the deeds were registered in 1885, and until this day neither the grantor nor any one claiming under him has attacked their integrity; and the defendants have been in the actual occupation of parts of the land since 1879. The Supreme Court of the United States said in *Malorin v. U. S.,* 68 U. S., 282, when speaking of an alteration in a deed, that the fact that no suspicion had been suggested for eighteen years was entitled to no little weight.

The jury will, of course, have the right, in determining when the erasure or interlineation was made, to consider any difference in ink and handwriting and other relevant circumstances, and if the deed has been withheld from registration, this circumstance, in the (115) absence of explanation, would be entitled to consideration and should have more or less weight according to the length of time elapsing and viewed in connection with any change in the condition of the parties to the deed.

If, however, the presumption was against the deed, it is doubtful if the plaintiff is in a position to take advantage of it, as it does not appear that he claims under the grantors in the deed.

Judge Dillon says, in Cyc., 2, 189: "If the parties affected by a change in an instrument do not complain thereof, others, who are not parties to the instrument or affected by the change, cannot, ordinarily, set up the change, unless there is evidence of fraud between the parties to the injury of the creditors. The alteration must relate to the parties to the particular instrument altered." See, also, *Hockmork v. Richler,* 16 Col., 263; *Logue v. Smith,* Wright (Ohio) 10; *Asylum v. Houns* (Ky.), 64 S. W., 642.

The exceptions to evidence cannot be sustained. If it be conceded that the answers of the surveyor to questions asked him were incompetent, it appears that he afterwards testified, without objection, that the deeds of the defendant covered the land claimed by her, which was all that was elicited by the examination objected to.

In our opinion the plat of the division of the lands of Elisha Wicker, father of the plaintiff, and the mortgage of the plaintiff to Elisha Watson, of date 20 March, 1891, were properly admitted; but if not, their introduction did not prejudice the plaintiff, as they were offered for the purpose of showing that Juniper Branch was the western boundary claimed by the plaintiff, and he admitted on cross-examination that Juniper Branch was one of his lines in the division of his father's land.

The objection to the form of the judgment is well taken. The finding of the jury establishes the fact that the plaintiff is not the owner of any part of the land in controversy, and the defendants allege, in their answer, that they are in possession of all the lands (116) which they claim.

The plaintiff must recover on the strength of his own title, and upon failure of proof by him the jury may well find that he is not the owner of the land, although satisfied that the defendant has no title.

There is no fact admitted by the pleadings or found by the jury which will support an affirmative judgment in favor of the defendants, and the judgment must be modified by striking out the clause, "but that

the defendants are the owners and entitled to the possession of said lands," and as thus modified it is affirmed.

The judgment will, of course, operate as an estoppel on the plaintiff, to prevent the further prosecution of an action on his behalf.

Modified and affirmed.

CLARK, C. J., dissenting: It is reasonably well settled now, though contrary to older decisions, that when there is an immaterial alteration by erasure or interlineation in a deed or other instrument it does not vitiate. It is also settled that whether an interlineation or erasure is material or not is a question of law for the court. When a material erasure or interlineation appears on the face of an instrument or is shown by proof *dehors,* whether the burden is upon the party that produces it to account for it, or whether the burden is upon the other party to show that it took place after the execution of the instrument, is a matter as to which the decisions outside this State are in conflict. In many cases the rule is laid down that "Where a written instrument shows an interlineation or erasure upon its face the presumption, in the absence of evidence, is that it was made after execution, and the burden is upon the parties claiming under the instrument to account for the alteration." 3 Enc. L. & P., 478; 2 A. and E. (2 Ed.), 276; 2 Cyc., 238, and many cases cited in those volumes.

In this State we have but two decisions expressly in point, and they are in accord with the above citations. In *Dunn v. Clements,* 52 N. C.,
60, it is said: "Wherever the alteration is a material one, a *pre-*
(117) *sumption* of fraud arises. But it is, we conceive, a rebuttable
presumption, and where the alteration is not material, the instrument will not be affected thereby unless it be shown that the alteration was made with an intent to defraud. 2 Pars. Cont., 226 (notes); *Adams v. Frye,* Metcalf, 103."

In *Norfleet v. Edwards,* 52 N. C., 457, the Court cites with approval the following from 2 Pars. Cont., 228: "In the absence of explanation, the evident alteration of any instrument is generally presumed to have been made after the execution of it, and consequently must be explained by the party who relies on the instrument or seeks to take advantage from it. Such is the view taken by many authorities of great weight. But others, of perhaps equal weight, hold that there is no such presumption; or at least that the question whether the instrument was written as it now stands, before it was executed, or has since been altered, or whether so altered it was done with or without the authority or consent of the other party, are questions which should go to a jury, to be determined according to all the evidence in the case." Our Court then

adds: "Very many cases are referred to in the note to that page which fully support the remarks of the learned author in the text. See, also, *Dunn v. Clements, ante,* 60."

The rule in *Dunn v. Clements,* thus cited and approved in *Norfleet v. Edwards,* is not only the precedent in this State, but it would seem to comport with reason. The natural and orderly condition of a paper is that it should not bear on its face or be shown by proof to have any material alterations or erasure. It is out of the ordinary course, and the party who produces the instrument should account for them. It will be almost impossible for the other party to show when or how the erasures were made. The party in possession has, or should have, knowledge and be able to show that the instrument when received by him already had such erasures or alterations. If prudent, he would not accept such instrument without a contemporaneous entry duly witnessed that they were on the instrument when it was delivered to him. This view has additional weight as to a deed now, since our registration laws require prompt registration. If the deed is promptly (118) registered notice of any alteration or erasure may be conveyed to any one examining the record. Whereas, if the instrument is withheld from registration, it is in the power of the grantee to make any alteration as to the boundaries, courses and distances, or acreage, as he may think proper, and it will be out of the power of the grantor when, after years have elapsed, the deed is produced in evidence upon a then recent registration, to prove that the alterations and erasures were made after delivery.

It is always in the power of the grantee to protect himself against the charge that a material erasure or interlineation was made after execution by requiring a memorandum stating that it was in the instrument at the time of the execution. But the grantor cannot thus protect himself against alterations and erasures made after the execution except by requiring proof of the grantee when he produces the instrument in evidence. As to negotiable instruments, though they cannot be held back as a deed can be held back from registration, yet as to them the law is well settled, and the burden is on the holder to show that any alterations were made in such instrument at or before its execution, and no prudent bank will accept such paper, in the ordinary course of dealings, without such proof.

It has been the general understanding in this State that material alterations by erasure or interlineation in an instrument, especially in a deed, must be noted and witnessed at the time of the delivery. *Dunn v. Clements,* 52 N. C., 60, has been understood to be the rule in this State. But if it is understood that this safe precedent is no longer the law, we may well apprehend that there will be a flood of cases in which instru-

ments have been materially altered after delivery, and are withheld from registration till the grantor or other witnesses, who can prove the fact, have passed beyond the reach of the court, by death or otherwise. The grantee remains in possession. It should be in his power, always, either to refuse a conveyance containing material alterations or require a contemporary note thereof on the instrument. If he does not do so, and especially if he withholds the deed from registration, it is but fair that the burden should be upon him to account for such alterations or erasures.

Cited: *Elliott v. R. R.*, 169 N. C., 395.

E. C. GREENE AND J. G. KAHL v. A. F. MESICK GROCERY COMPANY.

(Filed 1 May, 1912.)

1. Contracts, Written — Offer — Acceptance — Telegram — Parol Evidence — Best Evidence Rule.

The acceptance of a proposition for the rental of a hotel being by telegram, testimony as to the contents of the telegram, being a part of the contract relied on, comes under the best evidence rule forbidding the reception of parol testimony until the loss of the writing has been satisfactorily established.

2. Same—Evidence of Loss.

The contract sued on being in part an acceptance by telegram of an offer to rent a hotel contained in a letter, there was testimony tending to show that, under the rules of the telegraph company handling the message, it was sent to Richmond, having remained in the local office six months; that the party relying on the telegram applied at the company's Richmond office, made inquiry there, and failed to procure it. In the absence of evidence tending to show that search had been made by the company's agent at the Richmond office: *Held*, the loss of the message had not been sufficiently established to admit of showing its contents by parol evidence.

3. Same—Beyond the State.

When under the best evidence rule, necessity for proper and diligent search has been shown, parties charged with such duty are not relieved by the fact that the present and proper placing of the writing is beyond the limits of the State, provided it is accessible and otherwise reasonably attainable.

(119) APPEAL from *Daniels, J.*, at February Term, 1912, of FORSYTH. Civil action to recover $400 claimed to be due and owing from

defendant to plaintiff. There was verdict for plaintiff, judgment on the verdict, and defendant excepted and appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE HOKE.

Louis M. Swink for plaintiffs.
Watson, Buxton & Watson for defendant.

HOKE, J. This was an action to recover $400 as money had (120) and received to plaintiff's use, and was before this Court on a former appeal, 153 N. C., 409. From a perusal of that case it will appear that the right of plaintiffs to recover was properly made to depend on whether defendant company, resident at Winston, N. C., had sent a telegram to plaintiff at St. Louis, Mo., accepting a proposal of plaintiffs to rent a hotel from defendant on terms contained in a letter from plaintiffs to defendant company.

On the present trial defendant testified that, on receipt of plaintiff's letter, containing the proposal, he had gone to Western Union office and sent a telegram, the message having been written and left with the company for transmission. In reference to this message and its contents, it appeared that at the time of this occurrence written messages, the kind in question, were kept at the local office in Winston for six months and were then either destroyed or sent to Richmond, Va., the headquarters of the company for this division; that defendant had applied to the office at Winston and failed to get the message and had then gone to Richmond, Va., and made inquiry and failed to procure it there, having applied for it at company's offices. On this testimony, the court being of the opinion that the loss of the written message had not been satisfactorily established, declined to allow witness to give the contents of the message to the jury, and defendant excepted. It was urged by plaintiff that this ruling of his Honor should be sustained, for the reason that the contents of the supposed message was nowhere sufficiently disclosed to render its exclusion a material circumstance; but, conceding that it is otherwise, we are of opinion that the ruling of the court must be upheld for the reason given by his Honor, that the loss of the message has not been shown so as to permit parol evidence of its contents. As heretofore stated, the contents of the telegram were a material part of the contract, directly involved in the issue, and, it having been admitted that the one referred to was originally in writing and accessible if in existence, these contents came within what is known and frequently referred to as the "best evidence" rule, forbidding the reception of parol testimony until the loss of the writing has been satisfactorily established. It is held with us that the opera- (121)

tion of this rule is not necessarily affected by the fact that the proper custody of the written paper is no longer within the jurisdiction of the court. We find no testimony showing that search had been made for the written message at Richmond, Va., by the officer or agent of the company having such papers in his care, and, on the facts in evidence, the decision of his Honor on the question presented is fully supported by authority here and elsewhere. *Avery v. Stewart,* 134 N. C., 287; *Blair v. Brown,* 116 N. C., 641; *Justice v. Luther,* 94 N. C., 793-797.

No error.

Cited: Buchanan v. Hedden, 169 N. C., 224.

J. W. IVIE v. BLUM & BITTING.

(Filed 1 May, 1912.)

Partnership—Mortgages of a Partner—Receiver—Continued Business—Creditors—Priority of Payments.

The indorsers on a note made to a bank for money borrowed for the purchase price of an interest of a retiring partner from a firm, secured by a mortgage on the partner's interest in the firm's assets, agreed with other creditors of the firm that a receiver, thereafter appointed, should continue the business, which he did, incurring further indebtedness of the firm by continued purchases. The indorsers paid off the bank indebtedness and brought suit to foreclose the mortgage: *Held,* the mortgage held by the indorsers is in subrogation to the rights of the bank, being on the individual interest of a partner, and was subject to the fluctuations in business and postponed to the payment of the firm's creditors; (2) that class of creditors of the firm who sold goods to the receiver had the right to prior payment to the class who existed at the time of the appointment of the receiver, and who consented to his continuing the business.

APPEAL by defendants from *Lyon, J.,* at October Term, 1911, of FORSYTH.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

(122) *D. H. Blair, W. V. Hartman, and J. E. Alexander for plaintiff.*

Manly, Hendren & Womble for defendants.

CLARK, C. J. In 1906 C. R. Bitting bought the half interest of Fleming in the firm of Blum & Fleming, and to obtain money to pay

for the same executed a mortgage on the half interest thus acquired, and the firm became Blum & Bitting. In May, 1907, Blum & Bitting made a deed of assignment to Charles E. Shelton. Later this suit was instituted and a receiver was appointed. W. A. Whitaker and Mrs. L. P. Bitting were indorsers on the note of C. R. Bitting for $1,600 for which the aforesaid mortgage was executed. They paid off the note to the bank and seek to foreclose the mortgage which was given to secure them by reason of their indorsement.

The creditors of Blum & Bitting and W. A. Whitaker and Mrs. L. P. Bitting consented for C. E. Shelton, assignee, to continue the business, which he did with their consent for more than a year. While so conducting the business C. E. Shelton contracted sundry debts. In December, 1908, this suit was brought and a receiver apointed therein. He sold the property of the firm, which brought $1,600. The case was referred to a referee to state an account and determine the priorities of the different creditors claiming the fund derived from the sale of the property. The referee found that the creditors of C. E. Shelton, assignee, while continuing the business with the consent of the creditors, were entitled to the first lien; that the creditors of Blum & Bitting were entitled to the second lien, and that W. A. Whitaker and Mrs. L. P. Bitting, claiming by virtue of their mortgage on the undivided one-half interest of Bitting in the business, came in after the above two classes of creditors.

In *Daniel v. Crowell,* 125 N. C., 521, the Court cites with approval from *Bank v. Fowle,* 57 N. C., 8, as follows: "Where the interest of one partner in the property of the firm is assigned by him as security for his individual debt, and the assignee permits the busiuess to go on in its ordinary course, such security becomes subject to the fluctuations of the business, and upon the subsequent dissolution he is only entitled to what remains to such partner after the payment of (123) the debts of the firm." Bates on Partnership, sec. 186, says: "But his (the partner's) interest, mortgaged or sold, is subject not only to existing liabilities, but also to subsequent equities and the claims of subsequent creditors and the fluctuations of business. *Hence, though the partnership debts are later in date than the mortgage or assignment* of the share, yet the mortgagee gets only the interest in the surplus *as of the date of its ascertainment or of the foreclosure,* and not as of the date of its execution or default."

It is equally well settled that the creditors in the indebtedness incurred by Shelton in continuing the business with the consent of the prior creditors of the firm are entitled to priority over such creditors. 3 A. and E. Enc., 117; *Sherrill v. Shuford,* 41 N. C., 228; *Clarke v.*

Hoyt, 43 N. C., 222. In this class of preferred debts was properly allowed the rent to Grogan for the buildings and grounds where the business was conducted by Shelton.

The report of the referee was properly confirmed by the court.

Affirmed.

IN RE WILL OF R. C. MILLER.

(Filed 8 May, 1912.)

1. Wills, Interpretation of—Intent—Devises—Restraint of Marriage—Conditional Limitations.

While a condition subsequent annexed to a devise of lands in general restraint of marriage, *i. e.*, without limitation as to time or person, will be disregarded, as a rule, the principle will not ordinarily obtain in the case of an estate upon limitation or a conditional limitation, where by the terms of its creation the estate is so defined and limited that it terminates of itself on the happening of the contingent event, without entry or other action on the part of the grantor or his proper representative.

2. Same—Evidence.

When it appears from the perusal of the entire will and the facts and circumstances permissible in aid of a proper interpretation, that the testator intended to make provision for a beneficiary while she remain single, and the words used are not intended as a restraint upon marriage, the qualifying words will be given effect according to the testator's devise as intended and expressed by the will.

3. Same.

A testator devised his only land, his home place, to his widow, and to two daughters "during their natural lives; but in case either or both marry again, this becomes void. In the case of the marriage of one, the remaining one will hold until her death or marriage," with limitation over to his son for life, then to his wife for her life or widowhood, and then to their children as purchasers: *Held*, the qualifying words used in respect to the marriage of the testator's daughters, when properly construed from the will and attending circumstances, were not intended as in restraint of their marriage, but as a provision for their support until the marriage occurred.

(124) APPEAL from *Lyon, J.*, at March Term, 1912, of MECKLENBURG.

Case agreed. It was made to appear that R. C. Miller died in said county on 5 October, 1902, having duly made his last will and testament, leaving him surviving his widow, Margaret E. Miller, a daughter, Mary E. Miller, and a son, John L., who had a wife, Lucy, living and sev-

eral children, all of whom are parties; that the widow of the testator, Margaret E., died 22 August, 1908, without having remarried; that the daughter, Mary E., lived with her father and mother on the tract of land until they died and afterwards until 18 April, 1911, when she was married to Charles F. Smith, with whom she is now living as his wife; that Mary E. Miller, now Smith, continued in possession of the tract of land, receiving the rents and profits until 1 May, when John L. Miller went into possession and control and received rents and profits until 1 January, 1912, and holds same to the amount of $70; and since 1 January, 1912, the property has been leased, and the lessees withhold the rents pending the controversy.

In his last will and testament R. C. Miller made disposition of this property as follows:

I, R. C. Miller, of the State and county above mentioned, be- (125) ing in sound mind, and knowing the uncertainty of all earthly affairs, do herein publish and declare this my last will and testament, viz.: I direct my executor hereinafter mentioned to give me fitting burial and pay all my just debts.

Article 1. I give and bequeath to my wife, Margaret E. Miller, and my daughter, Mary E. Miller, the place where I now live, being my entire landed estate, to hold with all the rights and privileges pertaining thereto, during their natural lives; but in case either or both marry again, this becomes void. In case of the marriage of one, the remaining one will hold until her death or marriage.

Art. 2. I further direct that at the death or marriage of both, the above mentioned estate shall go to my son, John L. Miller, and at his death to his wife, Lucy Miller, during her life or widowhood; in case of marriage or death, the property must be equally divided between their children.

Art. 3. After the payment of my debts, I further direct that my entire personal property remain as it is, in possession of my wife, Margaret E. Miller, and at her death or marriage it shall be equally divided between my children, W. C. Miller, Elsie Houston, Anabella Gillespie, and Mollie Miller.

Art. 4. I appoint my son, John L. Miller, my executor to this my last will and testament, and direct him to see that every clause in the above mentioned be carried out to the full letter of the law.

R. C. MILLER.

The controversy is concerning the real estate and the rents arising therefrom since the marriage of Mary E. Miller. John L. and his wife and children, devisees, contending that on the marriage of Mary E. the land in question passed to them under the terms of the will, and

Mary E. contending that the conditions annexed to the devise to her was contrary to public policy and void as being in general restraint of marriage. The court being of this opinion, entered judgment declaring Mary E. Miller entitled to the life estate and the rents during said term, whereupon John L. Miller, etc., excepted and appealed.

(126) *Shannonhouse & Jones for John L. Miller et al., appellants.*
Stewart & McRae for Mary E. Smith, appellee.

HOKE, J., after stating the case: The question chiefly presented on this appeal has been very much discussed by the courts and there seems to be a great contrariety of decisions concerning it. Without attempting to explain or even refer to many of the cases on the subject, we consider it as established, certainly by the weight of authority, that where an estate or interest is definitely conveyed, with a condition subsequent annexed in general restraint of marriage, that is, without limitation as to time or person, the condition, as a rule, will be disregarded. *Watts v. Griffin,* 137 N. C., 572; *Otis v. Prince,* 76 Mass., 581; *Harmon v. Breron,* 58 Indiana, 207; Hopkins on Real Property, p. 173. The principle does not ordinarily obtain in the case of an estate upon limitation or a conditional limitation, where, by the terms of its creation, an estate is so defined and limited that it terminates of itself on the happening of the contingent event without entry or other action on the part of the grantor or his proper representative, an estate not infrequently instanced where a testator has made a devise or bequest in favor of his widow while she remains unmarried. *Bostick v. Blades,* 59 Md., 23; *Coppage v. Alexander Heirs,* 41 Ky., 315; *Hibbits v. Jack,* 97 Ind., 570; *Holtz's Estate,* 36 Pa. St., 422; *Pringle v. Dunkley,* 22 Miss., 16; Mordecai's Law Lectures, 521-522; 4 Kent's Com., 125-126.

Even though the words used may, in strictness, be those of condition subsequent, if there be a limitation over to a third person, the courts are inclined to consider it as an estate upon limitation rather than one upon condition. It seems that this fact of a limitation over is only allowed as controlling in cases of bequests of personalty. See notes to *Coppage v. Alexander, supra,* 38 Am. Dec., 159; but both Blackstone and Kent speak of it as prevailing in devises of realty also. 4 Kent., 126; 2 Blackstone, 155. But whether made determinative in cases of real property or otherwise, and whether the facts bring the present case within the principle or not—and we are inclined to think they do, *Stillwell v. Knapper,* 69 Ind., 558—the fact that there is such
(127) a limitation over should always be given full and proper weight in arriving at the mind and will of the testator and determining whether the disposition made of the property shall be considered an

estate upon limitation or a condition *in terrorem*, void as being in general restraint of marriage. Pursuing this suggestion, there is well-considered authority to the effect that, although the terms used may ordinarily import a condition if, from a perusal of the entire will and the facts and circumstances permissible in aid of a proper interpretation, it appears that the testator intended to make provision for a beneficiary while she remained single, and that the words were not used and intended as a restraint upon marriage, the qualifying words will be given effect according to testator's devise as intended and expressed in the will. *Chapin v. Cook*, 73 Conn., 72; *s. c.*, annotated in 84 Am. St., 139-149; *Mann v. Jackson*, 84 Mo., 400; *Estate Margaretta R. Holbrook*, 203 Pa. St., 93; *s. c.*, 5 Anno. Cases, 137, a position approved in 2 Jarmon on Wills, 572, making citations from *Jones v. Jones*, 1 Q. B. D., 279; 1 Underhill on Wills, sec. 505; Tiedeman on Real Property, sec. 281.

In the citation to Underhill the author says: "The authorities distinguish between a provision for a legatee 'until he or she shall marry,' or 'while she is unmarried,' and an estate upon condition subsequent terminating by the marriage of the legatee. The distinction is largely technical, depending upon the exact language used; but the test is, 'What was the purpose of the gift? What did the testator intend to accomplish?' If it is apparent from the will that he did not intend to prevent a marriage or to condemn the legatee to a life of celibacy, but that he intended solely to provide for her support while unmarried, and that, as soon as she was in a position to be supported by her husband, he desired the provision to cease and the property to be devoted to others, it is valid. The law will regard it as an estate upon limitation, not as an estate upon condition, and the gift over will go into effect as a conditional limitation."

Applying this, in our opinion, the controlling principle on (128) the facts presented, we hold the devise in question to be an estate upon limitation, and, on the marriage of the daughter, the estate passed to the son and his wife and their children, as expressed in the will. Here was a testator, owning a small tract of land, on which he and his wife and daughter had lived and, from a consideration of the circumstances and a perusal of the entire will, it was his desire and intent to provide a home for his widow and daughter while they lived or remained unmarried, and, in case either married, the survivor was to hold; and on the death or marriage of both, the estate should go to the son, his wife and their children, the design evidently being that if the widow or daughter married, they should thereafter look to the husband for support. True, the testator at first uses apt words of condition: "But in case either or both marry again, this becomes void," but he immediately adds: "In

case of the marriage of one, the remaining one will hold till her death or marriage," Showing that an estate upon limitation was meant; and this, in connection with the devise over to his son for life and then to his wife for her life or widowhood, and then to their children as purchasers, on principle and authority, gives clear indication that the qualifying words may not be properly construed as words *in terrorem,* void because intending to restrain marriage, but as a provision for the support of the devisees until the marriage occurred.

The case is very similar to that of *Jones v. Jones, supra,* cited by Mr. Jarmon, and finds support, also, in *Martin v. Seigler,* (S. C.), 10 S. E., p. 1073.

There is error. Judgment be entered for the ultimate devisees.

Reversed.

Cited: McCallum c. McCallum, 167 N. C., 312; *Gard v. Mason,* 169 N. C., 508.

KATHLEEN R. MOORE ET AL. v. T. C. QUICKLE ET AL.

(Filed 8 May, 1912.)

1. Deeds and Conveyances—Probate—Presumptions.

The presumption that the probate of a deed is properly taken arises when the only indorsement thereon is that the parties claiming under it "procured the same to be proved."

2. Same—Probate—Officer—Registration—Regularities Presumed.

The word "*jurat,*" written on a deed by an officer authorized to take probates, means "proved"; and when there is nothing in the form of the probate on the deed in question indicating that it was improperly taken, and there is no evidence to that effect, a presumption arises from the act of the register of deeds in admitting the deed to registration that the probate was by the proper officer and regular, and that proof of that fact was before him.

(129) APPEAL from *Long, J.,* at January Special Term, 1912, of GASTON.

This is an action ot recover possession of a tract of land.

Both parties claim under deeds from William Sams, each purporting to convey the land in controversy, the deed under which the plaintiff claims bearing date of 7 November, 1859, and the deed under which the defendant claims bearing date 7 March, 1860. Neither party claims title by possession, and the original deeds from William Sams were not produced, both parties relying on the records.

The deed from William Sams, of date 7 November, 1859, has been on the records for more than forty years. After the signature of William Sams, at the bottom of the deed, is found the following: "Signed, sealed, and delivered in the presence of William T. Shipp, A. W. Devenport, *Jurat,*" and the only question presented by the appeal is whether this deed has been probated and is properly on the registry.

If it has been duly probated and registered, the plaintiff is the owner of the land in controversy, as in that event she would have the older and better title from the common source.

His Honor held with the plaintiff, and the defendant excepted and appealed.

R. S. Hutchison and A. L. Bulwinkle for plaintiff. (130)
A. L. Quickle, Carpenter & Carpenter for defendant.

ALLEN, J. In *Starke v. Etheridge,* 71 N. C., 425, which has been frequently cited with approval, it is held that the word *"jurat"* when written on a deed by an officer authorized to take probates, means "proved," and in *Quinnerly v. Quinnerly,* 114 N. C., 147, that the presumption is that the probate is properly taken when the only indorsement on the deed is that the parties claiming under it "procured the same to be proved."

The authorities are conclusive against the defendant, if there is any evidence that the word *"jurat"* was written on the deed by an officer of the law, or if, in the absence of such evidence, the law would presume the fact to exist.

The question has arisen in several cases before this Court, and it has been held, as we think, without exception, in the absence of evidence and when there is nothing in the form of the probate on the deed indicating that it was improperly taken, that a presumption arises from the act of the register of deeds in admitting the deed to registration that the probate was by the proper officer and regular, and that proof of that fact was before him. *Strickland v. Draughan,* 88 N. C., 317; *Howell v. Ray,* 92 N. C., 513; *Cochran v. Improvement Co.,* 127 N. C., 389.

If the rule is ever applicable it should be in a case like this, where the deed has been registered more than forty years.

Being of the opinion, upon these authorities, that the deed of 1859 was duly registered, upon a legal probate, and that the judgment of his Honor is in accordance with law, it is

Affirmed.

HOKE, J., did not sit.

Cited: Power Corporation v. Power Company, 168 N. C., 222; *Trust Co. v. Sterchie,* 169 N. C., 24.

(131)

JOB MURDOCK v. CAROLINA, CLINCHFIELD AND OHIO RAILROAD COMPANY.

(Filed 8 May, 1912.)

1. Evidence—Opinion—Actual Observation—Safe Appliances.

It is competent for a servant, injured in the scope of his employment by a rail, which he and other employees had been carrying, bounding upon him as they were placing it upon the ground, to testify that the rail would not have bounced if tongs had been supplied him, when he is speaking of facts within his own observation.

2. Master and Servant—Safe Appliances—"Known and Approved"—Evidence.

In order to show that a certain implement should have been furnished by a master to a servant for the performance of certain duties, the failure to furnish which is alleged as the cause of a personal injury received by the servant, it is not necessary to prove that the implement was in universal use, and several instances may be sufficient—especially, as in this case, when the implement is well known and has been in use for a long time. *Orr v. Telegraph Co.*, 132 N. C., 691, cited and approved.

3. Jurors—Misconduct—Motions—New Trial—Practice—Appeal and Error.

A motion to set aside a verdict of the jury for misconduct of a juror must ordinarily be made before the trial court, unless it was not known to the complaining party until after adjournment, and then only on appeal in civil cases. It appearing in this case from the affidavits that a new trial should not be granted, the motion is denied without discussion.

APPEAL by defendant from *Foushee, J.*, at November Term, 1911, of MITCHELL.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

Charles E. Greene and Black & Wilson for plaintiff.
J. C. Biggs for defendant.

CLARK, C. J. This is an action for personal injury. There was evidence that the plaintiff and others were engaged in carrying with their hands heavy steel rails, weighing about 850 pounds each. Under the direction of a foreman they were required to do this, causing
(132) them to walk sideways. The plaintiff alleges that if steel tongs had been furnished, the rails could have been carried much more conveniently and when laid down would not have bounced and have injured him, this being the manner in which he was hurt.

The first exception is that the plaintiff was allowed to state whether or not in placing a rail with tongs the rail would bounce. This was not an opinion of the witness, but a fact which he stated from his own

knowledge and experience, and the question was competent. *Burney v. Allen,* 127 N. C., 476; *S. v. McDowell,* 129 N. C., 523; *Britt v. R. R.,* 148 N. C., 37.

The second and third exceptions are because the plaintiff was allowed to testify that railroad tongs were approved and in general use. *Orr v. Telephone Co.,* 130 N. C., 627; *Rushing v. R. R.,* 149 N. C., 160. In *Bailey v. Meadows Co.,* 154 N. C., 72, *Brown, J.,* says: "It is not necessary that the plaintiff should prove that such tongs are used on every railroad, but the fact that they are in use on three railroad systems is sufficient evidence to justify the jury in finding that they were in general use." Indeed, it ought hardly to call for proof that it was negligence not to furnish an appliance so long in use and so well known. *Orr v. Telegraph Co.,* 132 N. C., 691. The exceptions for refusal to nonsuit do not need to be discussed.

The defendant moved in this Court to set aside the verdict for misconduct of a juror. This motion, like that for a new trial for newly discovered testimony, must ordinarily be made before the trial court, but there is an exception (though in civil cases only, *S. v. Lilliston,* 141 N. C., 865), when the knowledge does not come to the appellant till after the court below has adjourned. *Turner v. Davis,* 132 N. C., 187, and cases there cited. It is true, those cases were where the new trial was asked on the ground of newly discovered testimony; but the same principle must apply in a case of this kind. Upon reading the affidavits, we find that the affidavits of the appellant are denied and the declarations imputed to the juror are fully explained in the affidavit of the juror himself, which is filed by the appellee. As in motions for newly discovered testimony, it would serve no purpose to discuss the evidence, but the Court will simply render its decision. *Brown v. Mitchell,* 102 N. C., 367; *Herndon v. R. R.,* 121 N. C., 498, and cases (133) there cited; *Crenshaw v. R. R.,* 140 N. C., 193. The motion is denied.

No error.

Cited: Caton v. Tolar, 160 N. C., 106; *S. v. Ice Co.,* 166 N. C., 404.

GEORGE W. PARKER v. G. W. VANDERBILT.

(Filed 22 May, 1912.)

Master and Servant—Safe Appliances—Negligence—Evidence—Nonsuit.

Upon evidence tending to show that the master failed to furnish a safe appliance, in general use, to his servant, in this case a shield to protect his servant from flying wood which the servant was directed to cut for fire purposes at a swing cut-off saw, and that this device would have avoided an injury to the servant caused by a piece of wood from the stick he was sawing flying up and striking him, a judgment of nonsuit should not be allowed.

APPEAL from *Lane, J.*, at July Term, 1911, of BUNCOMBE.

This is an action to recover damages for personal injury caused, as the plaintiff alleges, by the negligence of the defendant.

The plaintiff was in the employment of the defendant Vanderbilt at the time of his injury, and was engaged in operating a swing cut-off saw, and was injured by a piece of wood, which he alleges he was sawing being thrown against his face. The negligence alleged was a failure to provide a shield or guard for the saw.

The plaintiff testified, among other things, that he had been in the employment of the defendant in his wood-yard about three years, and that before he was injured he had used the cut-off saw to some extent, but not much, and that he was directed to use it at the time of his injury, and he gave the following description of the saw, of the circumstances connected with his injury, and of the general use of a shield or guard:

(134) Q. *Tell about this machinery, this cut-off saw; describe it to* the jury the best you can, so that they will know what it is. A. This swing cut-off saw is hung up, and it balances on a counter-shaft, and the saw swings back and forth, so you can catch hold of it and pull it and turn it loose when you cut the stick of wood off and it swings out. You put your wood on the table and you catch your saw with your right hand and you grab the wood with your left hand, if you are a mind to; if not, you pull it up with your right hand, and cut the wood into stove-wood and fire-wood lengths.

Q. You say this saw would swing out again? A. Yes.

Q. In order to cut the wood you pulled it through it? A. Yes.

Q. What is the size of that saw? A. Twenty-four inches.

Q. By what power was that saw run? Electric motor; current from the Weaver plant.

Q. At what speed would it revolve? A. About thirty-five hundred.

Q. State whether it revolved fast or slow. A. Very fast.

Q. State to his Honor and the jury about your injury there. A. I was cutting cordwood; was ordered by Mr. Forestburg to go and cut a cord of pine wood, and I went into the mill, and there was no one there to help me. Mr. Benken had got hurt, got his finger cut, and Mr. Forestburg asked me to go to Biltmore and see if I could get a man to help me cord wood that morning, and I went over there and found Mr. Green, and I asked him if he wanted to go to work, and he said he did, and I went over to the mill with him, and I went to the office and told Mr. Forestburg that I had found a man, and I went to the mill and started it to running and got hurt. The block hit me in the face, and that was about all I knew until I found myself out in the field, and I went to the office and tried to telephone for the doctor, and I was bleeding so I could not telephone for the doctor, and I went over to the drug store and asked Mr. Grove to give me something to keep me from getting sick, and I went over to the hospital and one of the nurses telephoned for Dr. Glenn, and that was all I remember until I woke up in bed.

Q. Just before you received that blow, what did you do? A. (135) I had pulled up this stick of wood and cut off one block and I went to cut off another, and when I got it in about this position (indicating with arms), it struck me in the face.

Q. State what kind of a block it was. A. I cannot say; I did not see it.

Q. State whether it was from the wood you were sawing. A. It must have come from the wood I was sawing.

Q. State whether it came from the wood you were sawing. A. I do not know.

Q. What threw it in your face? A. The saw.

Q. You said you heard the ring of the saw? A. Yes.

Q. State whether this swing cut-off saw had any guard on it or not. A. It did not. It had no protection that I know of.

Q. Have you seen swing cut-off saws at other places, and are you familiar with them? A. Yes.

Q. How many and what number? A. I have seen about four.

Q. Then describe fully to his Honor and the jury just what a guard on a swing cut-off saw is, what its use, what it does, etc. A. A swing cut-off saw, all the others that I saw, had the guard; there is a short mandrel that comes together at the lower part of it, and right at the side of this mandrel is a shield on all I ever saw except this one.

Q. What it the use of this shield? A. To keep the blocks from coming back over the saw.

Q. How does that keep the blocks from coming up? A. It catches them from behind and keeps them from coming up.

Q. You say that you know of five or six saws that ran here? A. Yes.

Q. And you say that all had the guards? A. Yes, all except one.

Q. And you saw them where else? A. I worked in the car shops at Wilmington; I was in the car department, and those saws all had the shields; there were four of them.

Q. Did you operate those saws yourself? A. No, sir.

Q. Where else did you see those saws? A. At Rocky Mount and at Wilmington; was after I got hurt.

(136) Q. You did not operate them? A. No, sir.

Q. Did you see them anywhere else? A. I saw them at Waycross, Ga.

Q. Did you operate those at Waycross? A. No, sir.

Q. State what they had. A. They had guards.

J. J. Harris, a witness for the plaintiff, among other things, testified as follows:

Q. Did you ever work for the Biltmore estate in reference to this lumber yard and wood shop they were speaking of? A. Yes.

Q. About when? A. My recollection is that I went there about 1901, as well as I remember now—no, it was later than that; I worked there four years, and my recollection is that I left there in 1907.

Q. What were your duties, what position did you hold? A. I was foreman of the plant.

Q. What did the machinery consist of; was that swing-cut off saw part of it? A. Yes.

Q. What was its condition with reference to this guard? A. It did not have any.

Q. How long have you been engaged in business of that character? A. Regularly for the last eight years.

Q. What is your knowledge and experience with saws of this character; what is your knowledge and experience, if any, with these swing cut-offs? A. I have seen them in operation, several of them just like this one. I have one like it in the plant I operate now.

Q. State whether saws of this kind are common in plants of this character. A. Yes, they are common.

Q. With or without guards? A. With guards.

Q. What is the object of that guard? A. If his body was very near the saw, and if anybody should fall against that saw, the shield would protect him, and they would not be apt to be cut unless they got their hand under the machine, and that shield would keep the saw from throwing pieces of timber up or in some other direction.

Q. What do you mean by "throwing them in some other direction"? A. Unless it was a very small piece of a block, it would not have room

to come up between the saw and the shield and it would go (137) behind.

At the conclusion of the evidence his Honor entered judgment of nonsuit, on motion of the defendant, and the plaintiff excepted and appealed.

H. C. Chedester for plaintiff.
J. H. Merrimon and J. G. Merrimon for defendant.

ALLEN, J., after stating the case: Applying the principle, frequently announced, that the evidence must be considered in the light most favorable to the plaintiff on a motion for judgment of nonsuit, we are of opinion there was error in allowing the motion as to the defendant Vanderbilt.

There was evidence tending to prove that the plaintiff was in the employment of the defendant, and was operating a swing cut-off saw; that while operating said saw a piece of wood he was sawing was thrown against him by the saw and injured him; that the saw had no shield or guard; that a shield or guard would have prevented the wood from striking him; that shields or guards were in general use on machines used for similar purposes.

If so, the case is controlled by *Pritchett v. R. R.*, 157 N. C., 88, and *Rogers v. Manufacturing Co.*, 157 N. C., 484.

The facts in the last case referred to are very much like those in this case, and the principles of law are the same.

We find no evidence tending to prove liability on the part of the defendant Schenck, and as to him, the judgment of nonsuit is affirmed.

A new trial is ordered as to the defendant Vanderbilt.

New trial.

(138)

W. M. SMITH, ADMR. OF JOSHUA GOSNELL, v. E. L. PATTERSON AND SOUTHERN RAILWAY COMPANY.

(Filed 15 May, 1912.)

1. Railroads—Parties—Residence—Venue—Executors and Administrators—Residence—Interpretation of Statutes.

Semble, that the provision in Revisal, sec. 424, that actions against a railroad shall be tried "where the plaintiff resided at the time the cause of action arose," when applied to an action of an administrator for the negligent killing of his intestate, has reference to the residence of the individual holding the office, and not to the official residence or place where he may have qualified.

2. Railroads—Joinder of Parties—Venue—Residence—Removal of Causes.

In an action for damages to recover of a railroad company and its engineer for the negligent killing of plaintiff's intestate, the cause is not removable if the defendant engineer is a resident of the county wherein the action has been brought, though the other parties to the controversy are not residents thereof and the cause of action did not accrue therein. Revisal, sec. 424.

APPEAL from *Lyon, J.*, at March Term, 1912, of MECKLENBURG.

Civil action, heard on motion for change of venue from the county of Mecklenburg, where same was instituted, to the county of Henderson, North Carolina.

The action was to recover damages for the death of intestate, caused by the movements and operation of an engine of defendant company attributed to the negligence of the company and of E. L. Patterson, the engineer and employee of defendant company at the time of the killing.

The court denied the motion and entered judgment embodying the relevant facts in terms as follows:

"This cause coming on to be heard at the March (1912) Term of Superior Court of Mecklenburg County, before his Honor, C. C. Lyon, judge presiding, and being heard upon a motion filed by the defendants at the January (1912) Term of the Superior Court of Mecklenburg County, the following facts are found by the court: "That this action was brought to the January (1912) Term of this court, and that (139) at said term, and before the time for filing answer had expired, defendants filed a written motion to remove this cause to Henderson County; that the intestate, Joshua Gosnell, was killed in Melrose, in Polk County, North Carolina, on or about 28 July, 1911, and was at the time of his death a resident of the county of Henderson, State of North Carolina; that subsequent to the time of the said Gosnell's death, and previous to the time of the institution of this action, W. M. Smith, a resident of Mecklenburg County, North Carolina, now and at the time of death of said Gosnell, qualified as administrator of the estate of Joshua Gosnell, before the Clerk of the Superior Court of Henderson County, North Carolina; that the defendant E. L. Patterson is, and was at the time of the death of the said Gosnell, a resident of Polk County, North Carolina. It is, therefore, considered and adjudged by the court that this action was properly brought in Mecklenburg County, North Carolina; and it is further ordered and adjudged that the defendant's motion to move to Henderson or Polk County be not allowed."

Defendants excepted and appealed.

C. W. Tillett, Jr., and Tillett & Guthrie for plaintiff.

O. F. Mason and Shannonhouse & Jones for defendant.

HOKE, J., after stating the case: The validity of his Honor's ruling is dependent upon the proper construction of section 424, Revisal, in terms as follows: "In all other cases the action shall be tried in the county in which the plaintiffs or the defendants, or any of them, shall reside at the commencement of the action; or if none of the defendants shall reside in the State, then in the county in which the plaintiffs, or any of them, shall reside; and if none of the parties shall reside within the State, then the same may be tried in any county which the plaintiff shall designate in his summons and complaint, subject, however, to the power of the court to change the place of trial in the cases provided by statute: *Provided,* in all actions against railroads the actions shall be tried either in the county where the cause of action arose, or in some county where the plaintiff resided at the time the cause of action arose, or in some county adjoining the county in which the cause (140) of action arose, subject, however, to the power of the court to change the place of trial in the cases provided by statute." Authoritative interpretations of this and legislation of similar import elsewhere would seem to favor the position that in respect to actions instituted by an administrator and coming within the effect of the proviso, the terms appearing therein, "where plaintiff resided at the time the cause of action arose," have reference to the residence of the individual holding the office and not to the official residence or place where he may have qualified. *Whitford v. Insurance Co.,* 156 N. C., 42; *Roberson v. Lumber Co.,* 153 N. C., 120; *R. R. v. Stith,* 120 Ky., 237; *Turner v. R. R.,* 110 Ky., 819. Without present decision of this question, however, we are all of opinion that the proviso to the section should be construed and held to apply to cases where a railroad company alone is defendant, and that the venue in actions where there are other parties defendant should come within the body of the act. This is not only the primary and natural meaning of the language used, but without express requirement it would be unreasonable to hold that the rights of all other litigants should be made subservient to a particular class, and this without regard to the convenience of the parties or the amount of the interest involved.

On authority, therefore, and owing to the joinder of the individual defendant Patterson, the action is properly brought in Mecklenburg County. *Whitford v. Insurance Co., supra.*

There is no error, and the judgment below is

Affirmed.

Cited: *Biggs v. Bowen,* 170 N. C., 35.

(141)

NORTH CAROLINA COTTON COMPANY v. R. N. WILSON AND THE TOWN OF GASTONIA.

(Filed 8 May, 1912.)

Cities and Towns—Cotton Weighers—Delivery of Cotton—Bailment—Pleadings—Conversion—Demurrer.

The delivery of bales of cotton to a cotton weigher appointed under a town ordinance only to weigh the bales is no evidence of bailment either by the town or the weigher appointed by it; and the complaint in an action against them for the value of cotton left thereafter by the owners on the platform, and which was lost without averment of conversion, is demurrable.

APPEAL from *Biggs, J.*, at May Term, 1911, of GASTON.

A. G. Mangum for plaintiff.
Geo. W. Wilson and Jones & Timberlake for defendant.

CLARK, C. J. The plaintiff carried two bales of cotton to the defendant Wilson, who was cotton weigher of the town of Gastonia duly appointed. The town ordinances required all cotton to be weighed. A short while after Wilson had weighed the cotton, he notified the plaintiff that the two bales were missing. The complaint does not allege that either of the defendants converted said cotton, but avers that they negligently handled and dealt with the cotton so that it was lost.

The town ordinances are set out in the complaint, and it appears therefrom that the cotton was not required to be delivered to the custody of the cotton weigher nor to the town, but merely that the owner thereof shall carry cotton to the weigher to be duly weighed. There was no bailment of the cotton and none was necessary. Neither the weigher nor the town assumed custody of the cotton or in any wise became bailee thereof. The plaintiff might well have stood by while his cotton was being weighed and immediately have taken it away. Neither the weigher nor the town held itself out as bailee nor agreed to furnish warehouse facilities. Their entire duty was done when the cotton was weighed. It was the plaintiff's fault, and at his own risk, that he left the cotton on the platform instead of taking it away.

(142) It is true, it is averred in the complaint that it was the custom of the weigher to tag the cotton. But there was no requirement in the ordinances to that effect, and Wilson testifies that he did in fact tag the cotton and at once rolled it back into line with the other cotton. However that may be, there is nothing in the ordinances or in the nature of the transaction which made the defendants bailees, either gratuitous or otherwise, of the cotton. The sole duty of Wilson was to

weigh it. The plaintiff left the cotton on the platform for his own convenience, and as there was neither charge nor proof that the defendants, or either of them, converted the cotton, there was no cause of action stated, and a nonsuit should have been directed. It is found in the issues submitted that the cotton was received solely for the purpose of being weighed; that it was weighed and tagged and placed back in the plaintiff's row of cotton, and that neither of the defendants has converted the cotton.

If there was any conflict in the instructions to the jury, it is immaterial to consider it, inasmuch as upon the complaint and evidence a nonsuit should have been directed.

No error.

(143)

BELLE McGHEE PHIFER v. WILHELMINA PHIFER GILES ET AL.

(Filed 15 May, 1912.)

1. Dower—Petition—Demurrer.

The allegations of a petition for dower will be taken as true upon demurrer.

2. Wills—Power of Sale—Conversion—Intent.

Bequests and devises of personal and real property, in trust, with power to sell, without making any distinction between the two kinds of property, is evidence of an intention to convert the whole to personalty, and a direction of the application of the proceeds indicates the purpose that all be sold.

3. Same—Partial Sale—Part Conversion.

The intent of the testator to convert his real and personal property in the hands of a trustee into cash must be shown by an imperative power to sell, arising by express command or necessary implication; and in this case, by construction of the language of the will, to sell said property or any portion thereof," the testator may have intended the trustee to sell so much of the property as might be necessary to pay his debts and charges for equality among his children, and no more, in which event there would be a conversion of a part only.

4. Wills—Power of Sale—Conversion—Intent—Trusts and Trustees—Election—Reconversion—Evidence.

When a power in a will directs the trustee to convert the testator's real and personal property into cash for certain purposes, and this has been done, leaving unsold realty in his hands, the parties entitled to the property as converted may elect to take it in its original form, which may be inferred from acts or conduct which manifest an unequivocal intention, as a division of the lands among themselves, or holding the possession for period of years, in this case for a period of thirty years.

5. Wills—Power of Sale—Reconversion—Dower—Petition—Demurrer.

The petition of a widow for dower in her husband's interest in lands devised to him by his father set forth sufficient allegation that her husband and other devisees under the will had elected by their acts to reconvert the lands remaining in the hands of the testator's trustee, after he had met the requirements of the trust imposed by a partial sale of the trust estate consisting of real and personal property: *Held*, the petition upon its face set forth facts sufficient to entitle her to her dower in her husband's part of the lands, and that a demurrer to the petition was bad.

APPEAL from *Adams, J.*, at July Term, 1911, of MECKLENBURG.

This is a proceeding for the allotment of dower, the petitioner claiming as the widow of R. S. Phifer, who was one of seven children of M. M. Phifer.

A demurrer was filed to the original petition, which was sustained, and the petitioner excepted and appealed to this Court. The appeal was heard at the last term, and the judgment of the Superior Court was affirmed. Upon the opinion of the Supreme Court being certified to the Superior Court, the petitioner filed an amended petition, by permission of the court, by adding the following paragraphs to the original petition:

"9. That after the execution of the last will and testament of (144) M. M. Phifer referred to in paragraph 3, and before her death, said M. M. Phifer paid the purchase money for the real estate referred to in the last will and testament of M. M. Phifer, and received a deed from said Joseph H. Wilson, conveying to her the land therein referred to in fee, it being the first tract of land described in the second paragraph of this complaint, and thereby became the owner of the legal and the equitable title to said property before her death, and at the time of her death was seized of said real estate in fee.

"10. That W. W. Phifer, executor of said last will and testament, has filed no report of his dealings with said real estate, either as executor or trustee, in the office of the Clerk of the Superior Court of Mecklenburg County, as required by law. That W. F. Phifer died on 30 December, 1882, and never qualified as executor of said last will and testament; and this petitioner is informed, advised, and believes that the deceased, M. M. Phifer, died owing no debts; that there was sufficient personal estate belonging to said M. M. Phifer at her death to pay all of her debts, and all of said debts, if any, have long since been paid.

"11. That a portion fo the land hereinbefore described has been cut up into city lots; some of said lots have been sold and conveyed to various persons, deeds to which have been executed by W. W. Phifer as executor and trustee, and by W. W. Phifer and the other devisees named in said last will and testament, except R. S. Phifer; but the petitioner alleges

that the greater part of said real estate has never been sold, and that the defendants George M. Phifer, Cordelia W. Phifer, Josie P. Durant, Mary W. Quinn, E. W. Phifer, and W. W. Phifer, being all the devisees and heirs at law of M. M. Phifer, deceased, except R. S. Phifer, deceased, are now in the actual possession of said unsold land.

"12. That on .... October, 1906, the defendants, W. W. Phifer individually and as the executor of the will of M. M. Phifer, Edward W. Phifer and wife, Annie Phifer, and Mary C. Quinn and husband, M. C. Quinn, Josie P. Durant, Cordelia W. Phifer and George M. Phifer, entered into an agreement in writing whereby they attempted to divide among themselves a part of the land described in the second (145) paragraph of this petition, which said written agreement is recorded in the office of the Register of Deeds of Mecklenburg County, in Book 209, page 494, a copy of which is hereto attached and marked Exhibit C.

"13. That there still remains a part of said land in the possession of the defendants George M. Phifer, Cordelia W. Phifer, Josie P. Durant, Mary W. Quinn, Edward W. Phifer, and W. W. Phifer, yet undivided and unsold.

"14. That this petitioner is informed, advised, and believes that the defendant W. W. Phifer, trustee and executor, has sold and disposed of more than enough of the land hereinbefore described to pay off all of the debts of M. M. Phifer, deceased, and to pay all of the devisees named in said last will and testament of the said M. M. Phifer, a sum of money equal to the amount advanced to R. S. Phifer by said M. M. Phifer, as referred to in her said last will and testament, and that all of the trusts, charges, obligations and duties imposed upon said W. W. Phifer, executor and trustee, by the said M. M. Phifer in her last will and testament have been fully discharged and satisfied, and that all of said duties, trusts, charges and obligations imposed upon said W. W. Phifer, executor and trustee, were either performed by M. M. Phifer during her lifetime and after the execution of her said last will and testament or by W. W. Phifer, trustee, after the death of M. M. Phifer and before the death of the petitioner's husband, R. S. Phifer, and that at the time of the execution of Exhibit A said R. S. Phifer was seized and possessed of a one-seventh undivided interest in the land described in paragraph 2 of this petition, except such land as the trustee, W. W. Phifer, had sold off for the purpose of applying the proceeds of the sale to the payment of the debts of M. M. Phifer and the payment to the devisees named in the last will and testament of said M. M. Phifer an amount of money equal to the amounts advanced by the said M. M. Phifer in her lifetime to the petitioner's husband, R. S. Phifer.

"15. That your petitioner is informed, advised, and believes that her said husband, R. S. Phifer, at the time said deed (Exhibit A) by him purports to have been made, was seized and possessed of a one-
(146) seventh undivided interest in the land described in paragraph 2 of this petition, except such lands as were actually sold by W. W. Phifer, executor and trustee, prior to the date of Exhibit A, for the purpose of applying the proceeds of such sale to the payment of the debts of M. M. Phifer and to the payment to said devisees except R. S. Phifer and W. W. Phifer an amount of money equal to the amount advanced to said R. S. Phifer, referred to in said last will and testament; and your petitioner desires to have her dower in said lands allotted to her, and to that end she prays the court to issue a writ to the Sheriff of Mecklenburg County, commanding him to summon three freeholders connected with the parties neither by consanguinity nor affinity, entirely disinterested and qualified to act as jurors, to view the said lands and to allot to your petitioner a one-third part of the one-seventh undivided interest in said lands, as hereinbefore set out, for the term of her natural life, and to report their proceedings to this court in due form of law."

A demurrer to the amended petition was sustained, and the petitioner again excepted and appealed.

The facts stated in the original petition, the will of M. M. Phifer, and the papers executed by R. S. Phifer, are fully reported on the former appeal, 157 N. C., 221.

W. T. Harding for plaintiff.

Burwell & Cansler, Tillett & Guthrie, Cameron Morrison, and Maxwell & Keerans for defendant.

ALLEN, J., after stating the case: When this case was before us on the former appeal, it was decided, upon the allegations then made, that the petitioner was not entitled to dower, as it was not made to appear that any part of the trusts declared in the will of M. M. Phifer had been executed, or that any part of the land devised in said will remained unsold, or that it was unnecessary to sell all of said land, or that after the payment of the debts and charges there would be any surplus.

It was also intimated that the trusts declared in said will were
(147) active trusts, and that a construction of the will was permissible to the effect that it was the intention of the testatrix to convert the realty into personalty, and that in either event petitioner would not be entitled to dower; but the Court refrained from passing finally upon these questions, as the pleadings then stood.

The amended petition presents a new case for our consideration, and if its allegations are true, which we must assume in reviewing a judg-

ment sustaining a demurrer to it, it is doubtful if there has been a conversion, as to the land remaining unsold after the payment of the debts and the charges for equality among the children, and if there was such conversion, the facts alleged, undisputed and without explanation, would be evidence of a reconversion.

The petitioner now alleges in substance that the debts and charges for equality, provided for in the will of M. M. Phifer, have been paid; that a sale of the land was unnecessary; that although more than thirty years have elapsed, a large part of the land remains unsold; that the beneficiaries under the will have elected to take the property as realty, and that her husband was seized in fee of an undivided one-seventh of the land remaining unsold.

These allegations are admitted by the demurrer, and must be construed liberally, and if they disclose grounds for relief, although imperfectly alleged, the demurrer must be overruled. *Brewer v. Wynne,* 154 N. C., 472.

The will of Mrs. Phifer bequeaths and devises personal and real property, in trust, with power to sell, without making any distinction between the two kinds of property, which is evidence of an intention to convert the whole to personalty (*Burr v. Sim,* 29 A. D., 52), and it directs the application of the *proceeds,* which indicates a purpose for all to be sold. The general scope of the will, examined by itself and without reference to the facts now alleged, suggests that the testatrix thought it would be necessary to sell the whole, and that she disposed of it for that purpose, which would be a conversion. *Ford v. Ford,* 2 Am. St., 124; *Lent v. Howard,* 89 N. Y., 169.

On the other hand, there is no conversion unless the power to sell is imperative, arising by express command or necessary im- (148) plication (*Mills v. Harris,* 104 N. C., 626; *Benbow v. Moore,* 114 N. C., 272; *Howard v. Perry,* 15 Am. St., 124), and the power to sell conferred by the will is "to sell said property or any portion thereof," which may mean that the testatrix intended that the trustees should sell so much of the property as might be necessary to pay debts and charges for equality among the children, and no more, in which event there would be a conversion of a part only (*Smith v. McCrary,* 38 N. C., 204; *Scholle v. Scholle,* 113 N. Y., 273; *Cronise v. Horett,* 47 Md., 436; *Ray v. Monroe,* 47 N. J. Eq., 359; *Sheridan v. Sheridan,* 136 Pa. St., 20; *King v. King,* 13 R. I., 507), and if the allegations of the amended petition are true, the debts and charges have been paid, and much of the land remains unsold.

If, however, it should be held that a conversion has taken place, the specific facts alleged, considered in connection with the allegation of the

petitioner that her husband was seized in fee of an undivided one-seventh interest in the land remaining unsold, if true, would amount to an allegation of a reconversion.

It is alleged that R. S. Phifer, the husband, conveyed his interest in the land, not in the fund, for the benefit of the other children of M. M. Phifer, in 1881, without the joinder of the petitioner, and that a large part of the land has remained unsold for more than thirty years, and that it has been divided as land among said children.

The doctrine of conversion and reconversion is clearly stated by *Justice Hoke* in *Duckworth v. Jordan,* 138 N. C., 525, and he there says, with reference to the latter: "This reconversion can be effected where all the parties, beneficially interested in the property, by some explicit and binding action, direct that no actual conversion shall take place, and elect to take the property in its original form. . . . In devises of the kind we are now considering, where land is directed to be sold and the proceeds divided, in order to a valid election all the interests must concur and all must be bound. If the beneficiaries are all *sui juris,* such election can be made by deed in which all join, or by answer expressly stating that the parties desire to hold the land as it is, or this may be done partly by deed and partly by answer (and there are (149) other methods), but all must concur by some action that will bind them."

It will be noted that, upon the facts in that case, the question was presented of a reconversion by deed or answer, but the Court said "there are other methods." Mr. Pomeroy, in 3 Equity Jurisprudence, sec. 1175, says: "By reconversion is meant that 'notional or imaginary process by which a prior *constructive* conversion is annulled and taken away, and the *constructively* converted property is restored, in contemplation of a court of equity, to its original actual quality.' . . . The rationale of this doctrine is clearly found in the right which every absolute owner or donee has to dispense with or forbid the execution of any trust in the performance of which he alone is interested. Reconversion is the result of an election expressly made or inferred by a court of equity. It depends wholly upon the right of election held by the person entitled to the property to choose whether he will take the property in its converted condition or in its original and unconverted form"; and again in section 1177: "It being assumed that the party entitled to the property has the capacity to elect to receive it in its unconverted form, and thus to effect a reconversion, the further question remains, how such election must or may be made. An express declaration of the intention in language is always sufficient, but is not necessary. An election may be inferred from acts or writings. Any act or writing which shows an

unequivocal intention to possess the property in its actual state and condition will amount to a valid election."

It appears, therefore, that there is a reconversion when the party or parties, entitled to the property as converted, elect to take it in its original form, and that this election may be inferred from acts or conduct which manifest an unequivocal intention to do so. *Harcourt v. Seymour,* 42 Eng. Ch., 45; *In re Davidson,* 11 Ch. Div., 350.

Many expressions are to be found in the reported cases, as to the conduct which is evidence of an intention to reconvert. It is said in *Bradish v. Gee,* 1 Amb., 229, that very slight evidence of intention by acts done is sufficient; in *Putteney v. Darlington,* 1 Br. Ch. R., 213, that circumstances of demeanor, even though slight, will do; (150) in *Wheldale v. Partridge,* 8 Ves., 235, that the slightest act would do; in *Van v. Barnett,* 19 Ves., 108, that a slight circumstance is sufficient; in *Fluker v. Gordon,* 17 Bev., 434, that slight circumstances are sufficient; in *Prentice v. Underwood,* 79 N. Y., 478, that a slight expression of intention will do; and in *Burr v. Sim,* 29 A. D., 525, that holding possession for one year is entitled to some weight.

Also, it has been held that a reconversion will be inferred from an uninterrupted possession of the property in its original form and the receipt of the rents for sixteen years (*Greesbach v. Freemantle,* 17 Beav., 318); from a possession for twenty-one years (*Stuck v. Mackey,* 4 W. and S., 196); from advising with an attorney as to the right to elect to take as land, and retaining possession of the title deeds (*Davis v. Ashford,* 38 Eng. Ch., 44); from an execution of a deed (*Beal v. Stehley,* 21 Pa. St., 376).

In the last case cited land was devised with power to sell and to divide the proceeds between three persons, two of whom conveyed their interest in the land to the third, and it was held that the making of the deed by the two was an election by them to take as land, and that the acceptance of the deed by the other was an election by him.

We have thought it necessary to say this much on the question presented by the record, to show the difference between the case on the former appeal and as now constituted; but the rights of the parties cannot be finally determined until the facts are ascertained, and to that end the demurrer is overruled, with leave to answer.

Reversed.

Cited: *Broadhurst v. Mewborn,* 171 N. C., 403.

(151)

J. M. SMITH v. MORGANTON ICE COMPANY ET ALS.

(Filed 15 May, 1912.)

1. Antitrust Laws—Interpretation of Statutes.

The anti-trust law of 1907, ch. 218 (Revisal, sec. 3028), since its amendment by chapter 167, Laws of 1911, restricts unlawful conduct "tending to interfere with the trade of an opponent or business rival with the purpose of attempting to fix the price of anything of value when the competition is removed" to the single instance when it is done "by circulating false reports."

2. Same—Commencement of Action.

By express terms of the statute, the repeal of chapter 218, Laws of 1907 (Revisal, sec. 3028b), does not affect any action theretofore commenced. Revisal, sec. 2830.

3. Same—Common Law.

By express provision, chapter 218, Laws of 1907 (Revisal, sec. 3028b), shall "not be construed so as to repeal or restrict the common-law doctrine preventing unlawful combinations in trade and commerce," and this provision is still effective, being reënacted by chapter 167, sec. 9, Laws of 1911.

4. Same—Punitive Damages—Instructions.

The plaintiff was a dealer in meats in M., and desirous of dealing in ice, also, made a contract with an ice plant at N., a nearby town, whereby he could sell ice in M. for a profit at 35 cents per hundred pounds. The defendant procured an agreement with the only other ice plant in the town of M. by which it would not sell ice there, and by threats of competition at N. deterred the Ice Manufacturing Company there from shipping ice to the plaintiff, and at least temporarily broke up his meat and ice business, whereupon the defendant put the minimum price of ice at M. at 50 cents per hundred pounds: *Held*, (1) the conduct of the defendant was violative of the common-law doctrine against monopolies; (2) conceding that the defendant did not know of plaintiff's contract, its unlawful conduct was the preventing plaintiff from obtaining the ice; (3) exemplary or punitive damages are recoverable in an amount to be allowed in the discretion of the jury, if the jury find that defendant's acts were maliciously done; (4) the defendant's acts if done without right or justifiable cause would constitute malice; (5) an instruction was not error when considered in connection with the charge as a whole, that the jury could "award exemplary damages for any injury they may find that the plaintiff suffered by the interference in his business by the defendant's attempt to fix the price of ice at M." for the illegal purposes, etc.

(152) APPEAL by defendant from *Long, J.*, at December Term, 1911, of BURKE.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

John T. Perkins for plaintiff.
M. Silver and Avery & Ervin for defendants.

CLARK, C. J. Though this State enacted an antitrust law in 1891, this case is the first that has reached this Court in which it has been attempted to enforce such legislation by civil action, and none has so far come up on the criminal side of the docket.

The defendant ice company owned an ice plant in Morganton. The plaintiff had a fresh-meat market which required ice, and he desired to deal in ice. The defendants procured an agreement with the Deaf and Dumb School in Morganton, the only other ice plant in that town, not to sell ice to any one. They then went to the neighboring towns that had ice plants and procured agreements from them not to ship ice to Morganton to plaintiff unless he would agree to sell at a minimum price in Morganton of 50 cents per 100 pounds. The plaintiff already had a contract with the ice company in Newton to ship him all the ice he wished at 17½ cents per 100, which he was selling at 35 cents per 100 pounds, at a profit. The defendants by threats that they would ship ice to Newton and put wagons on the streets there to dispose of their ice and cause the Newton company to lose money, deterred the Newton company from shipping plaintiff any more ice, and for a time at least broke up both the plaintiff's ice business as well as his meat market, whereby the defendants obtained a monopoly and control of the ice business in Morganton and sold ice at the minimum price to the public of 50 cents per 100 pounds.

Laws 1907, ch. 218, now Pell's Revisal, 3028a, subsec. (b), made it unlawful for "any person, firm, corporation, or association to directly or indirectly destroy or willfully injure, or undertake to destroy or injure the business of any opponent or business rival in the State of North Carolina with the purpose or intention of attempting to (153) fix the price of anything of value when the competition is removed."

This action was begun when the above section was in force, but chapter 167, Laws 1911, subsection (b), amended the above section by interpolating the words "by *circulating false reports*" tending to damage the credit of said opponent or rival. The effect of the amendment made in subsection (b) by the act of 1911 is to narrow and restrict the forbidden conduct "tending to interfere with the trade of an opponent or business rival with the purpose of attempting to fix the price of anything of value when the competition is removed" to the single instance when it is done "by circulating false reports." Under the act of 1907 all conduct of any nature done with such purpose or intention was made unlawful. Under

the act of 1911 no conduct with that purpose or intention is unlawful save only that of "circulating false reports."

The other subsections in the act of 1911 apply only when the methods forbidden are: *(a)* Sales on condition that purchasers shall not deal with competitors. *(c)* Destruction or injury by reason of lowering price. *(d)* Lowering or raising price with purpose of increasing profit when rival is destroyed. *(e)* Differentiating prices with intent to injure business of another. *(f)* Agreements not to buy or sell in certain territory with intention of preventing competition. *(g)* Conspiracy to keep down or put up prices. *(h)* Solicitation of trade, patronage, or goodwill by means of false statements. The conduct alleged against the defendants in this case is therefore not prohibited by the antitrust act of 1911.

Section 11 of the act of 1911 specifically repealed the above act of 1907. This action was begun in 1909. Whatever the purpose in thus restricting the provisions of subsection (b) and in repealing the act of 1907, this action begun before its repeal is saved from its operation by Revisal, 2830, which provides: "The repeal of a statute shall not affect any action brought before the repeal for any forfeitures incurred or the recovery of any rights accruing under such statute." The act of 1907 contained the provision, now Pell's Revisal, 3028b, that it shall "not be construed so as to repeal or restrict the common-law doctrine
(154) preventing unlawful combinations in trade and commerce, which is hereby reënacted and declared to be in full force in this State," except as inconsistent with that statute. This last provision is reënacted in the act of 1911, ch. 167, sec. 9.

Therefore this action is governed by the act of 1907, ch. 167, sec. 9; Pell's Revisal, 3028a, subsec. (b), or by the common law existing prior to the adoption of any statute on the subject. Under these the charge of the court and the verdict of the jury should be sustained.

The defendants' first exception is to evidence of the contract which the plaintiff had made with the Newton Ice Company, and the second is to the refusal of the issues tendered by the defendant. The third exception is to the refusal of a nonsuit. These exceptions are without merit, require no discussion, and indeed do not seem to be insisted upon by the defendants in their brief.

The fourth and fifth exceptions are because the court refused to charge that there was no evidence that the defendants at any time knew of the existence of a contract between the plaintiff and the Newton Ice Company by which the latter was to furnish the ice to the former. The witness, Wagoner, of the Newton Ice Company, testified that they could manufacture and sell ice to the plaintiff in any quantities he wished at 17½ cents, and would have done so but for the interference of the de-

fendant, and in fact that they had a contract with the plaintiff to furnish him what ice he needed and ordered and as often as he should order it during the season. The plaintiff's evidence was to the same effect. There was ample evidence to justify the jury to find that the defendants were aware of the contract. Besides, it is not material whether the defendants by threats induced the Newton Ice Company to break a contract to ship ice to the plaintiff or merely prevented them from shipping, if they otherwise would have done so.

Exception six is because the court refused to charge that the plaintiff could recover only actual damages. Exception seven is to the following charge: "It is made unlawful in this State for any person or persons to attempt to injure and break up the business of another for the purpose of fixing a rate at which any article of commerce shall (155) be sold; and the court charges you that if you find from the greater weight of the evidence that the defendants attempted to break up the business of the plaintiff and did break up his business, as alleged, and did injure him therein in the selling of ice in Morganton, for the purpose of fixing minimum price at which ice should be sold when his competition was removed, and that, pursuant to this intention, the defendants tried to induce nearby manufacturers of ice not to sell to the plaintiff, and prevented the Newton Ice Company from fulfilling their contract and fixed the price at which ice should be sold at a minimum at retail in Morganton as 50 cents per hundred, when the plaintiff had arranged and was then and there able to sell ice at a less price, you may award exemplary damages for any injury you may find that the plaintiff suffered by the interference in his business in the attempt to fix the price of ice in Morganton and effectuating the illegal purposes aforesaid."

The eighth exception is because the court charged the jury: "If you find that such contract as the plaintiff claims did exist, then if the defendants knowingly and intentionally procured it to be violated, they may be held liable for the wrong, although it may have been done for the purpose of promoting their own business, but in order to justify the finding of punitive damages against the defendant, the act done must have been done with the unlawful purpose to cause such damage or loss without right or justifiable cause on the part of the defendant, which constitutes damage."

The ninth exception is because the court told the jury that under the decision in *Haskins v. Royster*, 70 N. C., 605, the Court had defined the word "malice" as follows: "The act done must have been done without right or justifiable cause on the part of the defendant, which constitutes malice."

The tenth and last exception is because the court charged that it was held in *Hayes v. R. R.*, 141 N. C., 199, *Brown, J.*: "This Court has said, in many cases, that punitive damages may be allowed or not, as the jury see proper; but they have no right to allow them unless they draw from the evidence the conclusion that the wrongful act was accom-
(156) plished by fraud or malice, or recklessness or other unlawful and wanton aggravation on the part of the defendant. In such cases the matter is within the sound discretion of the jury, not only as to the allowance of damages, which is sometimes called smart money or punitive damages—not only as to the allowance, but as to the amount that is allowed."

Upon examination of the foregoing instructions they are found to be a correct exposition of the law on the subject.

The defendants insist that there was error in allowing the jury to consider the question of exemplary or punitive damages, and particularly urge that there was error in instructing the jury that they could "award exemplary damages for any injury you may find that the plaintiff suffered by the interference in his business in the attempt to fix the price of ice in Morganton and effectuating the illegal purposes aforesaid." But construed in connection with the context and with the whole charge, this exception is hypercritical. The conduct with which the defendants were charged and of which the jury, in response to the first three issues, find that they were guilty made them liable not only for the actual damages sustained, but also for punitive damages, if the jury found, as they must have done, that such conduct was willful and malicious as the latter word was construed in the charge and in the decisions of this Court which were quoted to them, to wit, that the act was done with the unlawful purpose, without right or justifiable cause on the part of the defendants, of interfering with the business of the plaintiff. If there was error, it was against the plaintiff, as the charge should have been that the jury could allow "exemplary damages *in addition to* the actual damages sustained" by the wrongful act of the defendants.

There is no error, and the defendants are not entitled to a new trial. It is, however, singular, that with numerous and glaring instances of the violation of law and right, in the manner herein shown by other parties and to a far vaster extent in the twenty-one years since this statute was passed, and indeed in violation of the common law, which punishes such offenses, that this case, in which a small infraction of the law is in-
volved, is the only one that has come to this Court. The enforce-
(157) ment of the law and the protection of the plaintiff and the public in this instance is noteworthy when with a statute so widely known and discussed and when the evil has been so great and manifest there has been no attempt to enforce the law in other cases.

No error.

GUS FORNEY v. BLACK MOUNTAIN RAILROAD COMPANY.

(Filed 8 May, 1912.)

Railroads, Domestic—Personal Injuries—Damages—Venue—Adjoining County—Interpretation of Statutes.

The provisions of Revisal, sec. 424, permitting a plaintiff to sue a railroad for damages for a personal injury in an adjoining county to that wherein the cause of action arose, applies to all railroad companies.

APPEAL by defendant from *Foushee, J.*, at November Term, 1911, of MITCHELL.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

J. W. Pless for plaintiff.

J. Bis Ray, Ellis Gardner, and A. S. Barnard for defendant.

CLARK, C. J. This is an appeal from a refusal of a motion to remove the cause from Mitchell County to Yancey. The plaintiff is a resident of Yancey County. The defendant is a railroad company, having its principal place of business in Yancey, with its line partly in Mitchell and partly in Yancey. The cause of action is a personal injury which occurred in Yancey County.

This case falls directly under the *proviso* in Revisal, 424, that "an action against a railroad shall be tried either in the county where the cause of action arose or in the county where the plaintiff resided at the time the cause of action arose," or "in some county adjoining the county in which the cause of action arose," subject to the power of the court to change the place of trial. This application for the change in venue was not made on the ground of the convenience of witnesses (158) or on account of local prejudice, which are matters within the irreviewable discretion of the presiding judge, but upon the ground that the proper venue was in Yancey County. Mitchell adjoins Yancey, and under the proviso in Revisal, 424, above quoted, the plaintiff had his election to bring the action either in Yancey or in any adjoining county. In *Propst v. R. R.*, 139 N. C., 397, the proviso was construed and it was held that this section of the Revisal applied to all railroads, both domestic and foreign.

Under the preceding sections 419 (1) an action against a railroad for setting our fire must be brought in the county where the land lies. *Perry v. R. R.*, 153 N. C., 117. Section 424 provides for venue "in all other cases," with the proviso as to railroads, which must be construed as applying to all cases not provided for in the preceding sections. *Propst v. R. R.*, 139 N. C., 399.

Affirmed.

J. H. RIPLEY v. T. H. ARMSTRONG.

(Filed 22 May, 1912.)

1. Wills—Acknowledgment—Signing Sufficient.

It is sufficient acknowledgment of a will, and the same in effect as if the testatrix had signed in the presence of the witnesses, for her to hold the signed instrument in her hands, declare it to be her last will and testament, saying she had signed it, and request the witnesses to sign, which they did in her presence.

2. Wills—Interpretation—Intent—Testator's Circumstances—Evidence.

The primary purpose in construing the will is to ascertain the testator's intent, and it is competent to consider his condition and that of his family, with all the attendant circumstances.

3. Same—Devise—Powers of Sale.

When it appears that the land of the testatrix was of comparatively little value, without sufficient income to maintain her children, the beneficiaries of her will, and that it was mortgaged without provision or means for releasing it, except by sale, a devise of the lands to the husband, "to use as he thinks best for the maintenance of" their children, makes the husband the trustee, and vests in him the power to sell and convey the property in fee simple.

(159) APPEAL by plaintiff from judgment rendered by *Foushee, J.*, 25 April, 1912; from HENDERSON.

Smith, Shipman, and Justice for plaintiffs.
Michael Schenck for the defendant.

CLARK, C. J. The plaintiff contracted to sell a tract of 17½ acres to the defendant, who now refuses to pay for the same upon the ground that the plaintiff cannot execute a good title. The plaintiff acquired title under the will of his wife.

Two questions are presented on this appeal. It appears in the probate of the will that the testatrix, "holding the instrument in her hands, with her name written at the bottom, acknowledged and declared the same to be her last will and testament; that the same had been signed by her; that she then and there requested the witnesses to sign the instrument, which they did in her presence and at her request as witnesses." This was sufficient. *Elbeck v. Granberry*, 3 N. C., 233; *Bateman v. Mariner*, 5 N. C., 176. This acknowledgment was of the same effect as if the testatrix had signed in the presence of the witness, which indeed is more than the statute requires. *In re Herring*, 152 N. C., 260.

The provision in the will in controversy is as follows: "I give and bequeath to my beloved husband, J. H. Ripley, all my real estate con-

sisting of land, houses and whatsoever it may be in Hendersonsville, N. C., or wheresoever it may be found, also all my personal property to use as he thinks best for the maintenance of our children." Upon this language, especially taken in connection with the attendant circumstances, we are of opinion that the plaintiff took as trustee, with power under the will to sell and convey the property in fee simple. The primary purpose in construing a will is to ascertain the intention of the testator from the language used by him. In ascertaining such intention it is competent to consider the condition of the testator and family and all the attendant circumstances. *Parks v. Robinson,* 138 N. C., 269. In *Crawford v. Wearn,* 115 N. C., 540, it was held that the "power to invest or use" conferred upon the life tenant the power to (160) convey in fee simple.

It appears upon the "facts agreed" in this case that the testatrix had executed mortgages upon the land described, aggregating $2,200, which were unpaid and a lien upon her land at the time of her death, and that she left no fund or personalty with which to liquidate said indebtedness; that the land is not valuable for agricultural purposes and it is without improvements thereupon except a cottage, and no income can be derived from the land suucient to maintain the family of four children who survived her, except by a sale; that it was necessary for the plaintiff to sell the land to obtain means of maintenance for the children. Upon these facts it is placed beyond reasonable doubt that the intention and meaning of the testatrix was to vest the husband with authority to sell said land, and that he can make a good title in fee thereto.

Upon the case agreed the judgment must be

Reversed.

G. A. WHITFORD v. BOARD OF COMMISSIONERS OF CRAVEN COUNTY.

(Filed 28 May, 1912.)

1. Schools, County Farm-life—Racial Distinctions—Separate Schools—Equal Facilities—Interpretation of Statutes—Constitutional Law.

Public Laws of 1911, ch. 84, providing for the establishment of county farm-life schools, by its provision that only one school of the kind shall be established in any county, does not deprive the local authorities of the power to provide equal facilities for the two races, but means that there shall not be more than one school of this kind for the instruction of both races, in separate buildings, with equal facilities; and is therefore constitutional. *Williams v. Bradford,* 158 N. C., 36, cited and distinguished.

2. Interpretation of Statutes—Constitutional Law—Presumptions.

There is a strong presumption in favor of the validity of legislation, and the courts will not declare an act unconstitutional unless it is clearly so, beyond a reasonable doubt.

(161) APPEAL by plaintiff from *Whedbee, J.*, at May Term, 1911, of CRAVEN.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

R. A. Nunn for plaintiff.
E. M. Green for defendant.

WALKER, J. This action was brought to restrain the collection of a tax and the issue of bonds by the county of Craven and Township No. 1 in the said county. The tax was levied and the bonds are proposed to be issued for the establishment, support, and maintenance of a county farm-life school in the county and township, under and by virtue of Public Laws 1911, ch. 84, the provisions of which have been fully complied with. Elections were duly held in the county and township, and by a majority of the qualified voters the levy of a tax of $2,500 and the issue of bonds by the county to the par value of $5,000, and by the township to the amount of $10,000, was authorized for the purposes mentioned in the statute. These and other facts not necessary to be stated were alleged in the complaint to which the defendants demurred. His Honor, *Judge Whedbee,* sustained the demurrer, and the plaintiff appealed.

The plaintiff attacks the validity of the tax levy and the bonds proposed to be issued, upon the ground that in section 17 of the act it is provided that not more than one farm-life school shall be established in any county, and by this prohibition it is argued that the local authorities are deprived of the power to provide equal facilities for the two races; but we do not think this follows. What the statute means is that there shall not be more than one school of this kind for the instruction of both races, in separate buildings, with equal facilities. Having two or more buildings for the purpose of racial separation does not constitute two legally distinct schools. It is all one school, though consisting of two divisions, one for each race.

The plaintiff contended that the principle announced in *Williams v. Bradford,* 158 N. C., 36, applies to this case, but we think the two cases are widely different. In the *Williams case* it was clear that provi-
(162) sion was made for one race only; but in this case the statute does not provide for each race exclusively, and it might just as reasonably be argued that the benefit of the school was confined to the colored race, as it can be that it is restricted to the white race.

We are not at liberty to declare a legislative act void, as being unconstitutional, unless it is clearly so beyond any reasonable doubt. There is always a strong presumption in favor of the validity of legislation, which must be overcome by some convincing reason to induce a court to declare it void. The act under consideration makes no discrimination between the races, and there is no expression in it which leads us to think that the school was intended for the exclusive benefit of the one race or the other. In this respect the language of the act is not unlike that which we construed in *Lowery v. School Trustees,* 140 N. C., 33, favorably to a provision establishing a graded school, in which *Justice Connor* said: "While in other acts which we have examined the plural is used, we see no difficulty in finding in the act a positive direction to establish one school in which the children of each race are to be taught in separate buildings and by separate teachers. The Constitution expressly commands it to be done; this was well known to the draftsman and the Legislature."

There was no error in sustaining the demurrer.

Affirmed.

Cited: *Moran v. Comrs.,* 168 N. C., 291.

BOARD OF EDUCATION OF GRAHAM COUNTY v. UNION DEVELOPMENT COMPANY, B. M. ORR, HENRY DITMORE, ET AL.

(Filed 28 May, 1912.)

1. Deeds in Escrow—Title—Suits—Equity—Practice.

Until the performance of the conditions of a deed to lands held in escrow the title remains in the grantor to the extent that ordinary actions for the protection of the property and preservation of the title may be brought by him.

2. Deeds in Escrow—Suits—Cloud on Title—Equity—Interpretation of Statutes—Relief.

When the conditions of a delivery of a deed placed in escrow have been performed pending suit, and the grantor, grantee, and adverse claimants are all before the court, *semble,* in proceedings to remove a cloud upon the title to lands, if the parties so desire, the cause may be proceeded with, it being in the nature of an equitable proceeding and the scope of the relief being somewhat enlarged and extended by statute. Revisal, sec. 1589.

3. Same.

During the progress of the trial of a suit brought by a county board of education to remove a cloud upon the title to one acre of its land to be

used for school purposes, and claimed by the defendants as a part of their lands, it appeared that the plaintiff had executed a deed to the defendants and placed it in escrow for delivery when the defendants executed to the plaintiffs a deed for the one acre claimed by and to be selected by it, and which had not been done at the time of the trial: *Held*, the plaintiff was entitled to proceed with its suit.

(163) APPEAL from *Lane, J.*, at Spring Term, 1912, of GRAHAM.

Action to remove a cloud from title to about one acre of land in possession or claimed by plaintiff. On adverse intimation of the court as to plaintiff's right to maintain the action, plaintiff submitted to a nonsuit and appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE HOKE.

Morphew & Phillips for plaintiff.

A. D. Raby and Dillard & Hill for defendants.

HOKE, J. As we understand the record, this is an action to remove a cloud from the title to an acre of land, held and claimed by plaintiff for school purposes, and arising by reason of an adverse claim made to said land by the individual defendants, B. M. Orr et al. During the progress of the trial it appeared that plaintiff board had prepared a deed for the land in controversy to the defendant the Union Development Company and deposited the same as an escrow with Mr. George B. Walker, to be delivered when said company had executed a deed to plaintiff for one acre of the company's land for school purposes, to be selected by
(164) the school board, and that this site had not been selected nor the deed therefor made by the company at the time of trial. Upon these facts, we think that the action should have been allowed to proceed. It is very generally held that in case of an escrow until condition performed, the title remains in the grantor, and the ordinary actions for the protection of the property and preservation of the title may be brought by him. *Calhoun v. Emigrant Co.*, 93 U. S., 124; *Fuller v. Hollis*, 57 Ala., 435; *Ins. Co. v. Nolin*, 56 S. W., 198 (Tex. Civ. App.); 3 Washburne on Real Property (5 Ed.), p. 321; Hopkins on Real Property, p. 135; 16 Cyc., p. 578.

Arrington v. Arrington, 114 N. C., 116, does not antagonize the principle, and *Craddock v. Barnes*, 142 N. C., 89, is in direct recognition of it. Thus, in page 97, *Associate Justice Walker*, delivering the opinion, says: "It is therefore the performance of the condition and not the second delivery that gives it vitality as a deed sufficient to pass the title," etc.

Apart from this, an action of this character is in the nature of an equitable proceeding, the scope of the relief having been somewhat en-

larged and extended by the provisions of our statute, Revisal, sec. 1589. 6 Pomeroy Eq. Jurisprudence, sec. 724 *et seq.* And even in case of conditions performed pending suit, the grantor and grantee and adverse claimants being all before the court, there seems to be no reason, if the parties so desire, why the trial of the cause should not be proceeded with.

There was error in the ruling of the court, and this will be certified, that the order of nonsuit be set aside and the issues raised properly determined.

Error.

(165)

J. S. ROBINSON v. MRS. H. H. JARRETT.

(Filed 28 May, 1912.)

Married Women — Contracts — Necessaries — Support of Family — Justice's Courts—Jurisdiction—Equity.

A recovery may be had against a married woman, as if she were a *feme sole*, in a justice of the peace court for a debt incurred by her for her necessary personal expenses, or for the support of the family, by plain implication from the language of the Revisal, sec. 2094; and the doctrine requiring a suit of an equitable nature to bind her separate property has no application in such instances.

HOKE, J., dissenting.

APPEAL from *Webb, J.*, at November Term, 1911, of MACON.

The following issues were submitted to the jury:

1. Is the defendant indebted to the plaintiff? Answer: Yes.
2. If so, what amount? Answer: $21.31.

From the judgment rendered, the plaintiff appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE BROWN.

Johnston & Horne for the plaintiff.

J. F. Ray and R. D. Sisk for the defendant.

BROWN, J. This action was brought before a justice of the peace against the defendant for the recovery of $200, alleged to be for necessaries of life furnished to the defendant for the use of herself and her immediate family. This is the only assignment of error. The defendant offered no evidence.

The evidence of the plaintiff tends to prove that the defendant had brought suit against her husband in October, 1909, for divorce from bed and board. At Spring Term, 1910, the plaintiff amended her complaint,

charging adultery upon the part of her husband, and obtained a judgment for divorce *a vinculo,* 7 May, 1910. This action was instituted 11 June, 1911.

The plaintiff's evidence tended to prove that the defendant had purchased a part of the goods, to wit, $21.31, after the decree of divorce was entered. His Honor held that the justice of the peace had no jurisdiction as to the remainder of the debt, and directed the jury to
(166) enter a verdict for $21.31. The plaintiff excepted and appealed.

The evidence offered for the plaintiff tended to prove that the entire debt, except the aforesaid $21.31, for which the suit was brought, was incurred by the defendant pending the divorce proceedings between herself and her husband, for the necessaries of life for herself and her family, for food and clothing.

The evidence also tended to prove that for some time prior to the institution of the divorce proceedings the defendant and her husband had not lived together as man and wife, and that the defendant had contracted debts for the necessaries of life for the support of herself and children.

We are of opinion that his Honor erred in holding that the justice of the peace had no jurisdiction. It is true that it has been held in a great many cases that a justice of the peace has no jurisdiction to render a judgment against a married woman upon a contract entered into without the written consent of her husband, and that the remedy is to proceed in equity in the Superior Court to charge the separate estate of the married woman, if the facts justify. *Dougherty v. Sprinkle,* 88 N. C., 301; *Flaum v. Wallace,* 103 N. C., 298; *Bank v. Benbow,* 150 N. C., 784.

These cases proceed upon the theory that at law a married woman is incapacitated to bind herself personally, and hence her contract will not be enforced against her *in personam,* but equity will so far recognize it as to make it bind her separate estate, and will proceed *in rem* against it. The law regards such estate as a sort of artificial person, created by the courts of equity, and that the estate is debtor and liable for her engagements. *Dougherty v. Sprinkle, supra.*

The statute, Revisal, sec. 2094, prohibited, prior to the act of 1911, a married woman during coverture from making any contract affecting her real or personal estate without the written consent of her husband, unless she be a free trader.

In this statute there are two notable exceptions, and these are: debts for her necessary personal expenses or for the support of her family, and such as may be necessary in order to pay her debts existing before marriage. These two exceptions are recognized in *Bank v. Benbow, supra,* and as to them the *feme covert* has always had, since the passage of the statute, unrestricted power to contract as if she was a
(167) *feme sole.*

It is upon this principle that the case of *Neville v. Pope,* 95 N. C., 346, and similar cases were decided, and it is based upon one of the exceptions contained in the statute. In that case it is held that a *feme covert* may be sued in the court of a justice of the peace for a debt due by her, or on a contract made by her before marriage, or for a debt contracted by her as a free trader.

We base our decision upon a construction of the statute, Revisal, sec. 2094, which gives by plain implication to a married woman the unqualified and unrestricted right to contract for necessaries for the support of herself and family, which contract may be enforced to the same extent and by the same courts as if she were a *feme sole.*

New trial.

HOKE, J., dissenting: Whatever might be my opinion if it were an open question, I think the disposition made of the present appeal is contrary to every decision of the Court construing the statute regulating the contracts of married women since same was enacted by the Legislature of 1871-72, chapter 119, beginning with *Pippen v. Wesson,* 74 N. C., 437. The question as to subsequent transactions having ceased to be of importance by reason of the Martin act, chapter 109, Laws 1911, it would serve no good purpose to make extensive reference to the cases or the reasons upon which they were made to rest. I therefore enter my dissent without further comment.

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(168)

J. E. PERSON AND WIFE, PEARCY A. PERSON, v. JOSEPH J. ROBERTS AND W. E. HAM.

(Filed 20 March, 1912.)

1. Deeds and Conveyances—Sheriff's Deed—Recitals—Execution—Evidence.

In an action for the possession of land, a recital in a sheriff's deed, in the chain of title of a party litigant, that an execution had been issued on a judgment under which the lands were sold, is not *prima facie* evidence that the execution was issued, in the absence of any proof that after due search the execution could not be found.

2. Same—Official Acts.

The act of issuing an execution is not that of the sheriff, but of the clerk, and should be proved by the execution itself, or in its absence, if lost, by entries on the record, and if it cannot be so proved and the search for it has been made without avail, the recitation in the sheriff's deed becomes *prima facie* evidence that execution had been issued.

3. Appeal and Error—Agreements—Sheriff's Deed — Recitals—Execution—Evidence.

In his action for possession of certain lands, the plaintiff introduced a sheriff's deed to the *locus in quo*, in his chain of title, and sought by evidence to estop the defendant as claiming from a common source. The defendant defended upon the ground that there was no evidence that an execution had issued under the judgment. The parties litigant filed an agreement in this Court to the effect that the sheriff's deed "was made under execution" in the case wherein the judgment relied upon was rendered: *Held*, it appeared from the words of the agreement that the execution had issued, and further evidence thereof was unnecessary; but as counsel afterwards agreed that such an admission was not intended by them, the case was decided according to the modified agreement.

4. Limitation of Actions—Title—Adverse Possession—Former Action—Evidence—Harmless Error.

In an action for the possession of lands, evidence is incompetent to show that a former suit, wherein no complaint had been filed, was for the same cause and the same relief as this one, for the purpose of rebutting the defense of title by adverse possession; but its admission was harmless in this case.

5. Deeds and Conveyances—Adverse Possession—Common Source—Senior Title—Evidence.

When in an action for the possession of land both parties claim from a common source of title, the one holding the senior title, nothing else appearing, is entitled to recover. Whether the deeds covered the *locus in quo* is a question for the determination of the jury.

6. Evidence—Maps.

An unofficial map of the land in controversy may be used by a witness to illustrate his testimony or make it intelligible to the court and jury.

7. Deeds and Conveyances—Indorsement on Deed—Evidence.

An indorsement on a deed which does not refer to the deed and with nothing to show why and by whom or under what authority it was made, is incompetent to alter or change the description of the lands conveyed.

(169) APPEAL by defendant from *Cooke, J.*, at November Term, 1910, of WAYNE.

M. T. Dickinson and Aycock & Winston for plaintiffs.
W. T. Dortch and W. C. Munroe for defendants.

WALKER, J. This is an action to recover land. There was a verdict and judgment for the plaintiffs, and defendant appealed. Plaintiffs sought to show that both parties claimed title from a common source, that is, under William Lewis, the original owner of the land, for the purpose of estopping the defendant. In order to do this, they introduced

a deed from John T. Kennedy, sheriff, to John Coley, whose lands at his death were divided among his heirs, and tract No. 2 allotted to the *feme* plaintiff, which includes the land in controversy. Plaintiff introduced other deeds for the land, but the sheriff's deed is the only one we need consider. Deeds were introduced showing that defendants claimed the land under William Lewis. There was no evidence of an execution against William Lewis, under which the land was sold, but the case was argued upon the theory that the deed recited the executions against him, under which the land was sold and the deed executed to the purchaser, John Coley.

At the hearing in this Court, the following agreement, signed (170) by the respective counsel, was brought to our notice and filed in the record. This agreement referred to the sheriff's deed, and is as follows:

"This deed was made under executions in the case of John L. Bridgers v. William Lewis, in the County Court of Wayne County, and in the cases of C. L. Perkins v. William Lewis, and E. B. Borden v. William Lewis, in the Superior Court of Wayne County."

Afterward a certified copy of the sheriff's deed was filed and it appears therefrom that the deed contains full recitals of the several executions in favor of John L. Bridgers, C. L. Perkins, and E. B. Borden against William Lewis, which had issued from the County and Superior Courts of Wayne County, and under which the sale of the land was made by the sheriff and the deed executed to John Coley, who was the purchaser.

The question raised in this Court by the counsel of defendant was that the chain of plaintiffs' title from William Lewis was not complete, by reason of the fact that they had not shown in evidence any execution authorizing the sheriff to levy upon and sell the land. It may be that the parties did not intend to agree that executions had actually issued, but only that the deed contained a recital to that effect; but we must construe the agreement as it is written, and so construed it means but one thing, *viz.*, that "the deed was made under executions in the case of John L. Bridgers and others," which, of course, means that the executions were issued and the sheriff sold the land under them. It could not well have been made otherwise under them. We do not think the recital would have been sufficient as evidence that the executions had been issued.

Plaintiffs relied on *Wainwright v. Bobbitt* to sustain their contention that it is, at least, *prima facie* evidence of the fact. But in that case there was some evidence of a search made by the clerk of the court for the execution, and the docket entries showed that executions had been issued on the judgment. Unless this reconciles that case with former decisions of this Court, we cannot approve what is said by the Court,

that more recent decisions have settled the doctrine that the recital in a sheriff's deed, as to the issue of executions, is *prima facie* evidence
(171) of the fact. We think our cases are all the other way, and we have uniformly and consistently held, since the decision in *Rutherford v. Raburn,* 32 N. C., 144, modifying the doctrine as stated in *Hamilton v. Adams,* 6 N. C., 161, that the plaintiff in the judgment, who is also purchaser at the sale under execution, must show judgment and execution, but a stranger to the judgment, only the execution. When the execution is lost, the recital in the sheriff's deed, that one had issued under which he made the sale, is *prima facie* evidence of the fact.

Harding v. Cheek, 48 N. C., 135, is cited in *Wainwright v. Bobbitt,* and is also relied on by plaintiffs. But that case was distinguished from prior decisions in *Rollins v. Henry,* 78 N. C., 342, by the fact that the judgment and execution were very ancient, dating back to 1775, eighty years before the trial of the ejectment. The particular objections in *Hardin v. Cheek* were, first, that there was no judgment; but this was answered by the statement that the plaintiff was not a party to the judgment, and therefore was not required to show that it had been rendered; second, that there was no evidence, not of the execution, but of the levy and sale, which were recited in the sheriff's deed. These were official acts of the sheriff, and under the authorities the recital, perhaps, was evidence of them, and they could be proved by parol. *Miller v. Miller,* 89 N. C., 402; *Rollins v. Henry, supra; McKee v. Lineberger,* 87 N. C., 182.

The levy, advertisement, and sale are acts done by the sheriff and in his official capacity, and are susceptible of oral proof, and besides, being the acts of a sworn officer, the recital of them in his deed, like similar recitals in a return by the officer, is *prima facie evidence* that the facts are truly stated. We find it stated in 17 Cyc., 1349, that upon the sale of property by an officer the recital in his deed of compliance with the various requirements of the statute is *prima facie* evidence of the fact, but it may be overcome by testimony proving its falsity. This statement, of course, is to be considered as subject to certain rights of a purchaser, who buys without notice of an irregularity. It is further said that, in some jurisdictions, a judgment and execution must be produced, and thereafter the recitals in the sheriff's deed, as to his acts there-
(172) under, such as levy, advertisement, and sale, are *prima facie* evidence of such facts. The author (Hon. John G. Carlisle) refers to statutes in other jurisdictions as requiring recitals of judgments, execution, and so forth, in the sheriff's deed, and making them evidence of the facts therein stated. The annotator of the text seems to say that *Wainwright v. Bobbitt* is in conflict with the other decisions of this Court; but we think it can be brought into harmony with them in the

way we have indicated. Where it is aid that the recital is *prima facie* evidence that an execution had been issued, the language of the Court must be construed with reference to the particular facts of the case then being decided, and it will be found that the expression is used with reference to proof that the execution had been lost, or reference is made to the official acts of the sheriff, such as levy and sale. We take it that *Rollins v. Henry* finally and conclusively settled the law in this respect, for *Justice Rodman* there says: "The rule which seems to be established, and which is supported by reason, appears to be this: The return to an execution is ordinarily the best evidence of a levy and sale under it. But when the execution has not been returned to the clerk's office, and it, with any return on it, has been destroyed or lost, and it is proved otherwise than from the recital that there was a judgment and execution, the recital in a sheriff's deed is *prima facie* evidence of the levy and sale, they being official acts of the sheriff, even although the sale was not *(sic)* a recent one. The rule is intended to be applicable only to cases like the present, and does not touch cases like *Hardin v. Cheek,* where the deed was an ancient one, but there was no proof of a judgment and execution."

We have discussed this question somewhat at length because of its great importance, and as it is very likely to arise in everyday practice.

The act of issuing an execution is not that of the sheriff, but of the clerk, and can easily be proved by the execution itself, or in its absence, if lost, by the record, and if not, then the recital in the sheriff's deed becomes *prima facie* evidence. In this case, though, it is admitted that executions were issued, as we have shown.

It appears that a former suit was brought, but no complaint (173) filed, and plaintiffs were permitted to show by parol what was the cause of action in that case, for the purpose, we presume, of rebutting the defense of the statute of limitations, or, to be more exact, the claim of title by adverse possession. If it had been material to show that the two actions were for the same cause and the same relief, the ruling would be erroneous. The point was decided against the contention of the plaintiffs in *Bryan v. Malloy,* 90 N. C., 508, in which *Justice Ashe* says: "Verdicts, judgments, depositions in a former cause, and the former testimony of deceased witnesses are considered as resting on the same principle. . . . The plaintiffs offered parol evidence to show that the action was brought to set aside the deed made by the Sinclairs to Kennedy. But his Honor excluded the evidence and the deposition taken in the cause. The plaintiffs alleged error in these rulings, and in support of their position relied upon *Long v. Baugas,* 24 N. C., 290, and *Yates v. Yates,* 81 N. C., 397. In the former of these cases *Chief Justice Ruffin,* who spoke for the Court, said: 'If the record can be aided by the aver-

ments and parol evidence, as held in New York, we find according to those cases that it can only be done when from the form of the issues the record does not and could not show the grounds upon which the verdict proceeded, and when the grounds alleged are such as might legally have been given in evidence, under the issue, and were in evidence in such way as to make it appear from the issue and verdict that these facts and grounds must have been necessarily and directly in question, or determined, and that upon these grounds, and no other, the verdict must have been found.' In *Yates v. Yates* the Court cited this decision with approval, and reiterated the doctrine there enunciated. The principle established in these adjudications is, that parol proof is admissible and only admissible in aid of the record; that is, whenever the record of the first trial fails to disclose the precise point on which it was decided, it is competent for the party pleading it as an estoppel ot aver the identity of the point or question on which the decision was had, and to support it by proof. But there must be a record to be aided. When there is no record, as in our case (in which there was no complaint), there (174) is no foundation for the proof." But our examination of the record does not disclose to us any such evidence of the defendant's adverse possession as made the testimony material or the fact of a former suit essential. Plaintiff might well recover without it; the statute was not in their way, and therefore the error was harmless.

The real question in the case was whether the parties claimed title from a common source, the plaintiff having the older title, and the evidence showed that they did. The judge left it to the jury to say if this was true, and also required them to find that the plaintiffs' deed covered the *locus in quo*. The jury found with the plaintiffs on this question, and as the parties claimed from a common source of title, and the plaintiffs held the senior title, they were entitled to recover. *Bowen v. Perkins,* 154 N. C., 449.

There are numerous exceptions to evidence relating to the location of the land, but no new principle is involved. The facts proposed to be elicited all tended to show that the description in the plaintiffs' deed embraced the land, and the evidence, therefore, was admissible.

It was competent for the court to permit a witness to use even an unofficial map for the purpose of illustrating his testimony or of making it intelligible to the court and jury. *Andrews v. Jones,* 122 N. C., 666, and cases cited; *Pickett v. R. R.,* 153 N. C., 148.

The entry which was indorsed on the deed was no part thereof, and was, therefore, incompetent as evidence to alter or change its description of the land. There is no reference in the deed to it, and nothing to show who put it there or by what authority the entry was made.

Since this opinion was prepared, counsel have agreed, in writing, that it was not their intention to admit that the sheriff's deed was actually made after a sale under execution which had duly issued from the court, but only that the deed recited that fact, and if their former agreement is otherwise expressed, it was inadvertently done. Upon this assurance of counsel, which we now adopt as the true meaning of their stipulation, we must declare, in accordance with our ruling, that there was error in receiving the recitals of the sheriff's deed as (175) *prima facie* evidence that executions had issued, without any preliminary proof of search for the executions and their loss. Because of this error there must be a

New trial.

Cited: Whitaker v. Garren, 167 N. C., 662; *Thompson v. Lumber Co.,* 168 N. C., 228; *Mason v. Tel. Co.,* 169 N. C., 234; *Cropsey v. Markham,* 171 N. C., 45.

J. M. DALTON, CHAIRMAN BOARD OF ROAD TRUSTEES OF COWEE TOWNSHIP, v GEORGE C. BROWN & CO. (INC.).

(Filed 28 May, 1912.)

1. Taxation—Occupations—Class Legislation—Legislative Powers — Constitutional Law.

The only constitutional restriction upon the power of the Legislature in classifying vocations and laying a tax of a different amount upon the different occupations is that the tax shall be uniform upon all in each classification.

2. Same—Highways—Heavy Hauling—Lumber Companies.

An act authorizing a levy of a tax of two cents per mile on each 1,000 feet of mill logs, lumber, or other heavy material hauled by "any lumber company, corporation, person or persons engaged in the lumber business" and using the public roads of a certain county, is not the levy of a property tax, which is required to be uniform and *ad valorem,* but a taxing of a particular vocation, which is uniform in its application to that class, is without discrimination therein, and not in contravention of the fourteenth amendment of the Federal Constitution, or of Art. V, sec. 3, and Art. I, sec. 17, of the Constitution of North Carolina.

3. Same—Reports—Penalty Statutes.

A valid legislative enactment authorizing the levy of a tax upon those using the public roads of a certain county for hauling mill logs, etc., thereon, of two cents per mile on each 1,000 feet thereof, is not unconstitutional in its requirement that those thus using the roads make a report upon which the proper amount of taxes may be collected, and im-

posing a penalty of $10 a day for each day they fail to make the report; and it being within the power of the Legislature to require them to make such report, the penalties incurred are enforcible.

4. Courts—Judicial Notice—Highways—Heavy Hauling—Lumber Companies.

The courts will take judicial notice of the fact that lumber companies and others engaged in the lumber business do greater injury to the public roads used by them than is done by the ordinary use.

5. Same—Taxation—Equality.

A tax of two cents per 1,000 feet for the use of the public roads of a certain county by those hauling mill logs, etc., thereon is held in this case to be reasonable and just, and within the legislative power to authorize its collection in equalizing the burdens of taxation with the other users of the roads who do less injury to them, and thus provide a fund for their repair.

6. Same—Legislative Powers—Police Powers—Constitutional Law.

The levying of a tax upon those hauling mill logs, etc., upon a public road of a certain county is within the discretionary power of the Legislature, and comes within its police power, with which the fourteenth amendment to the Federal Constitution does not interfere.

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

(176) APPEAL by defendant from *Lane, J.*, at Spring Term, 1912, of MACON.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

J. F. Ray, Johnston & Horn for plaintiffs.

T. J. Johnston for defendants.

CLARK, C. J. Chapter 115, Public-Local Laws 1911, entitled "An act to provide a better system for working and keeping up the public roads of Macon County," is a substitute for the former system of working the roads in that county. Section 15 of said chapter provides: "Any lumber company, corporation, person or persons engaged in the lumber business and desiring to use any of the public roads of any of the townships of Macon County for the purpose of carrying on its or their business of hauling, either by itself or themselves, or by hiring or contracting with other persons, mill logs, lumber, or other heavy material with log wagons, log carts, or other heavy vehicles, shall pay a license or privilege tax of two (2) cents per mile on each 1,000 feet of
(177) mill logs, lumber, or other heavy material so hauled."

Then this section provides that such corporations, firms, or persons shall make a monthly report to the road trustees of the amount of feet hauled each month, and a penalty of $10 per day for each day they fail to make report, etc.

This action was begun before a justice of the peace for accumulated penalties aggregating $50 for failure to make the monthly reports required by the statute. On appeal to the Superior Court by the defendant from the judgment of $50 imposed by the justice, the defendant filed a written demurrer alleging that the statute was unconstitutional because in violation of the fourteenth amendment and in violation of the Constitution of North Carolina, Art. V, sec. 3, which requires taxation by uniform rule of all property, and also because in violation of Article I, sec. 7, of the State Constitution, which prohibits special privileges, and also in violation of Article I, sec. 17, which prohibits the deprivation of life, liberty, or property except by the law of the land.

The demurrer was overruled. The only point actually presented is as to the power of the Legislature to require reports by lumber companies of the quantity of lumber hauled by them each month over the roads of Macon County. The statute expressly provides this penalty for failure to perform that duty. The failure to pay is made a misdemeanor subject to a fine of $50, and the civil action for failure to make the report is expressed to be in addition to the fine for failure to pay. There can be no question as to the right of the Legislature to require such report. The State is certainly sovereign as to the regulation of its dirt roads. *S. v. Sharp,* 125 N. C., 632; *S. v. Wheeler,* 141 N. C., 776. This would dispose of this appeal. But the question was debated before us upon the broader proposition, whether the act was unconstitutional by reason of the tax being a discrimination and therefore in violation of the constitutional provisions referred to in the demurrer.

It is a matter of common knowledge that lumber companies and others engaged in lumber business do great injury to the public roads. The Legislature deemed it unjust to make the owners of farm land and free labor pay road tax and work the public roads and (178) then to allow lumber companies and others hauling lumber to cut them to pieces without any remuneration or any legal method provided to make them bear an adequate proportion of the burdens. It does not appear upon the face of the fact, which is all that is before us upon this demurrrer, that there is any other business carried on in that community which would tend to cut up the roads as the hauling of lumber is calculated to do. But even if this did appear, the Legislature can classify vocations and lay a tax of a different amount upon the different occupations. The only requirement is that the tax shall be uniform upon all in each classification.

In *S. v. Powell,* 100 N. C., 526, the town of Morganton was authorized to levy privilege taxes of different sums on general occupations, including livery stables, selling sewing machines, etc., and fixing a penalty for carrying on each business without paying the license. This Court held that

"A tax is uniform which is the same upon all persons in the same class," and that it is in the discretion of the taxing power to place different rates of taxation on the different classes, citing *R. R. Tax Cases,* 92 U. S., 575, and *Puitt v. Commissioners,* 94 N. C., 709. *Smith, C. J.,* pointed out that the error in opposing the validity of the taxation consisted "in regarding such tax as imposed *on property,* in which both uniformity and the *ad valorem* principle must be observed. This is not a property tax, but a tax upon an occupation or vocation, and is not less so because the appurtenances to a livery stable necessary in conducting the businesss may be carriages, horses, and other property. Indeed, these articles, though so used, are still subject to the *ad valorem* assessment as property. As other trades, *purely personal,* without regard to the magnitude of the business carried, on, may be subjected to a tax of a fixed sum, we see no reason why those which require the use of property may not be."

On turnpike roads, which are kept up by private enterprise, there is one rate for lighter vehicles and a higher rate for heavier vehicles. There is no reason why the Legislature cannot authorize the county to lay a rate of two cents per 1,000 feet for the use of roads in (179) hauling lumber over them and content itself with exacting no tax upon other conveyances which do less damage, and for which the legislative judgment is that the regular road tax was a sufficient return.

In *R. R. v. Reidsville,* 101 N. C., 404, the Court sustained the validity of an ordinance of the town which levied a $50 tax on every railroad running through the town, saying that it was not repugnant to our own Constitution nor to the Constitution of the United States. In *Worth v. R. R.,* 89 N. C., 295, *Smith, C. J.,* said: The uniform rule to be observed in the exercise of the taxing power seems to be so far applicable to the taxes imposed upon trades, professions, franchises, and incomes as to require no discriminating tax to be imposed upon persons for pursuing the *same vocation, while varying amounts may be assessed upon vocations or employments of different kinds."* It was further added that this principle had been sustained by *Mr. Justice Miller* in *R. R. Tax Cases,* 92 U. S., 663, which held that it was sufficient "that the rule as to innkeepers be uniform as to all innkeepers, that the rule as to ferries be uniform as to all ferries, and that the rule as to railroad companies be uniform as to all railroad companies."

In *Rosenbaum v. New Bern,* 118 N. C., 92, *Avery, J.,* says: "The law of uniformity does not prohibit the classification by the municipality of dealers in a particular kind of merchandise separately from those whose business it is to sell other articles falling within the same general terms." To the same effect, *Schaul v. Charlotte,* 118 N. C., 733.

In *Lacy v. Packing Co.*, 134 N. C., 572, the subject is fully discussed, and it was held to be well settled that "A tax is uniform when it is equal upon all persons belonging to the prescribed class upon which it is imposed. It has been held that the tax may be different upon a dealer in whiskey by retail and dealer in the same article by wholesale, if uniform as to each class. *Gatlin v. Tarboro*, 78 N. C., 122. On tobacco buyers as a specified class, *S. v. Irvin*, 126 N. C., 989; on hotel keepers as a class, graduated in amount by the gross receipts and exempting those whose yearly receipts are less than $1,000, *Cobb v. Commissioners*, 122 N. C., 307; on the total amount of purchases by a merchant, in or out of the city, except purchases of farm (180) products from the producer, *S. v. French*, 109 N. C., 722; 26 Am. St., 590; in cities and towns according to population, *S. v. Green*, 126 N. C., 1032; *S. v. Carter*, 129 N. C., 560. In *S. v. Stevenson*, 109 N. C., 734, 26 Am. St., 595, it is said: "It is within the legislative power to define the different classes and to fix the license tax required of each class. All the licensee can demand is that he shall not be taxed at different rate from others, in the same occupation, as classified by legislative enactment." This is stated as a universal rule. I Cooley Taxation (3 Ed.), p. 260. The Court further said in reference to the fourteenth amendment: "It has been repeatedly decided by the Supreme Court of the United States that this section of the Constitution does not forbid the classification of property or persons for the purposes of taxation, but merely compels the equal application of the law to all members of the same class, when the classification is based upon reasonable ground and is not an arbitrary selection," citing numerous cases. The Court also said: "The Legislature is sole judge of what subjects it shall select for taxation (other than property tax, which must be uniform and *ad valorem*, and the exercise of its discretion is not subject to the approval of the judicial department of the State." A very full discussion of the whole matter, concluding as above, will be found in *S. v. Packing Co.*, 110 La., 180.

Lacy v. Packing Co. is cited and the above doctrine reiterated by *Hoke, J.*, in *Land Co. v. Smith*, 151 N. C., 75. In *S. v. Holloman*, 139 N. C., 642, the Court sustained a very similar statute to this, except that instead of the tax being levied in proportion to the quantity of lumber hauled, it laid a flat rate of an annual license tax for each cart or vehicle used for hauling lumber, without reference to the quantity in each load or the number of loads made. The Court said (p. 646): "This statute deprives no citizen of any right to use the highway. It does not restrain trade nor it is oppressive. Heavily loaded vehicles cut up and injure the roads, and a reasonable license tax, the proceeds of which are appropriated to repairing the damage thus produced, is

exceptionally equitable. The *method for making and keeping in repair the public roads is a matter solely for the legislative department.*"
(181) The tax of two cents per mile per 1,000 feet is reasonable, and is not discriminative simply because it does not include all vehicles. As is said in *S. v. Holloman, supra,* 646: "This license tax is simply a mode of regulating the use of the public roads and requiring that those desirous of using them for extraordinary purposes, as hauling heavy lumber and logs over the road in unusually heavy vehicles, shall not do so without taking out a license for such unusual and extraordinary and injurious use of the public highway and paying a license for the privilege." The reports required to be filed monthly of the quantity of lumber hauled is no hardship on defendants. It is only a method by which the road trustees can ascertain accurately the quantity of lumber hauled by each person engaged in the lumber business and proportion the tax levied accordingly.

The Fourteenth amendment does not require equality in levying taxation by the State, nor does it interfere with the police power. "How a State shall levy its taxation is a matter solely for its Legislature, subject to such restrictions as the State Constitution throws around legislative action. If, on the other hand, working the roads by labor is a police regulation or a public duty, certainly it is not a matter of Federal supervision." *S. v. Wheeler,* 141 N. C., 776; Brannon's Fourteenth Amendment, 149, 298, 323, and cases there cited.

The other two sections of the State Constitution prohibiting special privileges and prohibiting the deprivation of life, liberty, and property except by the law of the land, which are referred to in the demurrer, have no application to this case. The Legislature was within its legitimate powers in prescribing regulations for the maintenance of the public roads of Macon County and in laying a tax upon the use of heavy vehicles for the purpose of raising a fund to repair the damages usually inflicted on the roads by such traffic.

Affirmed.

BROWN, J., dissenting: I would be very glad to sustain the act of the General Assembly in question if I could reconcile it with the principles of taxation embodied in our Constitution. I recognize the inher-
(182) ent justice and value of such legislation, for it is an admitted fact that lumber companies do use the public roads to a far greater extent than private citizens.

I agreed to the decision in *S. v. Holloman,* 139 N. C., 642, because the statute was framed upon a very different principle from the one under consideration. There is a wide difference between this law and the Hertford County law. The latter applies to all persons, firms, or cor-

porations using the public roads of the township; whereas the Macon County law is confined in its operation to any lumber company, corporation, or person engaged in the lumber business, and levies a tax of two cents per 1,000 feet upon the lumber belonging to such users of the public road. This tax cannot be sustained as an exercise of police power. It does not in any way tend to promote health, peace, morals, and good order of the people. Cooley Constitutional Limitations, 572.

It is not a license tax or regulation tax in any case. Cooley on Taxation, 408. It is a contract pure and simple for keeping up the public roads, levied solely upon the property of those who happen to be engaged in the lumber business. It does not apply to the private individual who may haul hundreds of thousands of feet of lumber over the same road for his individual benefit.

Nor does it apply to those engaged in hauling, as a business, brick, clay, coal, or other heavy material over the same road.

The tax cannot be called uniform, because it does not apply to all persons using the public roads, but to a particular class who happen to be engaged in a certain kind of business. I admit that there is certain discretion given to the lawmaking power in regard to legislation affecting the public roads, but it is not an uncontrollable discretion; and when the tax is confined to one particular class of persons and not extended to all alike who use the same road, it cannot be called a regulation, but it is a revenue measure, pure and simple, and inasmuch as it is not uniform and does not bear alike upon all who use the public roads, it violates the uniformity of taxation, which is one of the essential features of our Constitution. Gray's Limitations of Taxing Power, sec. 1450; *S. v. Moore,* 113 N. C., 697.

It is said, however, that this action for the penalty may be (183) sustained because the Legislature has a right to make the defendants report monthly to the road trustees the number of feet of lumber, logs, and other heavy material hauled during the preceding month, in order that the tax of two cents per 1,000 feet may be collected.

It is apparent from reading the statute that this report is simply a part of the machinery for collecting taxes, and inasmuch as the statute must be taken as a whole, if the tax is void for lack of uniformity, then the whole statute falls to the ground.

MR. JUSTICE ALLEN concurs in this opinion.

Cited: Mercantile Co. v. Mount Olive, 161 N. C., 125; *S. v. Bullock, Ib.,* 225.

E. L. MASON v. SEABOARD AIR LINE RAILWAY COMPANY ET AL.

(Filed 28 May, 1912.)

1. Carriers of Passengers—Mileage Books—Exchange Tickets—Contracts—Conditions.

Railroad companies are under no legal obligation to sell mileage books at a less rate than that fixed for ordinary fare, and a sale of such books forms a contract between the railroad and purchaser which binds the latter to the condition that he exhibit to the conductor his mileage book, together with his exchange ticket, when riding as a passenger.

2. Same—Status of Passenger—Ejection from Train—Interpretation of Statutes.

When a purchaser of a mileage book from a railroad company is riding on an exchange ticket, and refuses, without excuse, to show his mileage book, in connection with the ticket, to the conductor on the train, he is not regarded as a passenger, and the conductor has the right to eject him from the train. Revisal, sec. 2629.

3. Carriers of Passengers—Mileage Books—Exchange Tickets—Contracts—Consideration.

When a passenger accepts a mileage book from the carrier at a reduced rate, and has been afforded an opportunity to purchase the ordinary or usual ticket, he enters into a contract with the carrier different from that implied by law upon the purchaser of an ordinary ticket at full rate or fare, and is bound in such cases by the terms of the contract in consideration of the reduced price.

4. Carriers of Passengers—Mileage Books—Exchange Tickets—Contracts—Conditions—Knowledge.

A passenger who has purchased a mileage book from the carrier, and is riding on an exchange ticket, knowing the conditions thereon, is not excused from the fulfillment of a condition that he exhibit the mileage book to the conductor on the train, if demanded. The reasonableness of this condition discussed by BROWN, J.

5. Carriers of Passengers—Mileage Books—Exchange Tickets—Conditions—Conductor—Principal and Agent—Waiver.

Semble, it is not optional with the conductor on the train to waive the requirement that a purchaser of a mileage book, riding on an exchange ticket, exhibit the mileage book to him.

6. Carriers of Passengers—Mileage Books—Contracts—Retaining Exchange Ticket—Ejection—Damages.

The plaintiff, claiming damages in his action against the carrier for a wrongful ejection from the train on which he was riding, was shown not to have been a passenger, for the reason that he refused to comply with the condition of his ticket, exchanged for mileage, requiring him to show

the mileage book to the conductor: *Held*, the fact that the conductor failed or refused to return to the plaintiff his exchange ticket did not entitle the plaintiff to his passage without complying with his contract.

HOKE, J., concurring; CLARK, C. J., and ALLEN, J., dissenting.

APPEAL from *Adams, J.*, at October Term, 1911, of MECKLEN- (184)
BURG.

Civil action to recover damages for an alleged unlawful ejection of plaintiff from passenger train of the defendant.

This issue was submitted to the jury:

Was the plaintiff a passenger on the defendant's train, as alleged in the complaint? Answer: No.

There was a judgment for the defendant. The plaintiff excepted and appealed.

Tillett & Guthrie, Stewart & McRae for the plaintiff. (185)
Burwell & Cansler and R. S. Hutchison for the defendant.

BROWN, J. The question presented by this appeal and raised by the assignments of error is whether the plaintiff was a passenger upon the defendant's train and unlawfully ejected. It is admitted that he was ejected by the conductor under direct orders from the authorities of the defendant, and it is not contended that there is any evidence that the said ejection was accompanied with undue force. There is no evidence of rudeness, insult, or other unnecessary force used in expelling the plaintiff from the train. The facts are practically undisputed.

The plaintiff purchased of the defendant a mileage book at the rate of two cents per mile. He signed his name to the contract contained in it. On 14 April, 1910, he was a passenger from Charlotte to Ellenboro on the defendant's road. He had presented his mileage book to the agent at Charlotte, who pulled the proper number of coupons to cover the distance, and gave him the exchange ticket. On his trip he exhibited both the mileage book and the ticket to the conductor and completed his journey. On the return trip, the same afternoon, he presented his mileage book to the agent, who pulled his mileage and gave him the usual exchange ticket. When the conductor asked him for his ticket, he handed him the exchange ticket, and upon being asked for his mileage book in order that the conductor might compare the exchange ticket with the book, the plaintiff refused to exhibit his book, but stated to the conductor that he had it in his vest pocket, and repeatedly declined to let the conductor see it.

The evidence of the plaintiff itself discloses that the conductor time and again requested him to show his mileage book, telling him the ex-

change ticket was not good for passage without it, and that he would be compelled to put him off. The conductor wired the general passenger agent for instructions, and received a reply ordering him to put the plaintiff off the train if he refused to comply with the conditions of his mileage book and exhibit it to the conductor in connection with the exchange ticket. The conductor showed this message to the
(186) plaintiff, who still refused to show his mileage book, although he had it in his vest pocket.

Whereupon the conductor put the plaintiff off the train at the depot in Lincolnton. The plaintiff hired a vehicle, drove to Gastonia, and came over to Charlotte on another road, reaching there three hours later than he would have done had he remained on the defendant's train.

The court charged the jury, in effect, that if they believed the evidence in the case, the plaintiff was not a passenger on the defendant's train, and therefore was not entitled to recover.

In considering this question it is well to bear in mind that the rate fixed by law for the sale of tickets upon common carriers is two and a half cents per mile, while mileage books are voluntarily sold by the railroad companies at the rate of two cents per mile.

It should also be borne in mind that the Legislature has no power to require the railroads to sell mileage books at a less rate than that fixed for ordinary tickets. This has been settled finally by the Supreme Court of the United States in *R. R. v. Smith,* 173 U. S., 684; and to the same effect are the decisions of the State courts of Virginia, New York, and others. *Anderson v. R. R.,* 7 L. R. A. (N. S.), 1086; *Beardsley v. R. R.,* 162 N. Y., 230.

So it must be conceded that the mileage book is a special contract of carriage between the carrier and the passenger, signed by the passenger, and made in consideration of a reduced rate of transportation, voluntarily granted by the railroad in consideration of the quantity of transportation purchased. Under such conditions the parties to the contract can incorporate in it such terms and conditions as they have mutually agreed upon.

In respect to such contracts it may, therefore, be stated as a general rule that the passenger is entitled only to those rights which the ticket confers, and is bound himself to perform the obligations which the ticket imposes upon him. Hutchison on Carriers, sec. 1053, where the author cites a great array of cases from the Federal and State courts in support of his text.

In discussing a case similar to this, the Supreme Court of
(187) Georgia says: "The plaintiff paid a special fare under a special contract. The defendant agreed that the plaintiff might travel for a fare which is not the full fare the law allowed, and the defendant

had a right to impose such conditions as they saw fit." To the same effect is *Bitterman v. R. R.*, 207 U. S., 171; *Mosher v. R. R.*, 127 U. S., 390; *Boylan v. R. R.*, 132 U. S., 146; *Watson v. R. R.*, 49 L. R. A., 454.

The consensus of all the authorities, without a single exception so far as we have been able to find, is that by accepting such a contract at a reduced rate when he has the opportunity to purchase the usual and ordinary ticket, the passenger enters into a contract with the carrier different from that implied by law upon the purchaser of an ordinary ticket at full rate of fare. The purchaser is bound in such cases by the terms of the contract, and is entitled to its advantages of reduced fare.

The right of common carriers to attach special conditions and limitations to tickets issued at reduced rates seems to have been settled by the decisions of this Court. *McRae v. R. R.*, 88 N. C., 526; *Pickens v. R. R.*, 104 N. C., 312.

The validity of this mileage contract was passed upon and upheld by this Court in an opinion by *Mr. Justice Hoke* in *Harvey v. R. R.*, 153 N. C., 567, in which it is held that "A railroad mileage book is a contract of carriage with the purchaser or lawful holder, subject to certain restrictive stipulations, for the wrongful breach of which the holder may be expelled from the company's train." This case is cited and approved in *Dorsett v. R. R.*, 156 N. C., 441. In both of these cases the railroad companies were held liable for violation of this very contract.

These identical questions have also been recently passed upon in *Desportes v. R. R.*, 87 S. C., 160; *Perry v. R. R.*, 9 App. Ga., 260; *R. R. v. Evans*, 169 Ind., 410; *R. R. v. Desauseur* 116 Ga., 53; *Harris v. R. R.*, 77 N. J. L., 278

It is immaterial whether the plaintiff read this ticket or not, for he knew of its conditions and complied with them on his trip in the morning. It was his own folly that he refused willfully and un- (188) necessarily to comply with them on his return in the afternoon. The plaintiff admitted that he had his mileage book in his vest pocket, and boastingly refused to produce it. *French v. Trans. Co.*, 199 Mass., 433.

Assuming, for the sake of the argument only, that we have the right to pass upon the reasonableness of such regulation, we are unable to see any great hardship imposed upon a passenger who desires to save a half cent per mile in traveling to require him to produce his mileage book in connection with the exchange ticket.

It is a well-known fact that the last General Assembly thoroughly investigated this question, and refused to interfere, even if it had the power. This regulation is devised to prevent impositions upon the railroad companies. As stated in the argument in this case, if the passen-

ger was not required to exhibit his mileage book to the conductor, but only the exchange ticket, he could secure many exchange tickets at the railroad station and easily sell them at a small profit. Contract of mileage is a personal one and not assignable by its very terms, and were it not for this regulation the railroad company would be utterly unable to prevent one person from traveling on the mileage book of another.

It is useless to discuss the utility of this regulation, because it seems to be universally held that if the passenger accepts the reduced rate he must take with it those conditions which the carrier attaches to it.

We find, however, in the books a great many regulations, not a whit more unreasonable than this, which have been sustained by the courts. *Reed v. R. R.,* Tex.; *R. R. v. Barlow* 105 Ga., 483; *Wenta v. R. R.,* 108 Ga., 290; *Eastman v. R. R.,* 70 N. H., 240; *England v. R. R.,* 32 Tex. Civ. App., 86; *McRae v. R. R.,* 88 N. C., 526; *R. R. v. Hudson,* 117 Ky., 995; *Dangerfield v. R. R.,* 62 Kan., 85; *Boling v. R. R.,* 189 Mo., 219.

From an unbroken line of authorities we are of opinion that the refusal of the plaintiff to present his mileage book in connection (189) with the exchange ticket by the express terms of the contract disentitles the plaintiff to ride as a passenger upon the train.

It was not optional with the conductor to waive any such violation, and he did not waive it, for he required the plaintiff to perform it that very morning, and the plaintiff voluntarily acknowledged his duty to perform it by producing the mileage book when demanded.

It is contended by the plaintiff that the conductor should have returned to him the exchange ticket. The question involved in this case is not the value of that exchange ticket, but the right of the plaintiff to continue as a passenger of the defendant's train when he willfully and obstinately refused to produce his mileage book in violation of the very contract which he had signed, a part of which reads as follows: "Good for continuous passage to destination, commencing only on date stamped on back hereof. Issued in exchange for proper number of coupons from and valid only when presented on train in connection with interchangeable mileage ticket."

This exchange ticket was absolutely valueless without the production of the mileage book, and did not entitle the passenger to transportation. The failure, therefore, of the conductor at the time to return it to the plaintiff certainly could not entitle the plaintiff to ride upon the train when he still repeatedly refused to produce his mileage book in connection with it. The identical point is decided in *Rahilly v. R. R.,* 66 Minn., 114, wherein it is said: "We are all agreed that even if the conductor had no right to take up the ticket, this would not give the

plaintiff any right to refuse to pay his fare until and unless the ticket was returned. Having no right to ride on the ticket, it was his duty to pay the fare, or leave the train, and then pursue his own remedy against the defendant for wrongfully withholding the ticket from him."

To the same effect is *Elliott v. R. R.*, 145 Cal., 441, in which it is said: "It is further contended that the defendant could not, while retaining the void ticket offered by plaintiff, legally demand the delivery of any other ticket or the payment of fare, and could not legally eject plaintiff for failure to comply with such demand. As already stated in our discussion of the findings of the court on (190) this subject, the conductor expressly repudiated this ticket as absolutely void, and notified the plaintiff that he could not honor it. It was, as a matter of fact, entirely without value.

"We are not at all satisfied that the conductor had any right to retain this ticket, but we cannot see how an improper retention of a worthless ticket by the conductor could give the plaintiff any right to remain on the train without the presentation of a valid ticket or the payment of fare. He had not exhibited or surrendered a valid ticket; he had given nothing of value to the conductor, and he had refused and continued to refuse to pay his fare."

We are of opinion that the judge of the Superior Court was right in holding that by his unreasonable conduct in refusing to exhibit the mileage book in his pocket the plaintiff forfeited his right as a passenger, and was rightfully ejected from the defendant's train. Section 2629 Revisal authorizes the ejection of passengers who refuse to pay fare or violate the rules and regulations of the carrier.

No error.

HOKE, J., concurring in the result: I am of opinion that, under existent law the mileage book, in its present form, constitutes, a contract of carriage, subject to certain restrictive provisions, and to the extent that these provisions are reasonable and reasonably insisted on, they bind the parties according to their tenor. In my judgment, the stipulation in question here is a reasonable one, being necessary to prevent the improper use of these books by persons who do not own them, and there is nothing in the record that, to my mind, justifies or permits the conclusion that in this instance the conductor acted maliciously or in wanton disregard of plaintiff's rights as a passenger. I therefore concur in the decision denying recovery to plaintiff.

CLARK, C. J., dissenting: It is too late to contest the proposition that common carriers are subject to public regulation, and that when they make regulations themselves, such regulations must be reasonable.

It is not correct that the defendant company sold the plain-
(191) tiff the mileage book at two cents per mile as a favor. When the General Assembly of this State by chapter 216, Laws 1907, prescribed two and one-quarter cents per mile as a maximum legal passenger rate an injunction was sued out in the Federal court to restrain the operation of this statute on the ground that it was confiscatory. Upon a reference to ascertain the facts, it was found that the railroad companies were making more money under the new rate than under the former higher rate. Thereupon the railroad companies proposed to the Governor of this State that if the rate was made two and one-half cents per mile they would issue mileage books at two cents per mile. In consequence the Legislature was called in special session in 1908 and adopted the two and one-half cent rate. It was well understood at the time that the mileage book theretofore in use, and which is still in general use elsewhere, from which mileage is pulled on the train, was intended. No other kind had ever been heard of in this section. It was therefore by virtue of contract with the State, and not as an act of grace, that the plaintiff was enabled to buy this mileage book. It was a distinct violation of contract on the part of the defendant that the mileage book put on sale was hedged about with these restrictions. Good faith to the public and to the plaintiff requires that the defendant should pay damages for the wrongful ejectment of the plaintiff.

Even if there had not been this contract between the railroad companies and the State, the regulations attached to this mileage book were unreasonable and should not be enforced. They are unreasonable because never known here, or required, till after the adjournment of the Legislature of 1908, and are practically unknown anywhere except in Virginia, Georgia, and in this State. Their enforcement in South Carolina has been prohibited by statute. These regulations being unnecessary and vexatious, should not be upheld by the courts.

Having seen fit to require that a mileage book should be used to buy tickets with, certainly it was unreasonable to require thereafter anything more than the presentation of the ticket which had been issued in exchange for the mileage. The ticket was then on the same
(192) footing as any other local ticket good for that day and train. If the defendant feared that such ticket might be held by some one who did not own the mileage for which it was issued, then it should simply have required the mileage book to be presented to the conductor as formerly, and not to be exchanged for a ticket. The double requirement is inexcusable.

It is true, as argued before us by defendant's counsel, that it seems a discrimination to permit those who can advance $20 to purchase a

mileage book at two cents per mile while those who cannot, or who do not wish to do so, are required to pay two and one-half cents. But the railroads themselves originated the system of mileage books upon the ground that it saved them the expense and inconvenience of selling so many tickets, when 1,000 miles could be sold at once. It is in denial of the very reason given for issuing mileage books heretofore that the defendant now requires that tickets shall be bought with mileage books. The whole trouble can be redressed by the railroads voluntarily, or under compulsion of a statute, selling transportation to all, whether with or without mileage books, at two cents per mile—the rate which has been established and which is in force in so many other States and which experience has proven to be most profitable.

In view of the reason heretofore given for placing mileage books on sale, it would seem that the requirements now that these books should be exchanged for tickets puts a double expense upon the railroad, and it has been suggested that the reason therefor is the desire to discourage the public from buying the mileage books which the railroads agreed to issue provided the State would raise the passenger fare to two and one-half cents.

If the defendant had shown that in fact the plaintiff was not the holder of a mileage book, and that his ticket was obtained of the agent by misrepresentation, the defense would admit of consideration. But here it is not denied that the plaintiff owned a mileage book; had shown it to this same conductor on this same train on his way up that morning; that in exchange for mileage out of that book he had obtained this ticket from the defendant's agent; that the conductor, evidently doubting his right upon that state of facts to ditch the plaintiff, wired to headquarters, and the company, with knowledge of these facts, (193) ordered him put off. The ticket on its face recited the number of the mileage book; the company's record shows that the plaintiff had bought it, and the conductor had seen it in his hands that morning. Besides, the station agent who sold the ticket in exchange for the mileage was accessible.

Thus, with the money of the plaintiff for his passage in its treasury and with ample proof of the fact as shown by the ticket issued in exchange for such mileage, the defendant put the plaintiff off its train without returning his ticket or refunding the money which he had paid to the company for it and for which the ticket was a receipt. This conduct was arbitrary, unreasonable, and unjust, and the defendant should be made to pay such damages as a jury should deem a fair compensation for the humiliation and wrong it has thereby inflicted upon the plaintiff.

ALLEN, J., dissenting: The opinion of the Court, as announced by *Mr. Justice Brown,* if carried to its legitimate conclusion, will permit common carriers to make contracts for mileage upon their own terms, and however unreasonable any stipulation may be, it will be binding because, as he says, it is a special contract based upon a consideration.

I think the error consists in assuming that the parties to the contract are upon equal terms, and in a matter of this importance that we ought not to go outside of the facts of this case, and prejudge questions not before us.

The question does not arise as to whether the General Assembly has the power to compel common carriers to issue mileage books because they are making such contracts, and I see no reason for suggesting that the power does not exist until the question is presented, nor for intimating that other, and perhaps more stringent, regulations may be adopted.

It is admitted in this case that the plaintiff had a mileage book, which is said in *Harvey v. R. R.,* 153 N. C., 571, to constitute a contract of carriage, subject to certain restrictive stipulations for a wrongful breach of which the company may, under given conditions, expel the holder from its train.

(194) The restrictive conditions, so far as applicable to this case, are that a ticket shall be procured on the mileage book, and that when the ticket is presented to the conductor the mileage book shall accompany it.

The first of these conditions was complied with, and the plaintiff was on the train of the defendant with a ticket which he had lawfully procured upon his mileage book.

He did not present his mileage book to the conductor with his ticket, and was expelled from the train.

The question is therefore, presented under the rule adopted in the *Harvey case,* as to whether the failure to present the mileage book with the ticket was a wrongful breach of the stipulation in the contract, created by issuing the mileage book, which justified the expulsion of the plaintiff from the train under the conditions then existing.

I think there is evidence that there was no wrongful breach of the stipulation, and if so, the judgment of nonsuit should be set aside and a new trial awarded.

I assume that the conductor has the right to demand the mileage book, when necessary to identify the holder, or for the purpose of seeing that the ticket presented corresponds with it; but I deny that he has any right to make such demand for the annoyance of the passenger, or in order that he may assert his authority.

In this case the plaintiff went from Charlotte to Ellenboro on the morning of the day he was expelled, and presented to the conductor his ticket and mileage book; there was a controversy at the time as to the right to see the book, the plaintiff telling the conductor to look at it good, as he would not see it again, and also informing him that he would be back that afternoon; he was expelled on the return trip from Ellenboro by the same conductor who had compared the ticket and the mileage book on the morning of that day, and after he had accepted the ticket from the plaintiff, which he retained, and had been reminded of the conversation about the mileage book on the trip to Ellenboro.

This, as it seems to me, furnishes some evidence that the demand to see the mileage book was not in good faith.

Cited: *Huff v. R. R.*, 171 N. C., 207.

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(195)

A. D. CHRISTMON v. POSTAL TELEGRAPH-CABLE COMPANY.

(Filed 20 March, 1912.)

1. Telegrams—Damages—Mental Anguish—Notice—Evidence.

A telegraphic message asking the addressee to "send word to the sender's wife that he will be home the next day" does not upon its face show that the illness of the sender's wife will naturally and proximately result from the failure of the company to send it.

2. Same—Verbal Notice.

The sender, upon delivering a message to the agent of a telegraph company reading, "Send word to wife will be home tomorrow; am well," informed the agent that he did not send the message direct to his wife because her condition was such that he was afraid it would surprise and excite her: *Held*, sufficient to notify the company that her condition was serious, if not critical; that she would suffer mental anguish if the message was not sent.

3. Same—Instructions.

A husband delivered to the defendant's agent a message asking the addressee to inform his wife that he would be home the next day, which the defendant failed to transmit. The instructions of the court properly restricted evidence of the wife's consequent illness to the mental anguish suffered by the wife.

4. Telegraph — Announcing Arrival — Evidence — Lost Letters — Collateral Matters.

A husband, having written to his wife to expect him home on a certain day afterwards telegraphed that he would be home on the day following,

and the telegram was not transmitted by the defendant: *Held*, the letter was a collateral matter, and, if it were necessary to produce it at the trial, evidence of its loss was sufficient which tended to show that the wife did not keep her husband's letters, and that the husband had made unavailing search for the letter where his wife kept her letters and papers.

5. Telegraph—Collect Message—Principal and Agent—Application of Money—Negligence—Damages.

A husband and wife sued for damages for mental anguish caused by the failure to send a message the husband had addressed to her. The next day the wife sent a message to another person, charges collect, inquiring as to where her husband was. The addressee of the last message instructed the defendant's agent to apply the money paid for the first message to the charges on the second one: *Held*, the addressee of the second message was without authority to thus direct the application of the money; and further, as the negligence had theretofore occurred, recovery was not barred by one payment of charges.

(196) APPEAL from *Peebles, J.*, at September Term, 1911, of JOHNSTON.

This action was brought to recover damages for the negligent failure to deliver a telegraphic message, addressed by the plaintiff, R. D. Christmon, to G. F. Pope, at Dunn, N. C., 13 January, 1909, as follows: "Send word to wife will be home to-morrow. Am well." The message was delivered to the defendant's operator at Wendell the afternoon of 13 January, 1909, but was never sent by him to G. F. Pope. The operator was informed by R. D. Christmon, at the time he received the message for transmission and was paid the charges, when asked by the operator why it was addressed to G. F. Pope instead of his wife, that her condition was such that "he was afraid it would surprise and excite her," though he did not tell hm what was the matter with her. He testified that she was in a delicate condition, though her general health was good. There is evidence that she was expecting her husband to return to Dunn by the train at 4 o'clock a. m. on 13 January, and when he failed to come by that train it made her very nervous and anxious, thinking that something had happened to him. She became very ill and her health was impaired by the premature birth of her child, which lived only a few hours. She suffered very much. The court admitted this evidence only for the purpose of showing her mental anguish, and carefully charged the jury in regard to it, instructing them not to consider it upon the question of damages, as follows:

"In considering the fourth issue, upon the question of damages, you must exclude all evidence that the plaintiff was taken with a nervous chill, was confined to her bed and forced to seek the services of a physician, or that a child was born to her prematurely and died."

There was other evidence from which the jury could infer that she suffered mental anguish as a result of the defendant's failure to send the message. The court, at the request of the defendant, (197) gave this instruction to the jury:

"The burden of proof is on the plaintiff to show, by the greater weight of the evidence, that her husband informed the agent of the defendant at Wendell of the importance of the message; and if she has failed to thus prove that he did, the plaintiff can only recover nominal damages, and you will answer the fourth issue, 50 cents. If you should find, in passing upon the fourth issue, that the plaintiff is entitled to recover actual damages, it is only such as were reasonably in the contemplation of the parties at the time the message from Christmon to his wife was received by the defendant's authorized agent at Wendell for transmission, and such as would directly and proximately result and reasonably be anticipated from the alleged negligence of the defendant."

The court refused to charge, at the request of defendant, that upon the evidence the *feme* plaintiff could only recover nominal damages.

The jury returned the following verdict:

1. Did the defendant receive for transmission the telegraphic message alleged in the complaint, with the charges and fees paid thereon, as alleged? Yes.

2. Did the defendant negligently fail to deliver the telegraphic message aforesaid? Yes.

3. Did the plaintiff suffer mental anguish by reason of the negligent failure of defendant to deliver said message? Yes.

4. What damages, if any, are the plaintiffs enttled to recover? $1,000.

The defendant, having duly reserved its exceptions to the rulings of the court, appealed from the judgment upon the verdict.

F. H. Brooks and Aycock & Winston for plaintiff.

R. C. Strong for defendant.

WALKER, J., after stating the case: The plaintiff was not entitled to recover damages merely because his wife became ill, as the message was not of the character to indicate that a failure to send it would naturally and probably cause her illness. Such a result was not in the contemplation of the parties, and the judge so charged the jury. But in this case the defendant was notified by the message, and (198) the information given to its operator, that Mrs. Christmon was in a very nervous condition, so much so that her husband would not send the message directly to her, but addressed it to a friend, who was to "break the news to her" in such way, according to his judgment and in the exercise of prudence and caution, as would prevent any harmful re-

sults. This information, with the message itself, was sufficient to notify the defendant that its contents would surprise and disappoint Mrs. Christmon, and almost the only inference to be drawn was that he had changed the date of his arrival at Dunn, making it later than he had before intended and as she had understood from him it would be. Why should he send a telegram at all, not addressed to her, but to his friend, informing her that he would be at home the next day, if she would not expect him to come sooner? If he had not already set any earlier time for his arrival, and the time of his return to his home had been left indefinite, a simple message that he would be there the next day would not be calculated to alarm her at all, but would have rather the contrary effect.

The facts in our case show that the husband was anxious about the delicate condition of his wife and wished her to be informed of his arrival the next day as soon as possible, for he used the telegraph instead of the mail. Why would she be alarmed by such a message, under ordinary circumstances, or if he had not told her he would be home sooner? It was some evidence for the jury to consider upon the question of damages arising from the mental anguish caused by its negligence, and perhaps is stronger than evidence held sufficient in some of the decided cases. *Dayvis v. Telegraph Co.*, 139 N. C., 79; *Suttle v. Telegraph Co.*, 148 N. C., 480.

In the case last cited, after stating that there was evidence that the company was informed as to the nature of the message and could have inferred what the consequences of delay would more than likely be, we said: "It (the company) cannot close its mind to the knowledge of facts which are apparent, and thus plead its own ignorance as an excuse for its failure to deliver the message. If it carelessly disregarded the information it received, and its evident import, its fault in this (199) respect is not to be imputed to the plaintiff, so as to bar her right to damages. The operator was told by Mr. Suttle what his purpose was in sending the message and in asking for a prompt delivery that evening. It was to avoid the very thing that has occurred, and which every reasonable man, mindful of his obligation to others, should have known would occur. The delay of the company was clearly the proximate cause of the injury." And in *Dayvis v. Telegraph Co., supra, Justice Hoke* said: "This message was sent to prevent anxiety in the plaintiff's mind, and but for the defendant's default it would have fulfilled its mission." This record, in one respect, presents a stronger case for the plaintiff than did the facts in the cases cited, as here the *feme* plaintiff's delicate physical condition must be considered, and her great susceptibility to mental disturbance or mental anguish.

The court would not permit the jury to award damages merely because the *feme* plaintiff was made ill. This was carefully excluded by the

judge. It was relevant to prove that her condition was serious, if not critical, in order that the jury might infer therefrom that she suffered mental anguish, so that the defendant's prayer for instructions was fully answered in this respect.

There was sufficient evidence of the loss of Christmon's letter to his wife, stating that he would be at home on the afternoon of 13 January, if it was necessary to produce the letter, it being a collateral matter. *S. v. Ferguson,* 107 N. C., 841; *S. v. Credle,* 91 N. C., 640; *S. v. Surles,* 117 N. C., 721; *Whitehurst v. Padgett,* 157 N. C., 424. Mrs. Christmon testified that she did not preserve her husband's letters, and he stated that he had searched for it in every place where his wife kept her letters and papers, and could not find it.

At the request of Mrs. Christmon, T. V. Smith sent a telegram to R. B. Whitley at Wendell, N. C., requesting Christmon "to come home at once," as his wife was very sick. The charges for this message were not prepaid, and Whitley told the operator at Wendell to apply the money paid by Christmon for the other message to the payment of the charges on the message to him, and the court was requested to charge that, if they found these to be the facts, Mrs. Christmon (200) had waived her right to recover damages for any negligence in not sending and delivering the message from her husband. But this does not follow. Whitley had no authority to direct such an application of the money, and, besides, the negligence had already occurred when he gave the order.

No error.

Cited: *Alexander v. Tel. Co.,* 158 N. C., 478; *Penn v. Tel. Co., post,* 309.

GREENSBORO NATIONAL BANK v. CAROLINA MUTUAL LIFE INSURANCE COMPANY ET AL.

(Filed 10 April, 1912.)

1. Vendor and Vendee—Conditional Assumption of Debt—Contracts, Written—Notice—Accounting.

In an action by a bank upon notes of an insurance corporation which had sold all of its assets to another insurance corporation, alleging the vendee corporation had assumed the debts of its vendor, it appeared that the contract of sale was in writing, introduced in evidence, and that it provided, among other things, that the selling corporation was to be paid a certain per cent of the premium receipts which was to be applied to the notes in suit. The representatives of the contracting parties had

carried the contract to the president of plaintiff bank; *Held*, the liability of the vendee corporation depended upon the written instrument, of which the plaintiff had notice, and, thereunder, the vendee did not unconditionally assume the obligation upon the notes; and, further, that upon proper amendment to the pleadings the plaintiff would be entitled to an accounting against the vendee for such sums as it had collected under the terms of the contract, and have the same applied to the payment of the notes.

2. Same—Parol Evidence.

When a vendee corporation is sued for the debts of its vendor under a written contract of which the plaintiff had notice, testimony of a witness that the vendee assumed the liability unconditionally will not be admissible to vary the terms of the written contract, especially when he modifies his testimony on cross-examination by saying that he knew there was a written contract which he had not seen, and was not present when it was executed.

(201) APPEAL from *Cooke, J.*, at January Term, 1912, of GUILFORD.

Action commenced before a justice of the peace and brought by appeal to the Superior Court.

The action was brought by the plaintiff to recover judgment upon two notes of the Mutual Registry Life Insurance Company of the denominations of $185 and $65, which notes were indorsed by the codefendants. There was a verdict and judgment against the Carolina Mutual Insurance Company only, for the sum of $165, with interest from 28 October, 1907. The said defendant appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE BROWN.

No counsel for the plaintiff.
G. M. Patton for the defendant.

BROWN, J. The plaintiff introduced testimony tending to prove that some time in 1907 the Mutual Registry Life Insurance Company, a corporation, sold its entire business to the defendant, the Carolina Insurance Company; that at the time the defendant company took over the business of the Mutual the plaintiff held two notes of the Mutual Registry Life Insurance Company in the sums of $185 and $65.

It is contended by the plaintiff that as a part of the transaction between the two companies the defendant company assumed the payment of these notes. An inspection of the record discloses that all of the evidence introduced for the plaintiff, as well as the defendant, establishes that the contract between the two companies was wholly in writing and dated 26 March, 1908, and was put in evdence by the defendant.

It is true that Waddy, a witness for the plaintiff, upon examination in chief, said that the defendant company assumed the liabilities of the

Mutual and agreed to pay the notes in question. But upon cross-examination the witness materially qualifies his testimony in chief, admits that the contract between the two companies was in writing, and states that he was not present when any contract between the two companies was made. He states that he did not see the written contract, but understood that there was one. Upon being questioned by the court as to how he knew that the defendant assumed the debts, the wit- (202) ness does not undertake to say, but states that he was not present when the contract was signed.

The witness Ellington, president of the plaintiff bank, states that Waddy, Newby, and others, representing the defendant company, came to the bank and said that the manager of the defendant was there and that he was to take over their assets and liabilities.

It also appears from the testimony of Ellington upon cross-examination that they came in the bank with this paper with them, evidently the contract of 26 March, entered into between the two companies, thus fixing Ellington, the president of the plaintiff bank, with notice that the contract between the two companies was in writing.

The contract between the two companies does not purport to be unconditional assumption of the debts of the Mutual Company, but, on the contrary, it provides for only partial payment, in these words: "and the said Carolina Mutual agrees to allow said Mutual Registry Life Insurance Company 25 per cent of the gross earnings derived from policyholders as premium on same, and that the said 25 per cent be applied on the two notes made and indorsed by the said Mutual Registry Life Insurance Company to the Greensboro National Bank of the city of Greensboro, each month, and that said sum be paid direct to said bank, and that a written report, showing such gross earnings, be sent to the proper officer of said Mutual Registry Life Insurance Company, and that said Carolina Mutual agrees that such 25 per cent be continued for a period of twelve (12) months; and it is further agreed that all policyholders of said Mutual Registry Life Insurance Company be fully reinstated from the date hereof and such amount arising therefrom as premiums be also applied as is herein stated."

It is further contended that Powell, the manager of the defendant company, stated "that he would assume the liabilities, and that Powell conducted negotiations for the Carolina Mutual Life Insurance Company."

It may be that Powell personally undertook to assume these (203) particular liabilities of the Mutual Company, himself; but there is not a shred of evidence that he had any authority to assume them on behalf of his company.

The contract between the two companies, as we have already shown, was in writing, and the rights and liabilities of the two insurance companies under it were already well defined, and there is nothing to show that Powell was authorized in any way to change them. If Powell had any such authority, the burden of proof would be upon the plaintiff to show it. 31 Cyc., page 1644, and cases cited.

While the plaintiff is not entitled to recover upon the notes sued on, upon the ground that they have been unconditionally assumed by the defendant, by proper amendment to the pleadings the plaintiff may call upon the defendant to account for such sums as it has collected under the contract, and have the same applied to the payment of the notes.

New trial.

IN RE WILL OF J. M. FOWLER.

(Filed 20 March, 1912.)

1. Wills—Caveat—Declarations—Witness—Interest—Interpretation of Statutes.

In proceedings to caveat a will, an heir at law who would receive more as a beneficiary under the will if it is not set aside may testify to declarations made by the testator after its execution which are competent to show that it was obtained by fraud and undue influence; and such testimony, being against the interests of the witness, is not prohibited by Revisal, sec. 1631.

2. Same—Extent of Interests—Courts.

When it appears that a witness, in proceedings to caveat a will, has testified against his own interest as to declarations made by the deceased after he had executed the paper which is contested, it is unnecessary for the court to inquire into the extent of his interest, upon the question of the admissibility of his evidence.

3. Wills—Caveat—Fraud—Undue Influence—Evidence.

Evidence that the testator was, at the time of making his will, an old and feeble man, living with his helpless wife at the home of his son-in-law, in whose favor the will was made, was held, under the circumstances of this case, sufficient to be submitted to the jury upon the question of mental capacity, undue influence, and fraud. *Linebarger v. Linebarger*, 143 N. C., 229, cited and distinguished.

4. Wills—Caveat—Fraud—Undue Influence—Issues.

In proceedings to caveat a will, upon the ground of mental incapacity and fraud or undue influence, an issue as to whether the paper-writing was the last will and testament of the deceased is sufficient, and a separate issue as to the fraud, undue influence, or mental incapacity is not necessary.

In re FOWLER.

APPEAL from *Peebles, J.*, at November Term, 1911, of HARNETT. (204)

This is a caveat filed to the will of J. M. Fowler, and was before the Court in a former appeal, 156 N. C., 340. The real question in the case is whether the execution of the will was procured by fraud or undue influence. The court submitted two issues, which with the answers thereto, are as follows:

1. Is the paper-writing here offered, and every part thereof, the last will and testament of James M. Fowler, deceased? Answer: Yes.

2. If the paper-writing was the last will and testament of J. M. Fowler, was it obtained by undue influence or fraud? Answer: No.

Upon the verdict for the propounders, the court entered a judgment establishing the will. The caveators excepted and appealed, and assign the following errors:

1. That his Honor erred in submitting the second issue of record, as appears in caveators' first exception.

2. That his Honor erred in excluding from the evidence the testimony of Rena Jackson, as offered by the caveators, as set forth in caveators' second exception.

3. That his Honor erred in charging the jury that there was no evidence of undue influence or fraud, and in his charge on the second issue, as set forth in caveators' third exception.

The other assignments were merely formal.

Upon the question whether there was any evidence of undue (205) influence, we make these extracts from the testimony:

Will Smith, a witness for caveators, testified: "I saw testator several times before he died, the last of February, 1910. He told me that he had something to tell me, and said that he had made his will and willed to all his children an equal share, and to his grandchildren one-half share. He told me that he was perfectly satisfied with his will. Later I saw him again, and he told me that he had made his will and was perfectly satisfied, as he had made it as his heart desired, but that he was being aggravated mighty bad over it; that some of them were not satisfied, and said that some of them wanted all of his property and let the rest get nothing. I went up there again on Sunday morning, about ten days before he died. He said: 'I have something to tell you, if I can get a chance. You know I made my last will, and made it to my heart's desire. I have been aggravated and provoked to do what I didn't want to do. I am sorry, but I can't help it now; I have changed my will, but not as I desired. I was forced to do it; I can't help it now.' He burst out crying, and said he had to do it or be thrown in the road. He was living in Mr. J. P. Jackson's house. He said: 'You know who paid for the building of this house and who paid for the work and labor

on this house. It is hard to be threatened to be thrown into the road; that has caused me to do what I have done.' I was there on Monday night, and he died Tuesday."

Edna Fowler, a witness for the caveators, testified: "I know the day that Mr. Fowler made his first will. I was down there. He told me he had willed all of his children an equal share and his grandchildren one-half share each. He said: 'I have done as well as I could and to my heart's desire.' About two weeks after that, I went to see him. He was crying. He told me that he bought that mantelpiece and paid for it, and bought his pump and paid for it out of his own pocket, and said: 'I paid for the sawing of the lumber in this house. I paid for every day's work on it out of my own money. It is pretty hard, don't you think, for me to do that much for one of my children and for him to threaten to throw me out in the road, and my wife in the con-
(206) dition she is in?' His wife was in a perfectly helpless condition.

Two or three days after that I was down there again. He was crying, grieving very bad, and said he was feeling very bad. He said: 'My troubles are more than my afflictions.' I asked him what he was troubled about. He replied: 'If J. P. Jackson and Forest Barnes don't quit harassing and tormenting me about my will I shall lay it in the fire and burn it up, and what is left after my death can be divided by law.'"

The caveators introduced a witness, Rena Jackson, a granddaughter of the testator, who testified to declarations of the testator which were made after the execution of the paper, tending to show that it had been procured by undue influence. This witness was a devisee under the will to which the caveat was filed, and it is admitted that she will receive less as an heir, if the will is set aside, than she would if it is sustained. It also appears that the testator had made a prior will, and if the caveators succeed in this case that will would be unrevoked if it had not been canceled. We infer from the admission and the facts stated in the case that it was canceled or destroyed. It does not appear that she was a beneficiary under that will. The court excluded the testimony of Rena Jackson and charged the jury that there was no evidence of undue influence, and that they should answer the second issue "No." The caveators excepted and appealed.

R. L. Godwin, E. F. Young and N. A. Townsend for caveators.
Douglass & Lyon and J. C. Clifford contra.

WALKER, J. The ruling of the court by which the testimony of Rena Jackson was excluded was erroneous. Her interests will be adversely affected by the result of this proceeding if the will is set aside. She

testified against her own interest, and in *In re Worth's Will,* 129 N. C., 223, it was held that by reason thereof she is not disqualified by Revisal, sec. 163 (Code, sec. 590), to testify, as the prohibition of the statute only extends to those cases in which the witness testifies in her own behalf or interest, which clause was not in the original section 343 of the Code of Civil Procedure, but is in The Code, sec. 590, and Revisal, sec. 1631. The case, therefore, in this respect, is not governed by (207) *Linebarger v. Linebarger,* 143 N. C., 229, and *Hathaway v. Hathaway,* 91 N. C., 139. In those cases it was held that it was incompetent to prove by an interested party, under Code, sec. 590 (Revisal, sec. 1631), declarations of the testator made after the execution of the paper, for the purpose of showing that it was obtained by fraud or undue influence. It was not decided whether evidence from a competent witness would be admissible to show such declarations, though it was held in the *Linebarger case* that prior or contemporaneous declarations, proven by such a witness, would be admissible. But such declarations—that is, those subsequent to the execution of the will—were held to be competent in *Howell v. Barden,* 14 N. C., 442, in able and exhaustive opinions by *Chief Justice Henderson* and *Judge Ruffin,* and the decision was approved in *Simms v. Simms,* 27 N. C., 684. In the last, *Chief Justice Ruffin* said: "It must, of necessity, in every case be inquired whether the paper be the will of the party deceased; whether he had capacity to make a will, and meant to dispose of his estate by the particular script propounded. Such is the law even as to attested wills; for it is competent to show, by subsequent declarations of the supposed testator, that he *never* assented to the instrument as his will, but that it was obtained by duress or fraud." The *Howell case* holds it to be competent to show, by subsequent declarations of the testator, that he did not have a disposing mind or a free will, as that the will was obtained by "fraud, duress, or undue influence"—in other words, that his free agency was destroyed. When the witness, by whom it is proposed to prove the declarations, has an adverse interest to be subserved, it is not material to inquire as to the extent of that interest. *Campbell v. Everhart,* 139 N. C., 503. But Rena Jackson testified against her own interest, according to the admission. A witness, though interested, may testify as to the state of the testator's mind, his sanity, or even his mental capacity or condition, and may prove his acts and declarations for the purpose of showing the basis of his opinion in regard thereto. This was expressly held in *McLeary v. Norment,* 84 N. C., 235.

We think the court erred in charging the jury that there was no evidence of undue influence, even if Rena Jackson's testimony is excluded. There was evidence that the testator was 74 years (208)

old and was sick and very feeble; that those in whose favor he made the second will were the only persons present when the will was executed, except the witnesses. His wife was in a perfectly helpless condition. There was much evidence to show undue influence besides that contained in the extracts we have made from the case; but what there appears is sufficient, if accepted as true, to show his depressed mental condition, and that he was under some dominating influence, from which he could not rid himself. J. P. Jackson and Forest Barnes were his sons-in-law, and he was living with Jackson, and there is evidence tending to show that he was under his controlling influence and unable to resist it. Jackson was heard by one of the witnesses to say to him: "Mr. Fowler, if I were in your place, I would make my will over again; it is not like it ought to be; I would make another and tear that up." It is, at least, probable that this old and feeble man was referring to Jackson's power over him and his own helplessness and abject submission to his will and dictation, in what he said to the witnesses Will Smith and Edna Fowler, and other witnesses who testified to the same effect. He said to the witness David Gregory: "I am mighty bad off. I have done something that has hurt me to the heart. I made my will and was forced to make another, and it is wrong." This was during the week before he died. We cannot resist the conclusion that there was sufficient evidence for the jury to consider, upon the question of the testator's mental capacity, and also of undue influence, which subjected him as a helpless and unresisting victim to the overmastering will of another. *Linebarger v. Linebarger, supra,* and *Lee v. Williams,* 111 N. C., 200, relied on by the learned judge, are not authorities against our conclusion. There was no such evidence in those cases as we have in this. The facts disclosed by this record, if found by the jury, are clearly sufficient to establish that an undue, and therefore fraudulent, influence was exercised over this man, enfeebled by old age and bad health, and without the aid of those who could give him disinterested counsel and advice. *Amis*
(209) *v. Satterfield,* 40 N. C., 173; *McRae v. Malloy,* 93 N. C., 154.

The relation between these parties, of control on the one hand and dependence on the other, made the task of overcoming and destroying his volition and free agency an easy one. The evidence was fit to be submitted to the jury. Using the language of *Judge Henderson* in *Howell v. Barden, supra:* "It is not for me to say how much such evidence ought to weigh, having, as I have elsewhere observed, no weights and measures for my own mind. It must, under the circumstances of each case, be left to the judgment and discretion of the jury, as rational men; if they believe it, they will give it effect; if they do not believe it, of course they will pay no attention to it."

It was not necessary to submit the second issue, as the questions of mental capacity and fraud or undue influence can be tried and determined under the usual issue in such cases, that is, the first issue in this case.

There was error in the ruling and charge of the court.

New trial.

Cited: *In re Patrick,* 162 N. C., 520; *In re Parker,* 165 N. C., 132.

D. A. BURWELL v. A. A. CHAPMAN ET AL.

(Filed 17 April, 1912.)

1. Deeds and Conveyances—Registration—Notice.

Actual notice of a prior conveyance of land, however full, cannot supply the notice of registration required by the statute, or affect the validity of a deed subsequently taken, but prior in time of registration.

2. Standing Timber—Deeds and Conveyances—Requisites.

Valid conveyances of the title to standing timber must be sufficient in form to pass realty, and are governed by all the laws relative to the transfer of title to land.

3. Deeds and Conveyances—Registration—Possession—Notice.

Purchasers for value of lands sufficient in form and properly registered are not affected with notice by possession of those claiming under a prior deed, either invalid in form or not registered at the time of the other conveyance.

4. Deeds and Conveyances—Standing Timber—Waste—Consideration—Reconveyance—Registration—Notice—Equity.

A reconveyance of the same standing timber between the same parties expressing a consideration of $1 and a release of the grantor "from all claims for damages on account of waste" which had been committed in violation of the restrictions of the first deed, is for a valuable consideration, and the grantees therein do not take subject to any equities of purchasers under a prior acquired and subsequently registered deed, given by their grantor.

JUSTICES HOKE and ALLEN did not sit.

APPEAL from *O. H. Allen, J.,* at November Term, 1911, of (210) GRANVILLE.

At the conclusion of the evidence his Honor sustained a motion to nonsuit. The plaintiff excepted and appealed. The facts are sufficiently stated in the opinion of the Court.

D. G. Brummitt and T. T. Hicks for the plaintiff.
T. Lanier and Graham & Devin for the defendant.

BROWN, J. Civil action brought to restrain the defendants from interfering with the plaintiff in cutting and removing timber from certain lands, and to declare the plaintiff to be the owner of the timber rights on said lands. The defendants denied the title of the plaintiff to the timber in question. The plaintiff presented several contentions upon which he based his right to cut the timber in question, but in the view we take of the case it is necessary to consider only one.

The timber lands in controversy belonged to the defendants, who conveyed all of the timber of whatever kind and description growing and standing on the said lands, subject to certain restrictions, to H. C. Wolfe of Pennsylvania. The said conveyance is dated 28 June, 1906, and was duly registered on 29 September, 1906, and fully describes the land upon which the said timber was growing.

It is claimed that Wolfe purchased the timber for himself and others, and that he and his associates contracted to form a corporation to whom this timber was to be conveyed, and by which it was to be manu-
(211) factured. It appears that the company was incorporated and stock taken as agreed by the incorporators. Wolfe was elected manager of the corporation. He continued to be such until July, 1909, when he resigned. During that time a large part of the timber was taken from the land and sold. On 16 January, 1909, this company, by its manager, Wolfe, conveyed certain of the timber to the plaintiff, which the plaintiff proceeded to cut and remove under his contract, which conveyance was not registered until 1 May, 1911.

On 25 January, 1911, the said Wolfe reconveyed to the defendants all of the standing timber and timber rights on the said land, specifically describing the land as being fully described in a deed from the defendants to H. C. Wolfe, recorded in Book 60, page 384, in the office of Register of Deeds of Granville County. This deed was registered on 26 January, 1911.

1. The conveyance, or timber contract, whatever it may be called, under which the plaintiff claims the timber in controversy was not registered until May, 1911, at which time the deed from Wolfe, conveying all of the property he had purchased from them, had been duly executed and recorded, to wit, on 26 January, 1911.

The plaintiff contends that the defendants had notice of the existence of the said timber contract made with the plaintiff, and that when they took the reconveyance from Wolfe they took subject to the plaintiff's rights.

It is not necessary to discuss the fact as to whether there is any evidence as to actual notice to the defendant, for no notice of the character claimed by the plaintiff, however full, can supply the notice by registration required by the statute.

This Court has held in several cases that standing trees are a part of the realty, and conveyances of title thereto must be sufficient in form to convey realty, and that such conveyances are governed by all the laws relating to the transfer of title to land itself. *Hawkins v. Lumber Co.,* 139 N. C., 161.

Applying this principle, it has been held that purchasers for value under a deed sufficient in form and properly registered are not affected with notice by possession under a prior deed, either invalid or not registered at the time of the other conveyance. *Tremaine v. Williams,* 144 N. C., 114; *Collins v. Davis,* 132 N. C., 106; *Blalock* (212) *v. Strain,* 122 N. C., 283; *Patterson v. Mills,* 121 N. C., 267.

2. But it is contended by the plaintiffs that these defendants taking under the deed from Wolfe dated 25 January, 1911, are not purchasers for value, and take subject to the equities of the plaintiff. We find no evidence to support this theory. On the contrary, the recited consideration of the deed from Wolfe to the defendants is the sum of $1 "and in consideration of the parties of the second part releasing the party of the first part (Wolfe) and the Stovall Lumber Company from all claims for damage on account of waste."

It was contended by the defendants that Wolfe had caused the said timber lands to be denuded of timber in violation of the terms and restrictions contained in the deed of 28 June, 1906, executed by the defendants to Wolfe. This release upon the part of the defendants was undoubtedly a release of a valuable right and formed a valuable consideration as a basis for the reconveyance by Wolfe to them.

3. It is further contended that the reconveyance from Wolfe to the defendants conveyed only such standing timber rights in the land as he, Wolfe, then had, and that having parted with them to the plaintiff, he had nothing to convey to the defendants. As we read the reconveyance, Wolfe reconveyed to the defendants all of the standing timber rights of all kinds which the defendants had previously conveyed to Wolfe on 2,070 acres of land, particularly described by metes and bounds in the deed from Wolfe to the defendants.

Upon a review of the record, the judgment of the Superior Court is Affirmed.

JUSTICES HOKE and ALLEN took no part in the decision of this case.

Cited: King v. McRackan, 168 N. C., 624; *Lynch v. Johnson,* 170 N. C., 111.

(213)

C. H. REXFORD ET AL. V. R. H. PHILLIPS ET AL.

(Filed 27 March, 1912.)

1. Tax Sale—Listing Lands—Tax Deeds—Interpretation of Statutes.

Lands may be sold for taxes and a valid deed made therefor only when the lands are listed according to the requirements of the statute.

2. Same—By Whom Listed—Penalties.

In 1908 the statutory requirements for listing lands for taxes were that the owners or their agents should do so under oath in a certain specified manner (Revisal, secs. 5217, 5222, 5227, and 5218); and upon the failure of the owner to list his lands at the appointed time, the chairman of the county commissioners should do so, in the name of the owner, giving valuation and description thereof, and charging double taxes; and with provision that if the lands have escaped taxation, the taxes shall be collected for previous years, by adding to the simple taxes of the current year all taxes due for preceding tax years, with 25 per cent interest thereon; and these provisions must be observed.

3. Tax Sales—Tax Deeds—Perfecting Deed—Listing by Stranger—Principal and Agent.

The statutory provision for perfecting, in the sheriff's deed, an indefinite description of lands listed for taxes, applies only when there has been a listing by the owner or some other person designated by the statute, and not where it is done officiously by a stranger.

4. Tax Sales—Tax Deeds—Principal and Agent—List-taker—Interpretation of Statutes.

A list-taker of property has no statutory authority to list taxes for the owner of lands, unless it appears that such authority has been given him by the owner, and if the lands have been sold for taxes upon such a listing by the list-taker, the sheriff's deed under a sale for taxes is void. The failure of the owner to list is governed by other provisions of the statute, which do not provide for a forfeiture of the lands, but prescribe a penalty for failure to list them.

5. Same—Purchaser—Occupants—Possession—Notice.

The purchaser at the sale of lands for taxes is required to serve written notice of his purchase and of the date when the time of redemption will expire "on every person in actual possession or occupancy of the land," and also "upon every person having a mortgage or deed of trust thereon, recorded in the county, if by diligent inquiry he can be found," requiring notice by publication if actual service cannot be had. Hence, where notice by publication is attempted, and direct notice may readily have been given, or where there is a registered deed of trust and various occupants of several tracts of the land, all of whom may readily have been served with direct notice, and were not, the purchaser of the lands is not entitled to a deed therefor from the sheriff, though proper notice may have been given to one or more of those in actual possession for the owner. Revisal, sec. 2903.

6. Tax Sales—Tax Deeds—Principal and Agent—Notice to Occupants—Purchaser.

The failure of the purchaser of lands sold for taxes to give the notice required by Revisal, sec. 2903, is a fatal defect which will invalidate his deed from the sheriff, for without proper notice the purchaser is not entitled to his deed.

7. Same—Prima Facie Evidence—Interpretation of Statutes.

Before a purchaser of lands sold for taxes is entitled to his deed from the sheriff, he must make affidavit that he has complied with the requirement of notice (Revisal, sec. 2903), setting forth therein particularly the facts showing such compliance, which must be delivered to the sheriff, before he executes the deed, and filed by him with the register of deeds for registration. It then becomes *prima facie* evidence that the notice has been given. Revisal, 2904.

8. Same—Evidence—Presumptions.

The statutory notice required to be given by a purchaser of lands at a sale for taxes (Revisal, sec. 2903) is a condition precedent to the execution of a valid deed, and the purchaser must show that it has been given, there being no presumption of that fact from a recital in the sheriff's deed.

9. Tax Sales—Tax Deeds—Evidence—Presumptions—Rebuttal.

The sheriff's deed to lands sold for taxes is presumptive evidence that the lands have been listed, which may be rebutted by the evidence. The presumption is rebutted in this case by the admitted facts.

10. Tax Sales—Tax Deeds—Title—Burden of Proof.

A person who questions the title conveyed by a sheriff's deed, under a tax sale, must first show that he had title to the property at the time of the sale; and the evidence is held sufficient in this case under the deeds introduced by plaintiff in his chain of title, and the other circumstances in evidence.

11. Tax Sales — Tax Deeds — Payment by Purchaser — Reimbursements — Practice—Tender—Appeal and Error—Costs.

It appearing that the defendant had paid certain taxes on lands which he had assumed to hold under an invalid tax deed, it is *Held*, that he should be reimbursed that amount of taxes and interest by the plaintiff, as he has relieved the land of a charge which otherwise would have rested upon it; and it is ordered that plaintiff pay this amount to defendant or deposit it in court for his benefit, and that the cost of appeal be taxed against the defendant, who had refused the tender thereof.

APPEAL by defendants from *Cline, J.*, at March Term, 1911, (215) of GRAHAM.

J. H. Merrimon, Stevens & Anderson, J. H. Tucker, and Adams & Adams for plaintiff.

J. D. Murphy and Merrick & Barnard for defendant.

WALKER, J. This action was brought, under Revisal, sec. 1589, to determine the title to a certain tract of land, of which the plaintiff claims to be the owner, and which defendant claims under a tax deed executed by the sheriff to him in 1910. The action was tried by the judge upon a case agreed, which is quite lengthy, and for that reason we will not set it out in full, but instead, refer to the material facts in the course of this opinion. The case involves the validity of the tax deed, which plaintiff attacks upon several grounds, which we will consider in their order.

First. The land, we will assume for the present, belonged to C. H. Rexford, and he claimed it, in part at least, under a deed from A. C. Avery and others to J. S. Bailey and a deed from J. S. Bailey to himself, which describe the land by metes and bounds as containing 13,625 acres, with the exception of several tracts therein particularly described, the number of acres in which is not stated. On 26 September, 1906, C. H. Rexford executed a deed in trust on part of the land to J. E. Rankin, to secure a debt fo $20,000 due to J. S. Bailey. In November, 1906, C. H. Rexford contracted with J. W. Kitchin to sell to him all of the said land, and this contract was assigned by Kitchin to a corporation known as the Kitchin Lumber Company. The deeds, the contract of sale, and the assignment were duly registered in Graham County at and
(216) before the time of the transactions hereinafter set forth. C. H. Rexford did not list the land for taxation in 1907, but the tax lister for Yellow Creek Township listed 6,587 acres of land in the name of J. W. Kitchin by him as agent, but without any authority so to do, as far as appears, and the number of acres was reduced on application of the tax lister, but without the knowledge or authority of Kitchin, to 4,352, that having been stated by him to be the correct number of acres by actual survey. The taxes for 1907-'8 were paid by the son of Rexford with the latter's check. It is said in the case that the land was not listed in June, 1908, by any one, but the list-taker merely copied the entry from the former tax book, and thus listed the same number of acres in the name of Kitchin for that year. It does not appear that he had any authority to do so. So it is the fact, as stated in the complaint, that C. H. Rexford did not list the land, nor did Kitchin; and the question, therefore, is whether what was done by the list-taker in 1908 was a compliance with the statute. We do not think it was. There were two ways at that time for listing land for taxes. Revisal, secs. 5217, 5222, and 5227, provides that the owner, in person, shall list his property under oath, setting forth in detail how it shall be done, and section 5218 provides that certain persons may appoint agents to list for them. Section 5233 provides that if the owner fails to list at the appointed time, the chairman of the board of commissioners shall list the same, in the name

of the owner, by inserting in the tax list the description and valuation of all property not listed by him, and shall charge him with a double tax, and section 5232 provides for the collection of taxes on land which has escaped taxation for previous years, by adding to the simple taxes of the current year all taxes due for preceding tax years, with 25 per cent interest thereon. There is no provision in the law for the listing of land by a township tax-lister, or in any other way than the one prescribed. It cannot be disputed that under the statute authorizing the sale of land for taxes it is necessary to show that the land has been listed for taxes. That is made by the law the first step in the process of assessment. It is the fundamental fact upon which the whole structure of taxation, in its various stages, must rest, and this listing must be done in the manner prescribed by the statute. If any argu- (217) ment were required to demonstrate this proposition, it is to be found in the provisions of the statute itself. If the owner or any other person or officer authorized to list the property should give a mistaken description of the same, the statute provides that the irregularity may be cured, or in certain cases disregarded, if the description is sufficiently definite "for any interested person to determine what property is meant or intended by the description," in which case the defective description may be perfected in the sheriff's deed. But this provision applies only when there has been a listing by the owner or some other person designated by the statute, and not where it is done officiously by a stranger. The Legislature has never provided that a person without authority in law or in fact may enter on the lists an indefinitely described number of acres in a township containing many thousand acres, not in the name of the owner, but of some one else, and thereby confer authority to sell lands thus listed, and by the sheriff's deed pass the title to the lands of another person whose name does not appear in the list, and whose lands are not described therein, and who has never authorized the listing of his land by another, and whose land has not been listed by the chairman of the county commissioners, as required by law in case of the owner's default. Such a description of land as we have in this case is too vague to give to any one notice of the land assessed for taxation; it is no description at all, as it could be applied to any land in the township. *Holmes v. School District,* 11 Ore., 332, 287. The law penalizes a taxpayer for not listing his land, by doubling his tax, but not by divesting his title. If he lists his land, or it is done by the proper officer, and then he fails to pay his taxes, he may lose the title in the manner prescribed by the statute. He does not forfeit it by not listing, but by not paying. There was no listing in this case, because authority is nowhere given to a list-taker to enter property on the lists for assessment. The Legislature provided these safeguards for the just protection of the taxpayer,

and the law must be enforced as it is written. Black on Tax Titles (2 Ed.), sec. 105; *Whitney v. Taylor,* 23 N. Y., 281; *Desmond v.* (218) *Bobbitt,* 117 Mass., 233; *Bell v. Fry,* 5 Dana, 341; *Mansfield v. Martin,* 3 Mass., 419; *Pearson v. Creed,* 78 Cal., 144; *Dubris v. Webster,* 7 Hun., 371. The provisions of the law are adequate for the proper listing of property and the collection of taxes, and the Legislature did not intend that it should be confiscated without notice. The facts stated in the record present a strong case for the application of the rule and the enforcement of these plain provisions of the statute, for it is agreed by the parties that the sheriff and the defendant knew before the sale that they were attempting to sell C. H. Rexford's land, whereas authority was only given to sell 4,352 acres, listed in the name of J. W. Kitchin.

Second. But there are other fatal defects in the proceedings which invalidate the sheriff's deed. The statute (Revisal, sec. 2903) requires that the purchaser at the sheriff's sale shall serve written notice of his purchase and of the date when the time of redemption will expire, "on every person in actual possession or occupancy of the land," and also "upon every person having a mortgage or deed of trust thereon, recorded in the county, if by diligent inquiry he can be found," and publication of the notice is required if actual service of the notice cannot be made. It appears that W. C. Heyser, representing the Brunswick-Balk-Collender Company, which claimed certain rights in the timber on the land, was in possession of a part of the land in controversy from 25 December, 1909, to 1 June, 1910, and that E. E. Deputy was in possession of the land, as tenant of C. H. Rexford, from the year 1904 until 24 December, 1909. No notice was servey by the defendant, as purchaser, on either of these persons. The defendant requested a finding that W. C. Heyser occupied land within one of the exceptions of the deed, but the court expressed its inability to so find, under the evidence. Defendant served a notice on Lampkin Farley, who occupied a part of the land near the Tennessee River, known as the Rymer boundary. No personal service of the notice was made on J. E. Rankin, trustee of J. S. Bailey, and no publication of a notice addressed to them by their names. There was published a notice to J. W. Kitchin, C. H. Rexford, "and whomsoever it may con-
cern." There seems to be no provision in the statute for service (219) or publication of the notice, except as to the person in whose name the land is listed, persons in actual possession of it, and persons having a mortgage or deed of trust upon it. No purchaser is entitled to a deed until the proper notice is given (Revisal, sec. 2903), and until he shall have made an affidavit that he has complied with the requirements as to notice, setting forth therein particularly the facts showing such compliance. Section 2904. This affidavit must be delivered to

the sheriff before he executes the deed, and he must file it with the register of deeds for registration. It then, and not until then, becomes *prima facie* evidence that the notice has been given. But the facts are before us in this case, and from them it appears that the notice was not served or published as the statute requires. It can make no difference under what claim of right W. C. Heyser held the possession. We are not concerned with that, as the statute directly, plainly, and positively provides that it shall be served, not upon any party in possession, or upon one or more of the parties, but "on every person in actual possession or occupancy of the land" (section 2903), and this without any qualification as to the character of the possession or the claim of the occupant. It will not be doubted, we suppose, that E. E. Deputy, tenant of Rexford, was a proper person to be notified. But the defendant, as purchaser, also failed to serve the notice personally on J. E. Rankin, trustee, or J. S. Bailey, for whom he held in trust, and he cannot be excused because he did not search for the trustee, because it is one of the facts in the case agreed that Rankin had lived in Asheville, N. C., for thirty-five years and could have been found by diligent inquiry, and in such a case it is provided that the notice shall be served upon him, and the publication of it as to him, if it had been made in this case, would not be sufficient. This is so because the statute says so, and no strict or liberal construction can make it otherwise. We have held that the giving of the notice by the purchaser in the manner prescribed by the statute is a condition precedent to the execution of a valid deed, and no presumption arises from the sheriff's deed that the proper notice had been given, but that the purchaser must show it. The present *Chief Justice* demonstrated this in *King v. Cooper,* 128 N. C., 347, and the case was approved in *Matthews v. Fry,* 141 N. C., 582; *Warren v. Williford,* 148 (220) N. C., 474. It appears also in the case that the defendant, as purchaser, has not presented his certificate of purchase or delivered any affidavit to the sheriff before or since he demanded or received the deed from him, nor has any such affidavit been filed with the register of deeds by the sheriff, as required by the statute. In these respects, therefore, defendant failed to comply with the statute. It is further stated as a fact that the sheriff did not read the deed before executing it, and did not know how the lands were described therein. He only knew he was conveying to defendant the lands he had purchased at the sale, that is, the 4,352 acres listed in the name of J. W. Kitchin. There are other departures from the statutory requirements, but as those already mentioned are sufficient to invalidate the tax deed, we need not refer to them more particularly.

The defendant contends, though, that as to Rankin, trustee, the deed is void, if at all, only as to him; but this is not what the statute says,

and we must execute the intention of the Legislature as it is expressed in its own words. The language is, "that no purchaser at a tax sale, or his assignee, shall be entitled to a deed" until he shall have served the required notice "on any person having a mortgage or deed of trust upon the land"—not that the deed shall be good in part, but that it shall be void as a whole, the apparent purpose being to notify the mortgagee and, through him, the owner of the land, so that they may save their rights, if it be necessary to inquire as to the purpose.

It is also urged that Revisal, sec. 2909, makes the deed "presumptive evidence of certain facts," and among others, that the land had been listed; but this is only a rebuttable presumption, and is fully rebutted by the facts agreed upon, as we have shown. The conclusive presumption relates only to the official acts of the sheriff and others. The requirement as to the notice to be given by the purchaser is not embraced by that section, but section 2904 provides that his affidavit of notice, if properly filed with the register of deeds, shall be *prima facie* evidence that notice has been given. He has not shown a compliance with the statute, and besides, if he had, the *prima facie* case is overcome by
(221) the facts admitted, which show that notice was not properly given. *King v. Cooper, supra.* Nor is the plaintiff required to show that the land was not subject to taxation, or that the taxes had been paid, in order to contest the validity of the tax deed. There is no substantial change in the law construed in *Warren v. Williford, supra,* which expressly holds that those provisions apply only when the tax deed is valid and has passed a title, and not when, being void, it has conveyed no title. Discussing substantially the same provision, *Justice Connor* said, in *Warren v. Williford,* 148 N. C., 479: "We do not think that this case comes within the language of section 20, Laws 1901 (Revisal, sec. 2909). It is true that, construing this section, this Court said in *McMillan v. Hogan,* 129 N. C., 314: 'The taxes due must be paid, which the law requires as a condition precedent to contesting the title carried by the deed by authority of the statute.' The defendant, having obtained his deed in violation of the express terms of the statute, acquired no title. As was said in *Matthews v. Fry, supra,* 'As the making of a proper affidavit was a condition precedent to the defendant's right to call for a deed, with which he has not complied, he has not acquired title to the land.' The deed was simply void, and defendant was not entitled to avail himself of the provisions of the statute intended to protect purchasers at tax sales." *Jones v. Schull,* 153 N. C., 521. The same principle must apply, as the language is the same, to the subsequent provision of Revisal, sec. 2909, that the person who questions "the title acquired by the sheriff's deed" must first show that he had title to the property at the time of the sale. *Eames v. Armstrong,* 146 N. C., 5.

Revisal, sec. 2909, corresponds with Laws 1901, ch. 558, sec. 20, which was construed in *Warren v. Williford.* Besides, the defendant is claiming under J. W. Kitchin, who claims under C. H. Rexford, and, as decided in the case just cited, this shows title sufficiently in Rexford, unless the tax deed is valid as to him, or, in other words, unless defendant has acquired the superior title by it.

We have gone into this case quite fully because of its importance to the litigants and to the public, and have considered the principal questions presented in the record. It appears that the plaintiff tendered payment of the amount of taxes, interest, and costs, which (222) tender was rejected. The defendant C. H. Thompson contracted to purchase the land from his codefendant, R. L. Phillips, and for that reason was made a party to this action, and will be bound by the judgment. The judge, upon the admitted facts, held that the defendants have acquired no title to the land, and entered judgment accordingly. In that opinion and judgment we concur. The State and county have not lost the tax which should have been assessed upon this land if it had been properly listed in the name of Rexford, as it has been paid to the sheriff by the defendant, and he should be reimbursed the amount of the tax and interest by the plaintiff. This is nothing but right, and is no more than the plaintiff should be required to do in order that his delinquency may not inure to his benefit, and that justice may be done to the defendant, who has relieved the land of a charge which would have rested upon it if the plaintiff had performed his duty by listing his property for taxation. The plaintiff will, therefore, be ordered to pay the said amount to the defendant or deposit it in court for his use, if the matter has not already been adjusted; but this order shall not affect the costs, which will be taxed against the defendant, as he rejected the tender of the amount when it was made to him.

Affirmed.

Cited: Board of Education v. Remick, 160 N. C., 570; *Johnson v. Whilden,* 166 N. C., 112; *s. c.,* 171 N. C., 156.

W. M. WITHROW AND VIRGINIA-CAROLINA CHEMICAL COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 22 May, 1912.)

1. Pleadings—Misjoinder of Parties—Demurrer.

A demurrer to a complaint for a misjoinder of a party plaintiff, on the ground that he is without interest in the suit, is bad.

2. Same—Harmless Error.

It is not held for reversible error when a demurrer to a complaint for a misjoinder of parties is not sustained, it appearing that the party demurring, under an instruction from the court obtained full relief by the verdict of the jury.

3. Carriers of Freight—Negligence—Consignor and Consignee—Payment—Evidence—Damages.

The plaintiff delivered to the defendant railroad for transportation to its customer fertilizer amounting in price to $1,192 delivered at destination. The only evidence of payment by the customer was to the effect that he gave notes and real estate mortgages to secure his indebtedness, which had not been paid, without evidence that the value of the shipment was included therein. The cars of fertilizers damaged by the defendant's negligence had been sold at public auction for $420, paid for by note which the plaintiff took as collateral to the debt of its customer: *Held*, the evidence did not establish defendant's contention that the plaintiff had been paid for the fertilizer, and therefore could not recover his damages.

(223) APPEAL from *Long, J.*, at August Term, 1911, of RUTHERFORD.

This is an action to recover $1,000 damages, alleged to have been caused by delay in transporting guano, and the plaintiffs are W. M. Withrow and the Virginia-Carolina Chemical Company.

The plaintiffs allege, in substance, that in February, 1907, the plaintiff company agreed to sell and to deliver at Caroleen, N. C., to the plaintiff Withrow, certain guano; that pursuant to said agreement said guano was delivered to the defendant at Blackburg, S. C., on 1 March, 1907, to be transported to Caroleen; that no part of said shipment was delivered at Caroleen until 3 April, 1907, and that a part of said guano was lost, and the remainder injured, by the negligence of the defendant, before it reached Caroleen.

The defendant demurred to the complaint as follows:

"First. That there is a misjoinder of parties plaintiff in this case. That from the complaint it appears that the plaintiff the Virginia-Carolina Chemical Company entered into a contract with W. M. Withrop, by which the Virginia-Carolina Chemical Company agreed to deliver to the said W. M. Withrow, at Caroleen, N. C., sixty (60) tons of fertilizer; that the said Virginia-Carolina Chemical Company delivered said fertilizers to defendant in March, 1907, and the defendant failed to transport the same until April, 1907. That from the complaint it appears that this is a complete cause of action in favor of the Virginia-Caro-

(224) lina Chemical Company and against the defendant company, and that the said W. M. Withrow has no interest or part therewith.

"Second. That the said complaint does not state a cause of action in favor of W. M. Withrow and against this defendant, for that it appears from the complaint that the only contract entered into or made by this

defendant with any person whatsoever in reference to the said fertilizers described in the complaint was with the Virginia-Carolina Chemical Company, and that the title or right of possession to said property did not vest in the said W. M. Withrow until the same reached Caroleen and was there delivered to W. M. Withrow."

The demurrer was overruled, and the defendant excepted. The defendant then answered, denying negligence, and also that the guano had been injured.

The plaintiffs introduced evidence tending to prove that it was a part of the contract between the plaintiffs that the guano was to be delivered at Caroleen; that the delay in transportation was unreasonable, and that a part of the guano was lost and the remainder damaged, on account of the delay, before it reached Caroleen.

The plaintiff testified as to the damage as follows:

"It (the shipment) would come from Blacksburg to Shelby over defendant's road; then over the S. A. L. to Caroleen. When the guano reached Caroleen it was in bad shape; sacks torn and a great deal of it gone, and the part that was delivered was damp and wet and greatly damaged. It was not all there. At Shelby one of the cars was broken down on the defendant's track. They had to transfer shipment to another car. Lots of it was left in the box car, which was broken down, and a larger quantity scattered round on the ground at the place of the breakdown, from shoe-mouth deep to half-leg deep. I went to see Purvis, agent of the guano company. The guano was torn all to pieces where the breakdown occurred."

The defendant introduced no evidence.

At the conclusion of the plaintiff's evidence the defendant moved for judgment of nonsuit, which was overruled, and the defendant excepted.

The defendant requested that the following instruction be given to the jury: (225)

"1. That the plaintiff W. M. Withrow, upon all the evidence, has no cause for action against the defendant and cannot recover in this action."

The court gave this prayer for instruction, and added that the plaintiff Withrow could not recover on his own testimony that the guano was to be delivered to him by the chemical company at Caroleen, N. C.

"2. That there is no evidence of damage to the plaintiff Carolina Chemical Company, and the said plaintiff is not entitled to recover in this action."

The court refused to give this prayer for instruction, and the defendant excepted.

There was a verdict in favor of the Virginia-Carolina Chemical Company for $284, and from a judgment rendered thereon the defendant appealed.

McBrayer, McBrayer & McRorie for plaintiffs.
S. Gallert for defendant.

ALLEN, J., after stating the case: The demurrer was properly overruled. It is not based upon defect fo parties, but because one had been joined as plaintiff who had no interest in the subject of the litigation, and was, therefore, an unnecessary party, which is not good cause for demurrer. *Green v. Green,* 69 N. C., 294; *Sullivan v. Field,* 118 N. C., 358; *Worth v. Trust Co.,* 152 N. C., 242.

In the last case *Justice Hoke,* speaking for the Court, says: "Our decisions are to the effect that the joinder of unnecessary parties plaintiff or defendant is not good cause for demurrer. 'That there is a defect of parties plaintiff or defendant' is the language of our own statute, and numerous decisions with us have given the interpretation that the joinder of too many parties does not come within the statute."

In any event, however, the defendant received the full benefit of the objection raised by the demurrer, as his Honor instructed the jury that the plaintiff Withrow could not recover, and the defendant was not prejudiced by the delay in making the ruling, as all the material evidence introduced on the trial would have been competent with (226) the Chemical Company as sole plaintiff.

The motion for judgment of nonsuit, and the exception to the refusal of the instruction requested, involve the same question, and that is, the right of the Chemical Company to recover damages upon the evidence.

The defendant admits that as the stipulation that the guano was to be delivered at Caroleen was a part of the contract between the plaintiffs, that the title to the guano was in the Chemical Company at the time of the delay complained of *(Summers v. R. R.,* 138 N. C., 295; *Cardwell v. R. R.,* 146 N. C., 218), and it does not deny that there is evidence of damage, but it contends that the evidence shows that the Chemical Company received the full contract price for the guano and, therefore, says it has suffered no damage.

If it be conceded that this would constitute a defense to the claim for damages, the evidence does not, in our opinion, justify the construction placed upon it by the defendant. There were in the shipment 55 tons of guano, the contract price of which was $20.40 per ton, and 5 tons of acid, sold at the price of $14 per ton, making the total shipment at the price of $1,192.

The only evidence tending to prove that anything was paid the Chemical Company on account of this shipment was that of W. T. Purvis, an agent of the company, who testified as follows: "I made contract for plaintiff company to ship the two cars to Withrow. There were other car-loads shipped to Withrow. I don't think he settled with the company for these cars of guano. He gave notes and real estate mortgages to secure what he owed the company, but has not paid same. These cars of fertilizer were sold at public auction. Perry Hardin bought them and gave note to Withrow, and plaintiff company took the note as collateral to secure our debt against Withrow. This fertilizer was bid off by Hardin for $420."

This falls far short of sustaining the contention that the contract price of $1,192 was paid to the Chemical Company. The witness says he does not think any settlement was made for this shipment; that the plaintiff had bought other guano from the company and had given his note and mortgage for the indebtedness, and that $420 was realized from the shipment, which was paid to the company. (227)

It does not appear that any part of the value of this shipment was included in the note and mortgage, or that the plaintiff Withrow agreed to pay more than its value after it reached Caroleen, and as the guano was damaged while the property of the Chemical Company, the company was entitled to recover all damages which were caused by the negligence of the defendant.

We find no error in the record, and the verdict of the jury seems to be conservative.

No error.

BEVILLE & VANSTORY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 27 March, 1912.)

1. Carriers of Goods—Connecting Lines—Live Stock—Bill of Lading—Execution—Evidence.

In an action to recover damages against a terminal railroad in a connecting line of carriers for injury to a shipment of live stock, there was evidence tending to show that the consignees had made a written demand upon said carrier and filed therewith the bill of lading purporting to be that of the initial carrier, which bill of lading was shown to a witness for the plaintiff, who testified that it was the one under which the shipment was made: *Held*, sufficient to admit bill of lading as evidence, without the necessity of showing its execution by the initial carrier, and that if the defendant desired to test the competency of the witness to testify or to test his knowledge of the facts, it should have been done by a preliminary examination.

2. Carriers of Goods—Live Stock—Connecting Lines—Terminal Carriers—Possession—Principal and Agent—Evidence.

Where there is a nonsuit upon the evidence, in an action against a delivering carrier for damages in transit to live stock shipped over several roads, the possession of the live stock by that carrier, and its conduct and dealings with the consignee with reference to the shipment, were held to be sufficient evidence of the authority of the defendant's agent, upon whom demand had been made, to settle the loss, without the necessity of introducing the bill of lading of the initial carrier under which the shipment was made.

3. Carriers of Goods—Connecting Carriers—Live Stock—Delivery in Bad Condition—Presumptions—Burden of Proof.

When a shipment of live stock is made over connecting lines of carriers, and delivered in bad condition to the consignee, there is a presumption, in an action for damages against the delivering carrier, that the injury occurred on its line, under the principle that, as between the plaintiff and defendant the latter is peculiarly in a position to know the facts, the burden of proof should rest on it.

(228) APPEAL by plaintiffs from *Whedbee, J.*, at October Term, 1911, of CUMBERLAND.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

Sinclair & Dye for plaintiffs.
Rose & Rose for defendant.

WALKER, J. This action was brought to recover damages for injury to live stock, alleged to have been shipped from Kansas City, Mo., and consigned to plaintiffs at Fayetteville, N. C. There was judgment of nonsuit upon the evidence, and plaintiffs appealed. The stock was received at its final destination and delivered to the plaintiffs by the defendant, the last of the carriers, in a badly damaged condition, and there was evidence that the damage amounted to at least $350. Plaintiffs handed to their witness, W. A. Vanstory, one of the plaintiffs, a paper, and asked him if it was the bill of lading for this shipment, and he said that it was, and that the bill of lading had been filed with the defendant when the plaintiffs made the claim for damages and as a part thereof. The case states that the plaintiffs proposed to introduce the bill of lading as evidence, and defendant objected, because there had been no proof of its execution, and for this reason it was excluded by the court. But we do not see why it had not been sufficiently shown by the witness Vanstory to be the bill issued to the plaintiffs, and, therefore, admissible as evidence. If the defendant wished to test the competency of the witness to speak in regard to it, the proper method was by a preliminary examination. As

the evidence now stands, the bill should have been admitted. We do not see, though, that it is material to decide whether it was (229) competent or not.

There is evidence tending to show that the defendant was in possession of the stock as a common carrier. Its conduct and dealings with the plaintiffs with reference to the shipment is some proof of this; and there was abundant evidence upon the question of damages.

It was not necessary to inquire as to the authority of the defendant's agent at Fayetteville, N. C., to settle with plaintiffs upon the basis of $350, there being other proof that the plaintiffs had sustained loss to that amount. Upon a motion to nonsuit, this is sufficient to carry the case to the jury. Reasonable inferences to be drawn from the testimony tend to show that the defendant received the stock, en route, at Augusta, Ga., after they had been unloaded, watered, and fed, and that they were then in good condition, for the witness Champlain testified that he was the defendant's yardmaster at Augusta, and that "no exception was made to the stock" and "the car was accepted and forwarded in apparently good condition." There was evidence tending to show the contrary, and that the stock was not injured while in the possession of the defendant. But all this conflicting evidence was for the jury to pass upon, and not for the court by a judgment of nonsuit. It should have been considered most favorably for the plaintiffs, there being a presumption that the injury occurred on the defendant's line. *Manufacturing Co. v. R. R.*, 121 N. C., 514; 128 N. C., 284; *Mitchell v. R. R.*, 124 N. C., 236; *Meredith v. R. R.*, 137 N. C., 488; *Furniture Co. v. Express Co.*, 144 N. C., 639.

It is a rule of law that when a particular fact necessary to be proved is peculiarly within the knowledge of one of the parties, upon him rests the burden of proof as to it, and the rule has been applied to shipment of goods by connecting lines of carriers, when a presumption arises that the carrier in whose possession the goods are found in a damaged condition caused the damage, it being all the proof the nature of the case permits to the plaintiff, and proof in exoneration of the carrier being more accessible to him than to the plaintiff. *Furniture Co. v. Express Co., supra; Brintnell v. R. R.*, 32 Vt., 665; Moore on (230) Carriers, pp. 490, 491; *Dixon v. R. R.*, 74 N. C., 538; *Lindley v. R. R.*, 88 N. C., 547.

We think there was sufficient evidence in the case, if found to be true, to fasten liability on the defendant as the carrier responsible for injury to the stock. There was error in ordering a nonsuit. It will be set aside and a new trial granted.

New trial.

JOHN J. STEWART AND WIFE, GRACE M. STEWART v. SALISBURY REALTY AND INSURANCE COMPANY AND B. H. HAMILTON.

(Filed 24 April, 1912.)

1. Deeds and Conveyances—Fraud—Misrepresentations in Values—Caveat Emptor.

While in proper instances the doctrine of *caveat emptor* applies to transactions in lands, relief will be afforded when it is shown that the buyer of real estate in a town where he was unacquainted with such values reasonably relied upon a false representation of an expert therein, in a sale made by him, that the owner had recently bought the property at $3,500, when in point of fact he had only paid $2,750 for it, and it is fairly to be inferred that the false representation was made with the intent to deceive the purchaser and induce him to believe he was making a good trade.

2. Same—Rescission—Damages—Election of Purchaser.

When misrepresentations of values are made in the sale of lands with a fraudulent purpose, calculated to and which reasonably did deceive the purchaser, and were relied on and acted upon by him, it will avoid the conveyance, or leave the purchaser to his redress in damages unless by his conduct he has waived the latter remedy by electing to avoid the transaction.

3. Deeds and Conveyances—Principal and Agent—Acceptance of Benefits—Waiver.

The owner of lands who has accepted the benefits of a sale thereof induced by the fraudulent representation of his sales agent, acting within the apparent scope of his authority, is bound by the transaction, and the doctrine of *respondeat superior* applies.

4. Deeds and Conveyances—Values — Misrepresentations — Fraud — Caveat Emptor—Measure of Damages.

When it is shown that a vendor of lands has fraudulently made a sale thereof by representing that he had recently paid $3,500 for the property, when in point of fact he had only paid $2,750 for it, and this formed an inducement to the transaction, the measure of damages is the difference between $2,750, the price the owner had actually paid, and $3,500, the price he represented he had paid, without regard to the actual value of the property, unless by his conduct the purchaser has elected to rescind the conveyances.

5. Same—Rescission—Waiver—Measure of Damages.

The plaintiff purchased of the defendant certain lands and gave his note secured by mortgage thereon for the purchase price. Thereafter he demanded cancellation of the note and mortgage and offered a deed reconveying the lands, upon the grounds of "misrepresentation and deception," and then brought his action alleging fraud in the transaction: *Held*, the demand of plaintiff was a waiver of his right to recover damages upon

the question of values, and having elected to rescind the transaction, he would only be permitted to recover any money actually paid upon it, and interest thereon.

6. Deeds and Conveyances—Fraud—Election—Waiver, Effect of.

An election by the purchaser to rescind a fraudulent sale of land, when once made, with knowledge of the facts, between coexisting remedial rights, which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding, based upon any remedial right inconsistent with that asserted by the election.

APPEAL from *Justice, J.*, at January Special Term, 1912, of (231) ROWAN.

At the conclusion of the evidence the court sustained a motion to nonsuit, and the plaintiffs appealed. The facts are stated in the opinion of the Court.

Theo. F. Kluttz and R. Lee Wright for the plaintiffs.
Stahle Linn and T. C. Linn for the defendants.

BROWN, J. The plaintiff alleges in his complaint, and offers evidence tending to prove, that about 13 October, 1910, he contracted to purchase from the defendant company, through its salesman and agent, the defendant Hamilton, certain real estate in Salisbury, N. C., called the Trexler property; that after much negotiating the defendant agreed to sell the property to the plaintiffs at an advance of $300 (232) above the cash price, which offer the plaintiff accepted.

Plaintiff further states that the agent Hamilton told him that the company had recently paid $3,500 cash for the property to Trexler; that the plaintiff was ignorant of real estate values in Salisbury, and, relying upon the statements and representations of Hamilton, closed the trade; that a deed was executed to plaintiff Grace M. Stewart, wife of John J. Stewart, and they executed note and mortgage to the company for the $3,800 on the Trexler property and additional landed security.

Plaintiff avers, and offers evidence to prove, that the defendants paid only $2,750 for the Trexler property, and that its agent intentionally and falsely misrepresented the cost price of said property for the purpose of cheating and defrauding plaintiff.

The defendants contend that the evidence of fraud is insufficient to carry the case to the jury, and that the doctrine of *caveat emptor* applies.

We recognize the general doctrine that the rule of *caveat emptor* is applied by the courts, even in respect to sales of land, when the buyer and seller have equal opportunity of knowledge, and where the buyer

makes examination, and when the representations concern the value of land, its condition or adaptation to particular uses, which are largely matters of opinion, and estimates as to which men may differ. Cooley on Torts, sec. 487; Smith on Frauds, p. 191.

The evidence offered, we think, is potent enough to take this case out of this rule.

Taken in its most favorable light for the plaintiffs, it shows that the purchaser was ignorant of real estate values in Salisbury, that he was dealing with an expert, that he relied upon the representations of such expert as to the actual price recently paid for the property, that such price was falsely and fraudulently represented to be $750 more than the true cost, and it is fairly to be inferred that such false representations were made with intent to deceive plaintiff and induce him to believe he was making a good trade.

(233) It is true that a purchaser will not be allowed to rescind his trade, or recover damages, simply because he has not made a good one; but where he has been tricked into making a trade he otherwise would not have made, the law generally affords some measure of relief.

We think the evidence in this case tends to prove that the misrepresentations were made by Hamilton, the agent of defendant company; that they were false and made with a fraudulent purpose; that they were calculated to and did deceive; and that they were relied on and acted upon by the plaintiff. *May v. Loomis,* 140 N. C., 352; *Tarault v. Seip,* 158 N. C., 363; *Whitehurst v. Insurance Co.,* 149 N. C., 276.

The evidence furthermore tends to prove that Hamilton was the agent of the codefendant; that he was acting within the scope of his agency, and that his principal reaped the benefit of, and therefore should be bound by, his acts. *Brite v. Penny,* 157 N. C., 110; *Bowers v. Lumber Co.,* 152 N. C., 607.

If the facts be found by a jury under appropriate issues in favor of the plaintiffs, what remedy have they?

The learned counsel for the plaintiffs argued with much force that the plaintiffs can recover in this action the sum of $750, the difference between the actual cost of the property and $3,500, its fictitious cost, and that this is true, notwithstanding the fact that the plaintiffs have offered no evidence tending to prove that the actual value of the property was less than $3,800, the price which the plaintiffs were induced to pay.

This position finds strong support in a case decided by the Supreme Court of Maryland, which appears to be on all-fours with the one at bar. *Pendergast v. Reed,* 29 Md., 398.

In that case A fraudulently represented the cost price of a vessel to have been $34,000, and sold a part of the vessel to B upon that basis.

B subsequently learned that the cost price of the vessel was much less than that which A represented it to have been. There was no evidence of the actual value of the vessel. B retained his interest, and sued for damages. The Court unanimously held that B was entitled to recover from A for the overpayment, even if the actual value of the share purchased equaled or exceeded what it would have been had the representation been true.

In the opinion it is said: "It is not simply the case of a false affirmation by a vendor, concerning the value of the thing sold, (234) where information on the subject was easily within the reach of the vendee, and where the law would regard it the folly of the latter to credit the assertion, but of a false representation of a material fact known to the defendant, and by means of which the plaintiff was induced to part with his money. The very essence of the contract here stated was a purchase for certain considerations of one-eighth of the vessel at its cost price to the defendant, and a false representation of this price, inducing the plaintiff to buy, worked an injury to him, for which he is entitled to recover, even if the actual value of the share purchased equaled or exceeded what it would have been had the representation been true. He had the right to all the profits of his purchase and contract as he made it, and it is no answer to his action to say, though the representation was false, yet the actual value of the thing sold is equal to what such false representation induced him to pay for it."

This case is cited with approval in notes in 18 Am. St., 555; also, *Walker v. Pike County,* 139 Fed., 609; *Garrett v. Wannfried,* 67 Mo. App., 437. The same principle is recognized in *Teachout v. Van Hoesen,* 76 Iowa, 113; L. R. A., 664, and notes; *Fell v. Bell,* 205 Ill., 213; *Thompson v. Newell,* 118 Mo. App., 405. See, also, 20 Cyc., 551 B and notes; also case almost identical with the one at bar, *Mason v. Thornton,* 74 Ark., 46.

It would seem upon the authorities that the plaintiffs, if the facts be as appear in the evidence introduced by them, are entitled to recover the $750, unless they have elected to rescind the contract of sale. There is no doubt in our minds that upon such facts the plaintiffs would have the right to rescind the contract, have the note and mortgage canceled, and restore the property to the defendant.

But we find it averred in the complaint that immediately upon discovering the alleged fraud, the plaintiffs made demand upon the defendant for rescission and cancellation of the contract, and the surrender of their note and mortgage, and also tendered to the defendant company a deed for the premises, executed by the plaintiffs. At the same time the plaintiffs served upon the defendants the following notice: (235)

SALISBURY, N. C., October 24, 1910.

To the Salisbury Realty and Insurance Company:

Take notice, that I hereby demand a rescission and cancellation of the house and lot contract—a cancellation of the note and mortgage I gave you, and that you accept a deed from me and wife for the house and lot you deeded us, or a reduction of the amount of the note and mortgage to the correct sum of $3,050, as per agreement with your agent, as heretofore made.

The grounds for above are misrepresentation and deception. I hereby tender you deed in accordance with the above. JOHN J. STEWART.

It is elementary learning that if the plaintiffs rescind the contract upon their part, they could only have the note and mortgage canceled, and recover any money actually paid upon it.

They could not recover damages for a breach of contract, as an action for damages proceeds upon an affirmance of the contract. Rescission will bar an action for damages when the only damage sustained is in not getting what was bargained for, and no special damages have been proven. 14 Am. & E., 170. But where special damages have been sustained, so that the party defrauded is damaged, notwithstanding the rescission, his rescission of the contract will not bar a recovery of such special damages. *R. R. Co. v. Hodnett,* 29 Ga., 461; *Nash v. Title Insurance Co.,* 163 Mass., 574; *Warren v. Cole,* 15 Mich., 265.

The record shows both from the allegations of the plaintiff and the notice of 24 October that the plaintiffs have made a binding election, that is to say, election with full knowledge of all the facts from which the coexisting, inconsistent, remedial rights arise. *R. R. v. Bernhein,* 113 Ala., 489. It seems to be well settled that an election once made, with knowledge of the facts, between coexisting, remedial rights, which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding,
(236) based upon any remedial right inconsistent with that asserted by the election. 15 Cyc., 262; *Moller v. Tusker,* 87 N. Y., 166; *Clausen v. Head,* 110 Wis., 405.

From the authorities it is plain that upon the plaintiffs' own showing they are not entitled to recover the $750, as they have elected to rescind and set aside the contract of sale.

We are of opinion that his Honor erred in sustaining the motion for nonsuit, as upon the plaintiffs' evidence the cause should have been submitted to a jury upon appropriate issues of fraud and deceit raised by the pleadings.

Reversed.

Cited: Chilton v. Groome, 168 N. C., 642; *Miller v. Mateer,* 172 N. C., 405.

KATIE ANN LOCKLEAR, ADMINISTRATRIX, v. W. A. SAVAGE ET AL.

(Filed 27 March, 1912.)

1. Title—Adverse Possession—Limitation of Actions—Evidence.

In an action to establish title to lands by adverse possession evidence is sufficient to carry the case to the jury which tends to show actual possession for the statutory period, by a claimant of title in his own right; that he had made such use of the land as it was capable of in its present condition, with acts of ownership so repeated as to show they were done in his character as owner, in opposition to the right or claim of any other person, and not merely as an occasional trespasser.

2. Same.

Plaintiff claiming title to lands by adverse possession introduced evidence tending to show that he had been in actual possession of the *locus in quo* for the statutory period, claiming it as his own, ordering trespassers off of it, cultivating different parts at different times; that he had built two residences thereon at different periods; and that his claim had extended to well defined boundaries of the whole: *Held*, upon a motion to nonsuit, the evidence was sufficient to take the case to the jury.

3. Appeal and Error—Exceptions Grouped and Numbered—Exception to Nonsuit—Practice.

The rule of this Court that exceptions on appeal be grouped and numbered does not apply when there is but one exception, and that taken to a judgment of nonsuit upon the evidence.

4. Appeal and Error—Record—Evidence in Narrative—Stenographer's Notes.

Upon an appeal from a judgment of nonsuit, the substance of the evidence should be set out in narrative form, and it is not permissible to set out the entire evidence by question and answer or to send up a transcript of the stenographer's notes. Because of the peculiar nature of the appeal in this case and the questions presented, *Held*, that there was no sufficient departure from the rule of this Court and the statutory provision to call for an affirmance of the judgment without considering the case on appeal.

BROWN, J., dissenting.

APPEAL from *Whedbee, J.*, at December Term, 1912, of ROBE- (237) SON.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

Britt & Britt and McNeill & McNeill for plaintiff.

McLean, Varser & McLean and McIntyre, Lawrence & Proctor for defendant.

WALKER, J. This is an action to recover damages for a trespass on land in cutting and removing timber therefrom. The plaintiff claims

title under John Locklear, being his administratrix. It is not pretended that he had any paper title for the land, or color of title, but to show title in him the plaintiff relied solely upon John Locklear's adverse possession of the land for more than thirty years, under a claim of right, to take the title out of the State and vest it in him, and the real question in the case is whether he had such a possession of the land for a sufficient length of time to produce that result.

What is adverse possession within the meaning of the law has been well settled by our decisions. It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must (238) be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner. *Loftin v. Cobb,* 46 N. C., 406; *Montgomery v. Wynns,* 20 N. C., 527; *Williams v. Buchanan,* 23 N. C., 535; *Burton v. Carruth,* 18 N. C., 2; *Gilchrist v. McLaughlin,* 29 N. C., 310; *Bynum v. Carter,* 26 N. C., 310; *Simpson v. Blount,* 14 N. C., 34; *Tredwell v. Reddick,* 23 N. C., 56.

So in *Loftin v. Cobb, supra,* it was held that cutting timber and making shingles in a swamp unfit for cultivation, continuously for seven years, is a good possession under the statute. "It is exercising that dominion over the thing and taking that use and profit which it is capable of yielding *in its present state.* It is all that can be done until the subject shall be changed. It is like the case stated in the books of cutting rushes from a marsh. This is sufficient, though it might appear that dykes and banks would make the marsh arable."

Again it was held in *Williams v. Buchanan,* 23 N. C., 535, that, as to a stream not navigable, keeping up fish-traps therein, erecting and repairing dams across it, and using it every year during the entire fishing season for the purpose of catching fish, constitute an unequivocal possession thereof. The possession must, of course, be not only adverse, as we have defined it, but open, notorious, and continuous, and the extent of it must be shown by known and visible boundaries. The doctrine was explained and illustrated in the recent case of *Coxe v. Carpenter,* 157 N. C., 557, in which we said, referring to the evidence in that case: "The jury may well infer that these acts were those of ownership, and not those of an occasional trespasser, and that they were repeated and continuous for a considerable period of time. The possession was as decided and notorious as the nature of the land would permit, and of-

fered unequivocal indication that plaintiff and his father were exercising the dominion of owners, and were not pillaging as trespassers. *Williams v. Buchanan,* 23 N. C., 535 (35 Am. Dec., 760); *Tredwell v. Reddick,* 23 N. C., 56; *Hamilton v. Icard,* 114 N. C., 538; *Simpson v. Blount,* 14 N. C., 34; *Baum v. Shooting Club,* 96 N. C., 310. It is true that in proving continuous adverse possession under color of title (239) nothing must be left to mere conjecture. The testimony must tend to prove the continuity of possession for the statutory period, either in plain terms or by "necessary implication." *Ruffin v. Overby,* 105 N. C., 83. This possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has, from time to time, continuously subjected the disputed land to the only use of which it was susceptible. *Ruffin v. Overby, supra; McLean v. Smith,* 106 N. C., 172; *Hamilton v. Icard, supra.* While the evidence offered is not necessarily conclusive, if taken to be true, as to the fact of possession, we think it is sufficient to be submitted to the jury, under appropriate instructions, that they may draw such inference as they see proper, bearing in mind that the burden of proof is on the plaintiff to establish the fact of possession for the statutory period by a preponderance in the proof."

The evidence in this case may not be as strong as it was in the *Coxe case,* but we are unable to say that there was absolutely none. We are passing upon a judgment of nonsuit, and it is a familiar principle that the evidence is to be viewed in the light most favorable to the plaintiff. The facts which the testimony tended to establish in support of the plaintiff's contention may be thus briefly stated: John Locklear was 80 years old when he died, and had lived on the land nearly all his life. He first built a hut on it, which was his home so long as fit for habitation. In 1853 he left this part of the land, the lower end, and built on the same premises, at a different place and near the public road, the house in which he lived until 1897, the year of his death. He cleared and cultivated ten or fifteen acres of the land around his house; boxed the pine trees on the tract for turpentine; cut wood and cross-ties; ditched the land and cut paths through it for the purpose of boxing the trees and cutting the timber. One witness testified: "I knew the bounds he worked up to and cultivated all of my lifetime—the lands where John Locklear lived. I can tell you the bounds." He then stated (240) the names of the adjoining proprietors, and also that the land Locklear lived on and used was bounded by Batrix Bay, Mill Swamp, the Fayetteville and Lowrie roads. The turpentine boxes were cut and the trees "worked for turpentine" as far back as thirty-five years ago—about 1876. This suit was commenced 9 April, 1910. There was also evidence

that John Locklear had forbidden people to come upon the land for the purpose of boxing the trees, and driven them away on occasions at the point of his gun. There was much testimony of the kind we have stated, and some other facts and circumstances of more or less value in determining the character of the possession. There was evidence, it is true, tending to show that John Locklear's possession was not adverse or continuous; but upon a nonsuit we cannot consider it. It may be that the jury will find, upon the evidence now before us, or upon that and additional evidence at another trial, when the facts are more fully developed, that there was neither an adverse nor a continuous possession. We must now infer everything from the testimony in favor of the plaintiff, which it tends to prove. This rule will not be the one for the guidance of the jury when the issue of fact is submitted to them, but rather a contrary one, for the burden will then be upon the plaintiff to establish her case by a preponderance of the evidence. There is enough evidence in the record to carry the case to the jury, and the issue must be tried by them, under proper instructions of the court with reference to the real facts as they may find them to be.

Without stating it, we think there was some evidence to the effect that the defendants had cut timber from the land and sawed it into lumber, under such circumstances as to make them liable for the same if John Locklear was the owner of the land.

The motion to dismiss the appeal because the exceptions are not grouped is overruled. There was only one exception, which was taken to the judgment of nonsuit, and the error is thus sufficiently assigned. We so decided at the last term. There is no irrelevant or superfluous matter in the record. On a motion to nonsuit we must review the whole of the evidence. This should not be set out by question and answer, or by a full transcript of the stenographer's notes, but in (241) narrative form. On account of the peculiar nature of this appeal and the question presented, there has been no sufficient departure from the rules of this Court and statutory provisions to call for an affirmance of the judgment without considering the case on appeal.

New trial.

BROWN, J., dissenting.

Cited: Green v. Dunn, 162 N. C., 343; *Locklear v. Paul,* 163 N. C., 338; *Christman v. Hilliard,* 167 N. C., 7; *Reynolds v. Palmer, ib.,* 455; *Horton v. Jones, ib.,* 667; *Lumber Co. v. McGowan,* 168 N. C., 87; *McCaskill v. Lumber Co.,* 169 N. C., 25; *Stallings v. Hurdle,* 171 N. C., 5; *Cross v. R. R.,* 172 N. C., 122, 125; *Holmes v. Carr, ib.,* 215; *Kluttz v. Kluttz, ib.,* 623.

R. H. SEWARD v. RECEIVERS OF SEABOARD AIR LINE RAILWAY AND SEABOARD AIR LINE RAILWAY.

(Filed 22 May, 1912.)

1. Master and Servant—Discharged Employee—Privileged Communications—Interpretation of Statutes.

Chapter 858, Laws 1909, making an employer liable in penal damages to a discharged employee if the employer "shall prevent or attempt to prevent, by word or writing of any kind, 'his' obtaining employment with any other person, company, or corporation," should be read in the light of the common law as it existed before its enactment, to discover the remedy intended to be supplied by the statute.

2. Master and Servant—Discharged Employee—Privileged Communications—Common Law.

Under the common law an employer would not be liable in damages if in good faith he made a report of the character of his discharged employee to another who was considering engaging his services; but if the report was knowingly false, or if it was maliciously made, it was actionable.

3. Same—Railroads—Express Malice—Interpretation of Statutes.

When a report is made by one railroad company to another upon a discharged engineer, the report is regarded as privileged, and in the absence of express malice no cause of action can be based on its publication. (Chapter 858, Laws 1909.) The doctrine is especially applicable in instances of this kind where the interest of the public and of the other employees make it necessary that only competent and careful men fill such responsible positions.

4. Same—Remedial Statutes.

Chapter 858, Laws 1909, was intended to correct the abuses under the common law of statements made concerning a discharged employee out of malice, where damages for the loss of employment were difficult of admeasurement; and under the provisions of the act a statement made as to the standing of the discharged employee is not privileged, if made maliciously, and the employer has thereby prevented or attempted to prevent the discharged employee from obtaining employment.

5. Same—Principal and Agent—Evidence—Questions for Jury.

A railroad company, upon the request of a discharged engineer, made reports to several railroad companies to whom the employee had applied for work, of such character as to prevent his being employed by them, with a statement that the employee was suing the railroad for damages for a personal injury. In his action against his former employer, under chapter 858, Laws 1909, the employee alleged and offered evidence tending to show that the report was untrue. It appearing that the one who made the report was duly authorized to make it by the defendant company and that the suit referred to was thereafter settled upon a payment to the employee of substantial damages, and the employer knowingly continued

to make the same statements: *Held,* the question should have been submitted to the jury upon the question of malice, and that the statement as to the suit was not a privileged communication as a matter of law.

BROWN, J., dissenting.

APPEAL from *Webb, J.,* at February Term, 1912, of WAKE. (242)

This is an action to recover damages under chapter 858, Laws 1909, for preventing or attempting to prevent the plaintiff from obtaining employment with certain railroad companies as an engineer.

The plaintiff entered the employment of the defendant as engineer, on 31 January, 1907, and was discharged on 9 January, 1909. After his discharge he applied to the Florida East Coast Railroad Company for employment, and this company, with the consent of the plaintiff, requested the defendant to give it a report of the record of the plaintiff, to which request the defendant replied on 22 January, 1909, as follows:

"As per your request of the 18th instant, I beg to give below the record of Engineman R. H. Seward:

"Entered service 31 January, 1907.

"Charged with thirty days actual suspension for refusing to go out. (243)

"Thirty days on account of accident.

"Thirty days actual suspension for damage on account of crown sheet to engine being damaged.

"Thirty days actual suspension for responsibility in connection with collision, and

"Forty-five days record suspension for minor offenses, and

"Dismissed 9 January, 1909, for leaving station on time of another train, resulting in head-on collision."

The plaintiff also applied to the Norfolk and Southern Railroad Company for employment, and upon request from said company for the record of the plaintiff, the defendant replied, on 9 July, 1909, as follows:

"As per your request of 7 July, beg to give below report of Engineman R. H. Seward while in our service, and will state further that this man is now suing the S. A. L. for personal injury.

"Entered service 31 January, 1907.

"Charged with thirty days actual suspension for refusing to go out.

"Thirty days on account of accident.

"Thirty days actual suspension for damages to crown sheet of engine.

"Thirty days actual suspension for responsibility in connection with collision, and

"Forty-five days record suspension for minor offenses, and

"Dismissed 9 January, 1909, for leaving station on time of another train, resulting in head-on collision."

The plaintiff also applied to the Durham and Charlotte Railroad Company for employment, and upon request of said company for the record of the plaintiff, the defendant replied, on 15 December, 1909, as follows:

"Yours of 11 December. Kindly find below record of R. H. Seward:

"Entered service 31 January, 1907.

"Charged with thirty days actual suspension for refusing to (244) go out.

"Thirty days on account of accident.

"Thirty days actual suspension for damage to crown sheet of engine.

"Thirty days actual suspension for responsibility in connection with collision, and

"Forty-five days record suspension for minor offenses, and

"Dismissed 9 Jauary, 1909, for leaving station on time of another train, resulting in head-on collision."

The action for personal injury referred to in the letter of defendant of 9 July, 1909, was commenced after the discharge of the plaintiff by the defendant, and was settled in October, 1909, by the payment of $1,350 to the plaintiff.

The plaintiff offered evidence tending to prove that he was refused employment by the several companies to which he had applied, by reason of the reports made by the defendant, and that the statements contained in the reports were false.

He admitted, however, on cross-examination, that he was notified of each charge contained in the report, and had a hearing thereon, and there was no evidence that the report did not contain a true statement of the action of the defendant upon the charge.

The part of chapter 858, Laws 1909, relevant to this case is as follows:

"If any person, agent, company, or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company, or corporation, such person, agent, or corporation shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding $500, and such person, agent, company, or corporation shall be liable in penal damages to such discharged person, to be recovered by a civil action; but this section shall not be construed as prohibiting any person or agent of any company or corporation from informing, in writing, upon request, any other person, company, or corporation to whom such discharged person or employee has applied for employment, a truthful (245) statement of the reason of such discharge."

The plaintiff contended:

(1) That the defendant had no right, under the statute, to give the record of the plaintiff, and could do no more than state the reasons for his discharge.

(2) That if the defendant could give the record of the plaintiff, it did not state it truthfully, and was actuated by malice.

The defendant contended:

(1) That it had the right, upon request, to give the entire record of the plaintiff, and that its communications were privileged and not actionable, in the absence of malice.

(2) That there was no evidence of malice.

At the conclusion of the evidence his Honor, upon motion of the defendant, entered judgment of nonsuit, and the plaintiff excepted and appealed.

Douglass, Lyon & Douglass and R. N. Simms for plaintiff.

W. H. Pace and Armistead Jones & Son for defendant.

ALLEN, J., after stating the case: The statute under which this action is brought, by its express terms embraces "any person, agent, company, or corporation," and is applicable alike to all who employ labor.

It must be read in the light of the common law as it existed prior to its enactment, for the purpose of seeing wherein it was deficient, and of discovering the remedy intended to be supplied by the statute. Black on Interpretation of Laws, p. 232, says: "When any question arises as to the meaning or the scope of a statutory enactment, it is a good rule to compare it with the common law on the same subject, and to construe the statute with reference to that law. . . . No statute enters a field which was before entirely unoccupied. It either affirms, modifies, or repeals some portion of the previously existing law. In order, therefore, to form a correct estimate of its scope and effect, it is necessary to have a thorough understanding of the laws, both common and statutory, which heretofore were applicable to the same subject. Whether the stat-
(246) ute affirms the rule of the common law on the same point, or whether it supplements it, supersedes it, or displaces it, the legislative enactment must be construed with reference to the common law, for in this way alone is it possible to reach a just appreciation of its purpose and effect. Again, the common law must be allowed to stand unaltered as far as is consistent with a reasonable interpretation of the new law"; and again on page 110: "The intention of the Legislature in enacting a particular statute is not to be ascertained by interpreting the statute by itself alone, and according to the mere literal meaning of its words. Every statute must be construed in connection with the whole system of which it forms a part, and in the light of the common law and

of previous statutes upon the same subject. And the Legislature is not to be lightly presumed to have intended to reverse the policy of its predecessors or to introduce a fundamental change in long-established principles of law."

When we look to the common law, we find that the employer had the right to employ whom he pleased, and to discharge with or without reason, and that the employee could select the person whom he would serve, and had the right to quit the service at pleasure, the only limitation upon the exercise of the right by either being the terms of the contract of service.

"An employer has a right to select his employees according to what standard he may choose, though such standard be arbitrary or unreasonable. An employer certainly has a right to refuse to employ any one whom he knows to have left another employer in violation of a reasonable rule which both employers are seeking to enforce. . . . There are, however, limitations upon the rights of the employers in this matter. While the employee is bound by the reasonable rules of the employer, as a part of the contract of employment, and may be reported to other employers for a breach of those rules, there is a correlative duty upon the employer not to report an employee wrongfully. The rule which enters into the contract of employment is as much a part of the contract of the employer as of the employee, and both are bound by it. The employer is strictly within his rights as long as he reports no employee for a violation of the rule except such as have actually violated it. When, however, he wrongfully makes such a report (247) and an employee is thereby damaged, such employee has a right of action." *Willis v. Manufacturing Co.*, 120 Ga., 600.

"It is a part of every man's civil rights to enter into any lawful business, and to assume business relations with any person who is capable of making a contract. It is likewise a part of such rights to refuse to enter into business relations, whether such refusal be the result of reason, or of whim, caprice, prejudice, or malice. If he is wrongfully deprived of these rights, he is entitled to redress. Every person *sui juris* is entitled to pursue any lawful trade, occupation, or calling. It is part of his civil rights to do so. He is as much entitled to pursue his trade, occupation, or calling, and be protected in it, as is the citizen in his life, liberty, and property. Whoever wrongfully prevents him from doing so inflicts an actionable injury. For every injury suffered by reason of a violent or malicious act done to a man's occupation, profession, or way of getting a livelihood, an action lies. Such an act is an invasion of legal rights. A man's trade, occupation, or profession may be injured to such an extent, by reason of a violent or malicious act, as would prevent him from making a livelihood. . . . A railroad company has the right

to engage in its service whomsoever it pleases, and as part of its rights to conduct its business is the right to discharge any one from its service, unless to do so would be in violation of contractual relations with the employee. It is the duty of a railroad company to keep in its service persons who are capable of discharging their important duties in a careful and skillful manner. The public interest, as well as the vast property interests of the company, require that none other should be employed by it. Its duty in this regard and its right to discharge an employee does not imply the right to be guilty of a violent or malicious act which results in the injury of the discharged employee's calling. The company has the right to keep a record of the causes for which it discharges an employee, but in the exercise of this right the duty is imposed to make a truthful statement of the cause of the discharge." *Hundley v. R. R.,* 105 Ky., 164.

(248) The intelligence and skill of the employee were regarded as his capital, which he had the right to sell, and which the employer had the right to buy, and an unlawful interference with the right of either was actionable.

As was said in *Willner v. Silverman,* 109 Md., 356: "In furtherance of their common welfare and in settlement of their ofttimes conflicting interests, both employers and employees stand upon a plane of perfect equality before the law, enjoying the same freedom and amenable to the same restrictions."

When the employee was discharged, he could not require a statement of the reasons for the discharge, and the employer was under no legal obligation to give to any one, with whom he sought employment, his record or character, while in his service, although he could do so upon request, and according to some of the authorities, voluntarily, and there would be no liability in damages if the report was made in good faith, and in the belief that it was true, although in fact false; but if made maliciously, it was actionable.

"An ex-employer may, without rendering himself liable in an action for slander or libel, in *good faith,* state orally or in writing, and as well without as with a previous request, all that he may *believe* to be true concerning his ex-employee. It appearing that the publication was made in what is termed 'giving a character,' the presumption is that it is made *bona fide,* and the burden is on the plaintiff to show *malice* in the publisher, *i. e.,* either that he had an intent to injure the person spoken of or that he did not believe in the truth of the statement published. Where no intent to injure exists, a belief in the truth of the language published is a legal excuse for making the publication; but where an intent to injure exists, a belief in the truth of the language published is not a legal excuse for making the publication. *Malice,* or

want of *good faith,* is established when it is shown that the matter published was false within the knowledge of the publisher; or malice may be established by showing a bad motive in making the publication, as that it was made more publicly than was necessary to protect the interests of the parties concerned, or that it contained matter not relevant to the occasion, or that the publisher entertained ill-will toward the person whom the publication concerned." Townshend on Slander and Libel, sec. 245, p. 420. (249)

"The instance that occurs most frequently in ordinary life of this first class of privileged communications is where the defendant is asked as to the character of his former servant, by one to whom he or she has applied for a situation. A duty is thereby cast upon the former master to state fully and honestly all that he knows either for or against the servant; and any communication made in the performance of this duty is clearly privileged for the sake of the common convenience of society, even though it should turn out that the former master was mistaken in some of his statements. But if the master, knowing that the servant deserves a good character, yet, having some grudge against him, or from some other malicious motive, deliberately states what he knows to be false, and gives his late servant a bad character, then such a communication is not a performance of the duty, and therefore is not privileged. There is, in fact, in such a case, evidence of express malice, which 'takes the case out of the privilege.'" Odgers on Libel and Slander, p. 199.

"One of the most ordinary occasions of everyday life which brings into existence the question of privilege in regard to communications is when one person, either voluntarily or in answer to an inquiry, states his own views to another concerning the character of some individual who has left his service and seeks to obtain employment elsewhere. A duty is thereby cast upon the former master to state fully and honestly all that he knows either for or against the servant; and any communication made in the performance of this duty is clearly privileged for the sake of the common convenience of society, even though it should turn out that the former master was mistaken in some of his statements. But if the master, knowing that the servant deserves a good character, yet, having some grudge against him, or from some other malicious motive, deliberately states what he knows to be false, and gives his late servant a bad character, then such a communication is not a performance of the duty, and therefore is not privileged. There is in fact, in such a case, evidence of malice, which 'takes the case out of the privilege.'" Newell on Defamation, Libel, and Slander, p. 490.

"It seems to us that any person who upon reasonable grounds believes himself to be posessed of knowledge which, if true, does (250)

or may affect the rights and interests of another, has the right in good faith to communicate such belief to that other, and he may make the communication with or without request, and whether he has or has not personally any interest in the subject-matter of the communication." *R. R. v. Richmond,* 73 Texas, 575.

The report was regarded as privileged, and in the absence of express malice no cause of action could be based on its publication, this doctrine resting on the moral obligation of the employer.

The life and limb of the employee were largely dependent on the intelligence, skill, and prudence of his coemployees, and it was the duty of the employer to exercise care to see that no one was admitted to the common employment who was careless or incompetent. The employer owed the same duty to the public, whose lives and property were committed to his care, and this duty could not be performed unless one employer could, without fear of liability, communicate freely his honest belief as to the standing of a discharged employee, and the law, therefore, said that such communications were presumed to be made in the performance of a duty, and in the absence of express malice they could not be made the basis of an action.

"The general doctrine of privilege, as applied to actions for libel and slander, is founded upon the reasonable view that in the intercourse between members of society, and in proceedings in legislative bodies and in courts of justice, occasions arise when it becomes necessary or proper that the character and acts of individuals should be considered and made the subject of statement or comment, and that, in the interests of society, a party making disparaging statements in respect to another on such a lawful occasion should not be subjected to civil responsibility in an action of this character, although such statements are untrue. The law of privilege has been stated by judges in different forms of words, but the comprehensive definition of *Blackburn, J.,* in *Davie v. Sneed,* L. R. (5 Q. B.); 611, as applied to communications between individuals, is especially worthy of notice: 'Where,' says that learned judge,
(251) 'a person is so situated that it becomes right in the interests of society that he should tell a third person certain facts, then if he, *bona fide* and without malice, does tell them, it is a privileged communication.' There are many examples in the books of communications held to be privileged, where the same words, if used other than on a lawful occasion, would be libelous, but which, by reason of the occasion when they were published, or spoken, will not sustain an action, although proved to be untrue, unless proved to have been spoken maliciously. The cases of charges made in giving the character of a servant, or in answering an authorized inquiry concerning the solvency of a tradesman, or

where the communication was confidential between parties having a common interest in the subject to which it relates, are illustrations." *Moore v. Bank,* 123 N. Y., 424.

"It (a report by an employer) was made upon a subject-matter in which the person communicating it had a deep interest, as well as a duty to perform, and was made to a person having a corresponding interest and duty. If one of defendant's servants had demonstrated his unfitness for a position held by him, it was for its interest, as well as for the interest of the public, that steps should be taken which would render the servant qualified and capable, or that he be dismissed. It would not only be for the interest of the company to remedy the evil, and to act so as to stop all future complaints, but it would be a matter of duty to the public. . . . The communication being of a privileged character, and having been made on a privileged occasion only, the *prima facie* effect was to overcome and rebut the quality or element of malice, and to cast upon the plaintiff the necessity of showing malice in fact; that is, that the defendant was actuated by ill-will in what it caused to be done and said, with a design causelessly and wantonly to injure the plaintiff. The law is that a communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When not made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proven before there can be a recovery, and in the absence of such proof the plaintiff (252) cannot recover." *Herner v. R. R.,* 78 Minn., 291.

We cannot think it was the intention of the General Assembly to withdraw these wholesome safeguards from employees and the public, and that the statute may be effective, and will serve a useful purpose, without abrogating the principles of the common law. In speaking of a statute having the same objects in view as the one under consideration, the Supreme Court of Minnesota says: "The act does not attempt to interfere with the right of an employer to discharge an employee for cause or without cause. It does not seek to prohibit an employer from communicating to other employers the nature and character of his employees, when the facts would be for their interest. . . . It is the purpose of this law to protect employees in the enjoyment of those natural rights and privileges guaranteed them by the Constitution, viz., the right to sell their labor and acquire property thereby." *S. v. Justus,* 85 Minn., 282.

Prior to the ratification of the act of 1909, statements as to the character and competency of discharged employees were frequently made voluntarily, and not upon request, and were sometimes prompted by malicious motives, when the motive was difficult of proof; when malice and

the loss of service, as the result of the statement, were proven, the damages were difficult of admeasurement; and when there was no loss of employment, but a mere attempt to prevent the employee from obtaining it, no compensatory damages could be awarded.

The act remedies these defects, and under its provisions a statement as to the standing of a discharged employee is not privileged, unless made upon request; and whether privileged or not, if made maliciously, and the employer has thereby prevented or attempted to prevent the discharged employee from obtaining employment, the jury may award penal damages.

"Malice or want of good faith is established when it is shown that the matter published was false within the knowledge of the publisher; or malice may be established by showing a bad motive in making the publication, as that it was made more publicly than was necessary to protect the interest of the parties concerned, or that it contained matter (253) not relevant to the occasion, or that the publisher entertained ill-will toward the person whom the publication concerned." Town. S. and L., sec. 245.

The employer has the right, under the statute, upon request, to give "a truthful statement of the reason for such discharge," and we do not give to these words the restricted meaning contended for by the plaintiff, as in our opinion they include the record of the employee, and if the statement is so made, in the honest belief that it is true, and not maliciously, the employer is protected.

The Supreme Court of Texas, in discussing a similar statute, says in *R. R. v. Hixon,* 104 Tex., 267: "By the term, 'a true statement' of the cause of his discharge, is meant the employer shall give fairly, honestly, and in good faith the ground or cause upon which the master acted. It was meant that he should not be permitted to discharge for one reason and, when called on to give a statement thereof, assign a different reason."

Applying these principles to the evidence, and it appearing that the plaintiff admits that he was suspended, for alleged misconduct, one hundred and sixty-five days during a service of a little less than two years with the defendant; that he was given a hearing as to each charge, and knew of the record that was made against him, and that the Brotherhood of Locomotive Engineers, of which he was a member, refused to prosecute his appeal when he was finally discharged, we would not hesitate to affirm the judgment of nonsuit, but for the fact that the plaintiff says that the charges contained in the report made by the defendant are not true, and the further fact that the defendant incorporated in its letter of 9 July, 1909, written by its superintendent, Poole, the statement, "and will state further that this man is now suing the S. A. L. for per-

sonal injury," which could not be a part of the record of the plaintiff while in the employment of the defendant, nor a reason for his discharge, as the suit was instituted after he left the service of the defendant.

This statement is competent evidence against the defendant because it was within the scope of Poole's employment to furnish a copy of the plaintiff's record, and it was made while performing this duty; and as said by *Justice Brown* in *Younce v. Lumber Co.*, 155 N. C., (254) 241: "It is well settled that the declarations of officers of a corporation are competent only when made in line of declarant's official duty, and while discharging it in reference to a transaction for the company."

It is not a sufficient answer as to the effect of this evidence to say that the statement is true, as it was not information the defendant was requested to give, and did not bear on the character or competency of the plaintiff, and was calculated to prejudice him.

There is also evidence that the action instituted by the plaintiff against the defendant, referred to in the letter of 9 July, 1909, was to recover damages for personal injuries sustained in a collision, which was one of the most serious charges against the plaintiff; that this action was settled in October, 1909, by the payment of $1,350 to the plaintiff, and that thereafter the defendant, in his letter of 15 December, 1909, retained this same charge against the plaintiff.

These facts at least permit the inference, which the jury are not compelled to adopt, that the defendant would not have paid the sum of $1,350 to the plaintiff voluntarily, on account of injuries sustained in a collision, if he had been guilty of wrongdoing, and that the retention and publication of the charge after the settlement was with knowledge that it was not true.

The statute is a wise one, and will serve a useful purpose, if judiciously administered; but juries, in the assessment of damages, when they can be recovered, should mark the line and discriminate clearly between the employee, who has honestly endeavored to perform his duty, who is entitled to the highest consideration, and the negligent and reckless employee, who is a menace to his coemployees and the public.

Upon a review of the whole record, we are of opinion that there was some evidence for the consideration of the jury, and a new trial is therefore ordered.

New trial.

BROWN, J., dissenting: The statute under which this action is (255) brought, which is correctly copied in the opinion of the Court, is

a very useful piece of legislation, and is intended as well for the protection of the traveling public as for the benefit of all employees who discharge their duty in a faithful manner.

Taking the statute as a whole, it seems to be very plain in its meaning. The gravamen of the cause of action is an attempt to prevent by word or writing of any kind which is false a discharged employee from obtaining employment. The statute expressly excepts from its operation any cause of action when the statement made by the employer *contains a truthful statement of such discharge.*

In this case the plaintiff is an engineer. He belonged to a class of men who daily take their lives in their hand for our benefit, and to a profession whose unpretending, self-sacrificing heroism has been immortalized in song and story.

Of all professions which are interested in having the records of their members made known for the benefit of the efficient and faithful, the profession of a locomotive engineer stands first. In order that publicity may be given to such records, the statute expressly authorizes the giving of a truthful statement as to why an employee has been discharged. If the statement is truthful, it is immaterial what the motive of the master may be in furnishing. If his motive is to prevent the employment in a position of immense responsibility of an incompetent or unfaithful person, then the motive is a laudable one.

The charge which the plaintiff makes in his complaint is that the defendant company, through its superintendent of motive power, Poole, attempted to prevent his getting employment with certain railroad companies by means of furnishing them with an untruthful statement of his service and record with the defendant company. These letters are published in the opinion of the Court.

I am constrained to hold that the testimony of the plaintiff, himself, shows that every material statement set out in these letters has been substantiated by his own evidence, and that upon such testimony the learned judge of the Superior Court was justified in sustaining the motion to nonsuit.

(256) The plaintiff's evidence tends to prove that he entered the employment of the defendant 31 January, 1907, and was dismissed 9 January, 1909. During his employment there was in force on the defendant railway the "merit system," whereby an engineer received demerits for bad conduct, and upon receiving a given number within twelve months, he was discharged. If he did not receive any demerits, then he was given a good mark. During the time of the employment of the plaintiff, a period less than two years, he was actually suspended for 120 days on account of accidents and other charges, and also received 45 days record suspension.

The plaintiff admitted upon cross-examination that he was present and his examination taken each time he was suspended, and that he was notified of his suspension. He admits that under the rule of the company he had a right to appeal in each instance in which he was not satisfied with the action of the company in suspending him, and that such appeal could be prosecuted personally by him, or by a committee composed of members of the Brotherhood of Locomotive Engineers.

The plaintiff further admits, although he was suspended on so many occasions, he appealed only on one occasion when he was discharged, and that the Brotherhood of Locomotive Engineers refused to take up the appeal for him, even after he had asked them to do so.

The plaintiff testified also, in respect to the trials by the officers of the defendant in regard to each of the items set forth in the three letters, as follows:

"These were all investigated. Was notified; was present at each investigation, but did not appeal except in the last case."

It is further admitted by the plaintiff upon his examination that when he applied to the Florida East Coast Railroad, and the Norfolk Southern, and the Durham and Charlotte, the three railroads to whom these letters were addressed, he authorized the officers of these railroads to apply to the defendant company for his record, and that this record furnished by the superintendent of motive power, Poole, was sent to the said railroad companies at their request, and by the permission of the plaintiff, himself.

It appears to me to be almost incontrovertible that upon a (257) comparison of the plaintiff's own evidence with the record furnished to the said companies, every fact set out in the record is established by the plaintiff, himself.

It is admitted in the opinion of the Court that the judgment of nonsuit would be sustained by the majority of my brethren upon the plaintiff's own evidence, except for the fact that in his letter of 9 July, 1909, Poole made this statement, "and will state further that this man is now suing the Seaboard Air Line for personal injury."

The majority seem to be of opinion that this statement affords some slight foundation for this action, because the suit was instituted after the plaintiff left the service of the defendant. But the record shows that this suit was pending at the time the request was made for the plaintiff's record, and that the statement was a truthful statement. It is not pretended in the letter that it was a part of his record. On the contrary, the language shows that it refers to a period after his discharge, for the writer says "that this man is now suing the Seaboard Air Line for personal injury."

It was a statement of a fact admitted to be true, and which could be easily discovered while examining the records of the court. Surely, it cannot be held to be an evidence of malice because the writer of the letter stated a fact which was manifest to all who chose to examine the public records of the courts of the State. If this is the only ground upon which this action can possibly be maintained, then, with all deference to my brethern, it appears to me too trivial to receive a moment's consideration.

There is another reason which impels me to the conclusion that the plaintiff cannot recover because of such statement inserted in the letter of 9 July, and that is because it was an unauthorized act of Poole, outside of and beyond his duty, and in no sense ratified by the defendant.

While Poole in his capacity as superintendent of motive power was authorized to communicate a truthful statement as to why the plaintiff was discharged, it appears upon the face of the letter itself that the statement in regard to the suit was not a reason for the discharge
(258) of the plaintiff, because the suit was brought after his discharge, and it was, therefore, the unauthorized act of Poole, and in no way connected with his duty as a servant or officer of the defendant company.

In Wood on Master and Servant, sec. 279, p. 535, it is said: "The question usually presented is whether, as a matter of fact or of law, the injury was received under such circumstances that, under the employment, the master can be said to have authorized the act; for if he did not, he cannot be made chargeable for its consequences, because, not having been done under authority from him, express or implied, it can in no sense be said to be his act."

It is admitted that it was within the scope of Poole's employment to furnish a copy of the plaintiff's record, and to give a truthful statement of the reason for his discharge, but it was not within the scope of his employment to inject into that statement matters entirely foreign to it and entirely disconnected with it, and which appear upon the face of the statement to have transpired long after the discharge. It seems to me that the act of inserting such foreign matter was not at all incident to the performance of the duties entrusted to Pool by the defendant company, any more than an amanuensis would be authorized to inject the emanations of his own brain into a composition dictated by his master.

I think this position is fully supported by the decisions of this Court in *Daniel v. R. R.*, 136 N. C., 517; *Jackson v. Telegraph Co.*, 139 N. C., 347; and *Sawyer v. R. R.*, 142 N. C., 1.

It is not pretended in this case that there was any express authority given to Poole to make any statement concerning the plaintiff on behalf of the defendant company, which had taken place after the plaintiff

had ceased to be in its employment. The relation of master and servant had then terminated, and this extraneous matter was inserted by Poole, as appears upon the face of the letter, upon his own authority, and there is no pretense that it was ever ratified by the defendant. On the contrary, it appears upon the face of the communication to be Poole's act and not that of the company.

The principal is not liable, as stated by *Mr. Justice Walker* (259) in *Daniel v. R. R.*, 136 N. C., 523; "when the agent steps aside from the duties assigned to him by the principal to gratify some personal animosity, or to give vent to some private feeling of his own."

D. S. CHADWICK, JR. v. O. A. KIRKMAN, GEORGE T. PENNY, J. R. THOMAS, CAROLINA LOAN AND REALTY COMPANY AND THE HOME BANKING COMPANY.

(Filed 22 May, 1912.)

1. Pleadings—Amendments—Trial Term—Court's Decision.

It is within the discretion of the trial judge, if exercised without abuse, to permit amendments to pleadings, in this case allowing a reply to be filed to defendant's counterclaim at the trial term and ordering a trial on the issues thus raised, it appearing that the counterclaim was only an incident to the facts raised by the issues, of which the defendant was apprised by the pleadings already filed.

2. Attorney and Client—Trial—Argument Upon Facts and Law—Harmless Error.

While in this case a ruling of the lower court would have been upheld, denying the right of plaintiff's attorney to read the facts of a decision to the jury in applying the principles of law therein laid down, for the reason that the case argued to the jury was an action against the defendant in the case at bar, involving similar questions of fraud, it is *Held* that, upon the record, the decision of the lower court in permitting it will not be disturbed.

3. Bills and Notes—Indorsee—Fraud—Burden of Proof—Immaterial Findings—Verdict—Power of Court.

In an action attacking the validity of a note for fraud in the procurement by the payee and its indorsee, alleged by the plaintiff to be a holder with notice, the burden is on the holder to show that he was purchaser for value before maturity and without knowledge or notice of the impeaching facts, shown to have existed, and *Held*, in this case, that it was not error for the trial judge to set aside or disregard a finding of the jury upon that issue, there being no evidence tending to show that the holder was an indorsee of that character, the allegation being simply that he had "taken over" the note.

4. Deeds and Conveyances—Fraud—Evidence Rendered Competent—Testimony, How Construed.

In regard to a sale of lands alleged by plaintiff to have been procured by fraud, a witness was permitted, over defendant's objection, to testify that on a certain occasion "he found there was a crooked sale on hand," referring to the transaction complained of, and concerning which he had already testified fully and directly as to the entire facts, tending to establish deliberate fraud on the part of defendant: *Held*, no reversible error.

(260) APPEAL from *Foushee, J.*, at February Term, 1912, of McDOWELL.

Action to recover damages for fraud and deceit in the sale of realty.

There was allegation, with evidence on part of plaintiff tending to show that in March, 1910, and at various times thereafter and before action commenced, the defendants, G. T. Penny, J. R. Thomas, and Carolina Loan and Realty Company, by fraud and deceit induced plaintiff to buy one-half interest in a body of land in McDowell County, composed of several tracts, and to pay therefor $2,500 in money and to execute his note for $2,500 additional, secured by a mortgage on the property. That the land was comparatively worthless and defendants without title to the most of it, and the damages suffered was practically the entire purchase price paid and agreed upon. For a second cause of action, plaintiff sued for a breach of warranty in the conveyance from defendants to plaintiff for the land in question.

Defendant, the Home Banking Company, an institution in which defendant Penny was a director at the time, answered, denying any participation in the alleged fraud, and alleged that it was *bona fide* owner and holder of the unpaid $2,500 note, having "taken over" same in due course of business. The other defendants answered fully, denying any and all allegation of fraud made against them, and set up a counterclaim in which they alleged that in the course of the transaction, plaintiff having received title for entire tract and made these defendants a warranty deed for one-half interest in same, had placed a mortgage on the entire land before defendants had registered their deed, and
(261) that this was done by plaintiff with design and intent to cheat and defraud defendants, etc., and offered evidence in support of some of these positions.

At the trial term and over defendants' objection, plaintiff was allowed to file a reply denying this charge of fraud, and defendants excepted and objected, and excepted further that they were compelled to try at said term on issues raised by this reply. The following verdict was rendered:

1. Did the defendants George T. Penny and J. R. Thomas procure the plaintiff to execute his note for $2,500 and pay $2,500 (in a check which was cashed) for the deed from O. Arthur Kirkman by fraud and misrepresentation, as alleged in the complaint? Answer: Yes.

2. If so, was the Carolina Loan and Realty Company a party to the fraudulent conduct entered into by the defendants George T. Penny and J. R. Thomas, by which $2,500 and the note for $2,500 was obtained from plaintiff, as alleged in the complaint? Answer: Yes.

3. Did the Home Banking Company participate in or have knowledge of any fraud by which a note for $2,500 was secured by plaintiff, as alleged in the complaint? Answer: No.

4. What amount of damage, if any, is the plaintiff entitled to recover from George T. Penny, J. R. Thomas, and the Carolina Loan and Realty Company? Answer: $2,500, with interest from 28 March, 1910, plus $10, without interest.

5. Did the defendant O. A. Kirkman have title to the 640-acre tract of land described in the deed from Kirkman to plaintiff at the time said deed was made, or did he afterwards acquire the same? Answer: No.

6. What amount of damages, if any, has the plaintiff sustained by reason of the failure of the title to the land described in the deed from O. A. Kirkman to plaintiffs? Answer: Nothing.

7. Did plaintiff execute a mortgage on the lands described in the deed from Kirkman to plaintiff to L. W. Davis for $2,500 after he had executed a deed to one-half interest in said lands to Penny and Thomas? Answer: Yes.

8. What damage, if any, have the defendants Penny and (262) Thomas sustained thereby? Answer: None.

On the rendition of the verdict, the court being of opinion that there was no evidence from either party tending to show that the Home Banking Company was a holder of the note, in due course, set aside the verdict on the third issue and gave judgment on the verdict for plaintiff, the material parts of which are as follows: "It is therefore adjudged that the verdict as to the third issue be set aside, and that the plaintiff have and recover of defendants George T. Penny, J. R. Thomas, and the Carolina Loan and Realty Company the sum of $2,500, with interest from 28 March, and a further sum of $10, with interest on the $10 from the date of this judgment, and the cost of this action. It is further adjudged that the said Home Banking Company is not the *bona fide* holder of the said note given by the plaintiff, referred to in the pleadings, and can recover nothing from the plaintiff on account thereof. And it is further adjudged that the said note be delivered up for cancellation."

Defendants having duly excepted, appealed.

Justice & Broadhurst and Pless & Winborne for plaintiff.
J. F. Spainhour, W. T. Morgan, and E. D. Steele for defendants.

HOKE, J., after stating the case: There was ample evidence to support the verdict, and on careful perusal of the record we find no good reason for disturbing the results of the trial. It was urged for error that the court below permitted the filing of a reply to defendants' counterclaim at the trial term and in ordering a trial on the issues thereby raised. This is a matter that is left largely in the discretion of the trial court, and while such court should be always careful to see that a party is not taken by surprise and unduly prejudiced by being presently forced into the trial of issues which he had no reason to expect or prepare for, there is nothing in this case to show that the discretion vested in his Honor was improperly exercised. The counterclaim of defendant was only one incident in this matter. The cause of action set up by plaintiff embraced the entire transaction and fully apprised defendant of all the (263) facts relevant to the injury, and they were evidently not taken by surprise. As a matter of fact, there was no testimony offered tending to support a charge of fraud against plaintiff, and the counterclaim referred to and made the basis of this exception seems to have been inserted more with a view of "talking back" in the record than with any well-grounded hope of benefit to be derived from it.

It was insisted further, that in the argument of plaintiff's counsel to the jury improper use was made of the case of *Brite v. Penny,* reported in 157 N. C., 110, a case involving an issue of fraud and in which the same defendant, George T. Penny, appears to have been an actor.

It is recognized with us—a rule established by express statutory provision—that an attorney may argue the whole case to the jury, both of fact and law, and in the exercise of this privilege counsel have been allowed to state the "facts of another case for the purpose of applying the law of that case to the one in hand," and only to the extent required for such purpose. *S. v. Corpening,* 157 N. C., 623; *Harrington v. Wadesboro,* 153 N. C., 437; *Horah v. Knox,* 87 N. C., 483.

It is unfortunate for defendant that he has figured in another cause involving an issue of fraud, and on facts not dissimilar to the one at bar, and the propriety of using such a case is at least questionable. We deem it right to say further, that if his Honor in this instance had denied the right to counsel, his ruling would have been upheld; but as a matter of law the argument was kept well within the principles of the cases referred to and others of like kind, and we have concluded that on this record the question could very properly be left to the decision of the just and learned judge who presided at the trial.

The action of the court in setting aside the verdict on the third issue, or in disregarding it, as immaterial, was entirely proper and worked no legal wrong to defendants. *Sprinkle v. Wellborn,* 140 N. C., 163.

The fraud having been established, in order to maintain the position of holder in due course of the $2,500 note, the burden was on the defendant to prove that it was indorsee for value before maturity and without knowledge or notice of the impeaching facts. *Manufac-* (264) *turing Co. v. Summers,* 143 N. C., 103. There was not only an entire absence of evidence to support the position, but it was not even alleged in the answer that defendant company was indorsee of the notes, the allegation being simply that the company had "taken over" the note. The facts, therefore, embodied in the third issue were irrelevant and immaterial and could well have been disregarded by the court in its judgment. *Mayers v. McKimmon,* 140 N. C., 640; *Tyson v. Joyner,* 139 N. C., 69.

The objection that plaintiff in his testimony was allowed to say, in reference to a foreclosure sale under the mortgage given by him to the railway company, that "on coming to Marion on one occasion he found there was a crooked sale on hand," may not be sustained. The witness had testified fully and directly to the entire facts of the transaction, tending, if accepted by the jury, to establish a deliberate fraud on the part of defendants, and this expression of opinion, while not in strictness permissible, was too remote and insignificant to be allowed for reversible error.

On examination of entire record, we are of opinion that the case has been tried on correct legal principles, that an actionable wrong has been clearly established, and the judgment on the verdict in plaintiff's favor should be affirmed.

No error.

Cited: Betts v. Telegraph Co., 167 N. C., 81.

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(265)

CECIL G. WILKINSON v. O. F. WILKINSON.

(Filed 24 April, 1912.)

1. Malicious Prosecution—Nol. Pros.—Termination of Criminal Action.

Entering a *nol. pros.* in a criminal action is a sufficient termination thereof within the requirement for bringing an action for malicious prosecution.

2. Same—Nol. Pros., "With Leave."

A criminal action is as much terminated by an entry of a *nol. pros.*, "with leave," as if an entry of a *nol. pros.* alone had been made, the effect being the discharge of the prisoner without day.

3. Malicious Prosecution—Probable Cause—Mixed Facts and Law—Instructions—Questions for Jury.

The only difference between a general or unqualified *nol pros.* and one "with leave" is that in the latter case the leave to issue a *capias* upon the same bill is given by the court in advance, instead of upon a special application made afterwards, which may be refused by the court in order to guard the citizen against any abuse of process.

4. Malicious Prosecution—Probable Cause—Mixed Facts and Law—Instructions—Questions for Jury.

The question of probable cause, in an action for malicious prosecution, is a mixed one of law and fact, leaving for the jury to determine from the evidence, as a matter of fact, whether the circumstances of the case show the cause to be probable or not probable; but whether, supposing them to be true, they amount to a probable cause, is a question of law for the judge.

5. Same—Appeal and Error.

In an action for malicious prosecution an instruction is held to be insufficient and erroneous in failing to charge the jury what would or would not be probable cause, as they might find the facts to be upon the evidence, and by which they were told only that if they found from the evidence the defendant procured the arrest of the plaintiff, and at the time the facts and circumstances were not such as would lead a man of ordinary caution and prudence reasonably to believe that the offense had been committed, there was not a probable cause for the prosecution.

6. Malicious Prosecution — Measure of Damages — Instructions — Punitive Damages.

In this action for malicious prosecution it is held that the charge upon the measure of damages, though not as clear and explicit as it should have been, was not erroneous, and that punitive damages can only be allowed upon a finding of particular or actual malice by the jury. *Stanford v. Grocery Co.*, 143 N. C., 419, cited and applied.

(266) APPEAL by defendant from *Cooke, J.*, at January Term, 1912, of DURHAM.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

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

WALKER, J. This is an action for malicious prosecution. The defendant had caused the arrest and prosecution of the plaintiff, who was

not related to him, upon the charge of having feloniously stolen certain admission tickets belonging to him as proprietor of the Arcade Theater in Durham. The criminal proceedings were brought before the recorder, and when the solicitor stated that he had not been able to examine the case, and the defendant insisted upon an immediate trial, a *nol. pros.*, with leave, was entered at the suggestion of the recorder, in order to preserve the rights of the State, but the prosecution of the case was never renewed. It is now contended that this was not a sufficient determination of the proceeding to authorize the bringing of this suit. It was held, though, in *Hatch v. Cohen,* 84 N. C., 602, and *Marcus v. Bernstein,* 117 N. C., 31, that a *nolle prosequi* is a legal determination of the original suit within the meaning of the law concerning malicious prosecution. But defendant contends that this rule does not apply to a *nol. pros., with leave,* as in the latter case the prosecution is kept on foot, or, in other words, is not ended. This, we think, is a misapprehension of the true reason upon which those cases were decided. A *nol. pros.,* in criminal proceedings, is nothing but a declaration on the part of the solicitor that he will not, at that time, prosecute the suit further. Its effect is to put the defendant without day, that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance (267) to appear at any other time. It is not an acquittal, it is true, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he be tried upon it. To prevent abuse, the power of the solicitor to issue new process upon the same bill is checked and restrained by the fact that a *capias,* after a *nol. pros.* does not issue, as a matter of course, upon the mere will and pleasure of the officer, but only upon permission of the court, which will always see that its process is not abused to the oppression of the citizen. This was laid down, as fully as we have stated it, in *S. v. Thornton,* 35 N. C., 256, and ever since has been considered to be the settled practice. The only difference between a general or unqualified *nol. pros.* and one "with leave" is that in the latter case the leave to issue a *capias* upon the same bill is given by the court in advance, instead of upon a special application made afterwards. *S. v. Smith,* 129 N. C., 546. Referring to this kind of *nol pros.,* the Court, in *S. v. Smith, supra,* said: "While we recognize the fact that the court should control its process, and see that it is not used to the oppression of the citizens of the State, it is also necessary to so use it as to bring offenders to trial and justice. If the court thinks proper to grant such leave at the time the *nol. pros.* is entered, we do not see why it may not do so; and we do not feel like reversing a practice so universally adopted in the State." The suit is terminated as much by one form of entry as by the other, because in both the prisoner is discharged without day, and that seems

to be the true test. In both he can be taken upon a fresh *capias,* in one by special order and in the other under the general leave to issue. Our opinion is, therefore, against the defendant on this point.

But we think there is error in the charge of the court upon the question of probable cause. The court charged the jury as follows: "If you find from the evidence in this case, and by the greater weight thereof, that the defendant procured the arrest of the plaintiff on a charge of stealing tickets, and at the time the facts and circumstances were not such as would lead a man of ordinary caution and prudence rea-
(268) sonably to believe that such offense had been committed, and that the plaintiff was guilty of committing the offense, then there was not probable cause for the prosecution." The decisions of this and many other courts are to the effect that the judge must instruct the jury as to what facts, if found by them, will show that there was or was not probable cause. We have followed the ruling in the celebrated case of *Johnstone v. Sutton,* 9 T. R. (1 Durnf. & East), 510, 545, where it was held that the question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show the cause to be probable or not probable are true and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law; and upon this distinction, *Lord Mansfield* said, proceeded the case of *Reynolds v. Kennedy,* 1 Wilson, 232. This case was approved in *Stewart v. Sonneton,* 98 U. S., 187. Following the rule of *Johnstone v. Sutton, supra,* this Court decided, in *Plummer v. Gheen,* 10 N. C., 66, that the parties are entitled to the opinion of the court upon the facts as they may be found by the jury, as to whether there was probable cause or not, and *Chief Justice Taylor* said: "As the question of probable cause is compounded of law and fact, the defendant had a right to the opinion of the court distinctly on the law, on the supposition that he had established, to the satisfaction of the jury, certain facts. Whether the circumstances were true was a question for the jury; whether, being true, they amounted to probable cause, is a question of law." In the later case of *Beale v. Roberson,* 29 N. C., 280, the Court said: "This case brings up again the question whether probable cause is matter of law, so as to make it the duty of the court to direct the jury that, if they find certain facts upon the evidence, or draw from them certain other inferences of fact, there is or is not probable cause; thus leaving the questions of fact to the jury, and keeping their effect, in point of reason, for the decision of the court, as a matter of law. Upon that question, the opinion of the Court is in the affirmative, and therefore this judgment must be reversed." The Court then reviewed the authorities and thus commented upon them, and established the rule as we have stated it: "Such
(269) a series of decisions, in our own courts, the same way, would

protect the doctrine laid down in them from being drawn into debate now, even if we entertained doubts of its correctness originally. But independent of authority, our reflections satisfy us that the principle is perfectly sound. It is a question of reason, whether certain ascertained facts and circumstances constitute a probable and rational ground for charging a particular person with crime." And after remarking that it is not the prosecutor's belief of the other's guilt which will excuse him, for he must take care that he acts only on a *reasonable* belief, a *just* suspicion, the Court further said: "Now, our inquiry is, whether, for the determination of the question as to the sufficiency or the insufficiency of the grounds of suspicion, supposing them to exist in fact, the court or the jury be the more competent; and we think, very clearly, that the court is, because it is a question of general and legal reasoning, and can best be performed by those whose professional province and habit it is to discuss, weigh, and decide on legal presumptions. The only argument against that is the difficulty in cases of many and complicated facts and contradictory evidence, as in *Plummer v. Gheen,* of properly separating, to the comprehension of the jury and to the satisfaction of the judge, the matters of law and fact. But that only proves the difficulty of deciding such cases, whether by the court or jury, and does not at all help us in saying whether this or that point should be decided by the one or the other." The Court, therefore, held, upon the added authority of *Panton v. Williams,* 2 Ad. & El. (N. S.), 169, that "In an action of this sort the judge must determine whether the facts, if proved, or any of them, constitute such cause, leaving it to the jury to decide only whether the facts, or those inferred from them, exist; and as that is so when the facts are few and the case simple, it cannot be otherwise when the facts are numerous and complicated. It would seem, then, that making a question on this subject must be regarded as an attempt to move fixed things, and cannot be successful either in England or here. As the case goes back to another trial, on which the facts may appear differently, we think it unnecessary to consider those that came out on the former trial, in reference to the question of probable cause, further than to (270) remark that few cases, perhaps, could better illustrate the danger of leaving that question to the discretion of a jury, whose decision of it is not susceptible of review in another court." This has been considered as the leading case upon the subject, and has been followed in all subsequent cases as stating the law correctly. The instruction in *Beale v. Roberson* was substantially like that given in this case, and was held to be erroneous. The following more recent cases assert the same doctrine and approve *Beale v. Roberson, supra: Swain v. Stafford,* 26 N. C., 392; *Vickers v. Logan,* 44 N. C., 393; *Bradley v. Morris, ibid.,* 395, and *Jones v. R. R.,* 125 N. C., 227, which is directly in point.

In *Smith v. Deaver, Judge Battle* thus sums up the matter: "What is probable cause is a question of law, to be decided by the court upon the facts as they may be found by the jury. *Beale v. Roberson,* 29 N. C., 280; *Vickers v. Logan,* 44 N. C., 393. As a guide to the court, it is defined to be 'the existence of circumstances and facts sufficiently strong to excite, in a reasonable mind, suspicion that the person charged with having been guilty was guilty. It is a case of apparent guilt as contra-distinguished from real guilt. It is not essential that there should be positive evidence at the time the action is commenced, but the guilt should be so apparent at the time as would be sufficient ground to induce a rational and prudent man, who duly regards the rights of others as well as his own, to institute a prosecution; not that he knows the fact necessary to insure a conviction, but that there are known to him sufficient grounds to suspect that the person he charges was guilty of the offense."

Brooks v. Jones, 33 N. C., 261; *Kelly v. Traction Co.,* 132 N. C., 372; *Downing v. Stone,* 152 N. C., 527, cited by plaintiff's counsel, do not sustain the instruction. The Court, in those cases, was dealing with a question of malice.

In *Downing v. Stone, supra, Justice Hoke* applies the rule as we have stated it, when he says: "Where it is proven that legal advice was taken by a prosecutor, this, too, is a relevant circumstance in con-
(271) nection with other facts, admitted or established, to be considered by the court in determining the question of probable cause. *Morgan v. Stewart,* 144 N. C., 424; *R. R. v. Hardware Co.,* 143 N. C., 58." He expressly adopts the rule in *Morgan v. Stewart, supra,* in the following words, citing the cases: "It is accepted doctrine with us that, on facts admitted or established, the question of probable cause is one of law for the court. *Jones v. R. R.,* 125 N. C., 229; *Bradley v. Morris,* 44 N. C., 395; *Swaim v. Stafford,* 26 N. C., 392." See, also, Newell on Malicious Prosecution, secs. 276 and 277; 16 Am. & Eng. Enc. (2 Ed.), p. 669.

Unless we overrule the many cases which have been decided by us and have settled the rule, we must hold that the judge's instruction was insufficient, and left to the jury to decide what he should have decided for them, that is, whether upon any given state of facts which may have been found by the jury there was or was not probable cause. As it is, the jury were only required to apply a definition of probable cause to the facts, without any opinion of the court to guide them, as to how the law considered the different phases of the evidence. This was a clear violation of the rule, if we are to adhere to it. We think there was evidence for the jury to consider as to whether there was probable cause or not. The facts are not complicated, but simple, and it should not be difficult

to arrange them so as to inform the jury clearly upon the law. This error of the court requires us to remand the case for a new trial. We will add that, in our opinion, there was no positive error in the charge upon the question of damages, although it was not as full and explicit as it might have been. We do not understand the charge to mean that plaintiff can recover punitive damages upon proof of general malice, such as would be sufficient to establish liability, but only upon proof of particular or actual malice, as defined in the cases. See *Stanford v. Grocery Co.*, 143 N. C., 419, where this question is discussed.

New trial.

Cited: *Brinkley v. Knight,* 163 N. C., 195; *Humphries v. Edwards,* 164 N. C., 157; *Tyler v. Mahoney,* 166 N. C., 514.

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ELIZABETH HOLT ET AL. V. S. B. ZIGLAR.

(Filed 1 May, 1912.)

1. Wills—Caveat—Infants—Adverse Interests—Consent Judgment—Process.

Where, in proceedings to caveat a will, the interests of minor children are involved, who are not properly represented, the issue of *devisavit vel non* cannot be answered by consent of the parties to the action so as to bind the infants.

2. Wills—Caveat—Infants—Adverse Interests—Representation—Process.

Infants taking under a will are not properly made parties to proceedings to caveat the will, who have been served with summons after the commencement of the term, only two days before the trial.

3. Same—Consent Judgment—Fraud and Collusion—Questions of Law.

When it appears in proceedings to caveat a will that the parents of infants, who held an adverse interest to them, were appointed guardians *ad litem,* and who with their attorney and by their pleadings and testimony consented to an answer to the issue of *devisavit vel non* in their own favor, the decree accordingly rendered in an interval between the trial of criminal cases at the term is collusive and fraudulent as to the infants, and cannot bind them.

4. Wills—Caveat—Guardian Ad Litem—Adverse Interests—Disqualification.

A guardian *ad litem* must have no interests adversary to those of his ward, and his attorney must be equally disinterested.

5. Wills—Caveat—Infants—Adverse Interests—Guardian Ad Litem—Disqualifications—Fraud and Collusion—Interests Unprejudiced.

A testator devised two-thirds of his lands to be equally divided between certain children of his two daughters and his son. At the death of his

wife, the third thereof, which was devised to her for life, was to be divided share and share alike between the son and the grandchildren named: *Held*, (1) the interests of the daughters and son of the testator were adversary to those of the grandchildren, and their consent to an answer in the negative to an issue of *devisavit vel non* in proceedings to caveat the will was collusive and fraudulent as to the grandchildren, who were not properly made parties or legally represented; (2) the only issue being as to collusion and fraud, the question as to whether the infants interested would be prejudiced by the judgment entered does not arise for consideration.

APPEAL from *Lyon, J.*, at November Term, 1911, of ROCKINGHAM.

Civil action. Fourteen issues were submitted to the jury by his Honor, but as the finding of the jury in response to the first issue is determinative of the action, it is necessary to set out only that issue, to wit:

1. Was the judgment setting aside the will of Valentine Allen obtained by collusion between Samuel A. Allen, J. Ham Cardwell, and S. B. Ziglar, for the purpose of vesting the title to the lands conveyed in the will of Valentine Allen in their respective wives, and divesting the children of the said respective wives of their interest in said land under the provisions of said will? Answer: No.

In response to a second issue by consent, the facts were found by the court, and his Honor found them as follows:

An unsigned paper was filed in the clerk's office, in the form of a caveat to the will of Valentine Allen, and on 20 October, 1885, the clerk issued a citation to the heirs and devisees of said Allen, notifying them to appear at the November Term, 1885, of the Superior Court, which begun on 9 November, 1885.

This citation was served on some of the heirs on 9 November, 1885, and on the others on 11 November, 1885; and on 12 November, 1885, guardians *ad litem* were appointed for the infant defendants, and they filed answer admitting the allegations of the complaint.

There was a motion for a new trial. The motion was overruled. There was judgment that the defendants go without day. The plaintiff excepted and appealed.

Watson, Buxton & Watson, and C. O. McMichael for plaintiff.
Humphreys & Sharp, Manly, Hendren & Womble for defendants.

BROWN, J. A paper-writing purporting to be the last will and testament of Valentine Allen was duly admitted to probate in common form by the clerk of the Superior Court of the county of Rock-
(274) ingham in 1885. A paper-writing, undated, purporting to be a caveat to said will was filed in the office of the said clerk dur-

ing said year, and on 20 October, 1885, notices were issued by the clerk direct to Elizabeth A. Allen *et al.,* devisees under the said will, and an issue of *devisavit vel non* was made up and certified for trial to the regular term of the Superior Court of said county on 9 November, 1885. At said term it appears that the issue was submitted to the jury in the following form:

Is the paper-writing propounded for probate the last will and testament of Valentine Allen? Answer: No.

Whereupon the usual decree was entered, denying probate to the said paper-writing, and declaring it not to be the last will of Valentine Allen.

This action is brought by the plaintiffs, a granddaughter and a great-grandson of Valentine Allen, against a son, a married daughter, and certain grandchildren of Valentine Allen, for the purpose of setting aside the aforesaid decree upon the ground of fraud and collusion between the adversary parties to the record of the suit in which said decree was rendered.

In the consideration of this appeal we deem it necessary to consider only one assignment of error.

In apt time the plaintiff's counsel offered the following special instructions:

(The trial of the Allen suit was had on 11 November, 1885, being Wednesday of the first week.)

1. If the jury find from the evidence that prior to November Term, 1885, of Rockingham, that the last will and testament of Valentine Allen was probated and proved in common form before the Clerk of the Superior Court of Rockingham, and was duly admitted to record by the examination on oath of the subscribing witnesses thereto, and that under the provisions of said will the lands belonging to the estate of the said Valentine Allen were devised to the minor children of Margaret J. Ziglar and S. B. Ziglar, and to the minor children of Ellen Cardwell and J. Ham Cardwell, and that Samuel A. Allen, the son of Valentine Allen, was only willed a grandchild's share; and the jury further find from the evidence that at said term of court (275) a proceeding was instituted in the name of Samuel A. Allen, plaintiff, v. Margaret J. Ziglar and her husband, S. B. Ziglar, and Ellen Cardwell and her husband, J. Ham Cardwell, and the minor children of Margaret J. Ziglar and Ellen Cardwell, defendants, for the purpose of setting aside the will of Valentine Allen; and that a citation issued which was served upon the minor children of Margaret Ziglar by John Boyer, Sheriff of Forsyth County, by reading the summons to them on 11 November, 1885, two days after the beginning of said November term of court of Rockingham County, and which was also served upon

the minor children of Ellen Cardwell by reading the same to them on 9 November, 1885, the first day of said November term of court; and they further find that the bond for cost in the said proceeding purporting to have been given by Samuel A. Allen was signed by S. B. Ziglar, one of the defendants, as surety for the maintenance of said action; and if the jury further find from the evidence that the written motion in the handwriting of counsel of record for the defendants, S. B. Ziglar and J. Ham Cardwell in said proceedings was made to appoint S. B. Ziglar and J. Ham Cardwell guardians ad litem for their minor children, and that said Ziglar and Cardwell were appointed by the court, such guardian *ad litem* of their respective children in the said proceedings, and that a joint answer was filed in the handwriting of counsel for defendants J. Ham Cardwell and his wife Ellen, S. B. Ziglar and his wife Margaret, and that S. B. Ziglar, J. Ham Cardwell, guardian *ad litem* for their respective minor children, in which said answer it was admitted that the said paper-wiriting probated as the last will and testament of Valentine Allen was not the last will and testament of Valentine Allen, and upon the back of said answer there appears in the handwriting of counsel for the plaintiff Samuel A. Allen the following: "12 November, 1885. We authorize the within answer to be filed both for ourselves and in our capacity as guardians *ad litem*. J. Ham Cardwell, S. B. Ziglar"; and if the jury find that a judgment was rendered at said November term of court to which the summons purporting to have been served upon the minor defendants upon said action was returnable, and in which said judgment it was de-
(276) clared that the said paper-writing purporting to be the last will and testament of Valentine Allen was not his last will and testament, and adjudging that Samuel A. Allen, the plaintiff, should pay the cost of said proceeding: that if the jury find these to be the facts, the court holds that the said proceedings so far as the minor children of Margaret Ziglar and Ellen Cardwell are concerned, were collusive and a fraud in law upon the rights of the said minor children under the provisions of their grandfather's will, and if they find such to be the facts, the plaintiffs in this said action are entitled to have the judgment depriving them of their interest in said land granted at November term in 1885 of the Superior Court of Rockingham, in the case of Samuel A. Allen v. Margaret Ziglar and others, set aside, and the jury will answer the first issue "Yes."

The court declined to give the instruction, except as modified as follows: That if the jury find these to be the facts, the court *charges you that you may consider these facts in passing upon the question of*

fraud and collusion between S. A. Allen and J. Ham Cardwell and S. B. Ziglar in obtaining the judgment at Fall Term, 1885, setting aside the will of Valentine Allen.

We think the court erred in adding the modification. The plaintiffs were entitled to the prayer as asked. The record disclosed that there is abundant evidence to substantiate every fact set out in the prayer for instruction. In fact, there is practically no evidence to the contrary; and if these facts are taken to be true, they constitute legal fraud, fraud in law, which would entirely vitiate and destroy the force and effect of the decree setting aside the will of Valentine Allen.

Under that will the testator devised two-thirds of his landed estate to be equally divided between the children of his two daughters, Margaret Ziglar and Ellen Cardwell, and his son Samuel, and at the death of his wife, Elizabeth, the third which had been devised to her for life was to be divided share and share alike "between my son Samuel and my grandchildren, the heirs of the bodies of my two daughters, Margaret Ziglar and Ellen Cardwell," and that portion given to his son Samuel was to be placed in the hands of a guardian. (277)

It is patent that it was the manifest interest of Margaret Ziglar and Ellen Cardwell and of Samuel Allen to have this will set aside. They were heirs at law of the testator, and the children of Margaret Ziglar and Ellen Cardwell (these plaintiffs) were the principal beneficaries under the will.

The evidence shows that the fathers of these children went deliberately to work to have that will set aside and to consent in behalf of their children to the decree entered in the proceedings.

The policy of the law will not permit the last will and testament of a person to be set aside by consent. An issue of *devisavit vel non* is not such a proceeding as can be determined by the consent of the parties thereto where some of them, as in this case, are infant children. So careful is the law to give effect to the disposition of property that even the witnesses to the will are regarded as the witnesses of the law, and not the witnesses of any particular party.

The facts embodied in the prayer for instruction are scarcely denied, and show that the infant devisees were only served with notice after the term of court began when the issue was to be tried. This service was made on Monday, 11 November, when the court began on 9 November, and the case was "railroaded" through on Thursday, 14 November, during a temporary suspension of the criminal docket for the purpose of submitting this issue to a jury.

Under all our decisions the infant devisees were really not parties to the proceeding. *Doyle v. Brown*, 72 N. C., 393; *Condry v. Cheshire*,

88 N. C., 375; *Harrison v. Harrison,* 106 N. C., 282; *Card v. Finch,* 142 N. C., 144-148; *Hughes v. Pritchard,* 153 N. C., 141. In this last case *Mr. Justice Manning* eloquently says:

"Infants are, in many cases, the wards of the courts, and these forms, enacted as safeguards thrown around the helpless, who are the victims of the crafty, are enforced as mandatory, and not directory only. Those who venture to act in defiance to them must take the risk of their action being declared void or set aside."

(278) The evidence shows that the father of the Ziglar children became the surety of Samuel Allen, the caveator, on the bond for cost at the very time that he was appointed guardian *ad litem* to protect the rights of his children, the infant defendants, and further, that the father, Ziglar, paid the attorney's fee to represent him as defendant in the case which Ziglar was assisting in prosecuting by signing the cost bond. Ziglar and his brother-in-law, Cardwell, were each appointed guardian *ad litem* of his own children, and they filed a joint answer in their individual capacity representing their wives, and also as guardians of their minor children, although their interests were diametrically opposed.

It was quite like these faithful guardians to see to it that this joint answer admitted that the paper-writing was not the will of Valentine Allen, when by doing so they deprived their children and wards of all interest in more than 800 acres of land, which then, of course, descended to their wives in fee.

The evidence shows that the same counsel represented Ziglar and Cardwell and their wives in their individual capacity and also acted as their attorney as guardians of their children, whose interest, as we have shown, was opposed to that of their parents.

It requires no citation of authority to show that upon these facts the law must pronounce a decree rendered under such circumstances, without even the semblance of a trial, collusive and fraudulent as to the rights of the minor children.

It is another singular fact appearing in evidence that this will was written by a Dr. Scales and executed on 22 November, 1875, and the testator lived for ten years afterwards. Upon the so-called trial it was not contended that Samuel Allen had no capacity to make a will, but the only evidence offered bearing upon the execution of the will was that of Dr. Scales, who stated ten years after he had written the will that he did not think he had drawn the will as Valentine Allen wished it drawn, although, when the will was probated by the clerk, this same witness made no such declaration.

It is held that a guardian *ad litem* of infant defendants must be a person who has no adversary interests to his ward. *Ellis v. Massenburg,* 126 N. C., 129. In this case the Court says:

"The court has no higher duty than the protection of infant (279) defendants, and there can be no trust more sacred than that of a guardian, who must be absolutely free from any interest or motive that can possibly interfere with the faithful performance of his duties."

If he has any interest at all in the suit, it must be thoroughly consistent with that of his ward's. Even his attorney must be equally disinterested, and a mere colorable interest is a sufficient disqualification for either if at all adverse. *Moore v. Gidney,* 75 N. C., 34; *Molyneux v. Huey,* 81 N. C., 106-113; *Arrington v. Arrington,* 116 N. C., 170-179; *Cotton Mills v. Cotton Mills,* 116 N. C., 647-652.

Says the Court: "We think that this rule is analogous to that forbidding a trustee to deal with himself, which, founded upon natural justice and public policy, has become too firmly imbedded in our jurisprudence by repeated decisions to need citation of authorities."

In *Covington v. Covington,* 73 N. C., 172, *Judge Pearson* comments with some severity upon a guardian who makes use of the name of his ward to maintain a proceeding directly opposed to the interest of his ward and for his own benefit. In *Morris v. Gentry,* 89 N. C., 248, it was held that no person should be selected as guardian *ad litem* unless he is in position to protect the rights of the infants, and has no adverse interests.

The learned counsel for the defendant submitted an elaborate argument that Samuel Allen and the other devisees would take *per stirpes* and not per capita, and, therefore, that no injustice was done by setting aside the testator's will, although the proceeding was collusive and fraudulent in law.

It is not necessary to determine as to what share Samuel Allen would take under his father's will until that will is established and probated according to law. The only issue raised by the pleadings in this case is one of fraud and collusion in respect to the manner in which that will was set at naught.

We are of opinion that the court should have given the prayer for instruction in the manner and form as requested.

New trial.

Cited: *S. c.,* 163 N. C., 391; *Johnson v. Whilden,* 171 N. C., 154.

MECHANICS BANK AND TRUST COMPANY v. H. B. WHILDEN.

(Filed 28 May, 1912.)

1. Evidence—Title—Corners—Declarations.

In this controversy, involving title to lands, declarations as to certain corners material in establishing the location of the lands held incompetent.

2. Equity—Cloud on Title—Description—Right of Action.

As the defendant's deed, in any event, covers a part of the lands described in plaintiff's deed, the right of plaintiff to maintain an action to remove a cloud from his title upon the ground that, according to the plaintiff, the defendant's lines are outside of his deed, is not presented.

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

APPEAL by defendant from *Webb, J.*, at Fall Term, 1911, of GRAHAM.

This is an action to remove a cloud from title.

The plaintiff claims under a grant issued by F. H. Busbee,
(280) trustee, of date 18 August, 1885, and the defendant under a grant issued to D. F. Goodhue, of date 27 May, 1872, and both parties introduced evidence to sustain their respective claims.

The principal controversy between the parties is as to the location of the Goodhue grant, the plaintiff contending that its beginning corner is at H on the plat, in which event it would cover only a small part of the land in the plaintiff's grant, and the defendant contending that it is at A on the plat, which location would cover nearly all of the land in the plaintiff's grant. There was a locust tree at A and one at H, and his Honor permitted a witness for the plaintiff to say that he had heard three persons say that the locust at H was a corner of the Goodhue tract, and the defendant excepted.

There was no evidence fixing the time when the declarations were made, or that those making them were disinterested, or that they were dead at the time of the trial.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

(281) *W. T. Crawford and Felix E. Alley for plaintiff.*
Bryson & Black for defendant.

ALLEN, J. The evidence of the declarations of certain persons as to the location of the Goodhue corner was incompetent because hearsay, and should have been excluded.

"The restrictions on hearsay evidence of this character—declarations of an individual as to the location of certain lines and corners—estab-

lished by repeated decisions, are: that the declarations be made *ante litem motam;* that the declarant be dead when they are offered, and that he was disinterested when they were made." *Hemphill v. Hemphill,* 138 N. C., 506.

None of these requirements were met by the plaintiff, and as the declarations are condemned under the general rule excluding hearsay evidence, it was its duty to prove the facts bringing the evidence within the exception.

In *Dobson v. Finley,* 53 N. C., 499, *Chief Justice Pearson* says: "In the latter, to wit, hearsay evidence, it is necessary as a preliminary to its admissibility to prove that the person whose statement it is proposed to offer in evidence is dead; not on the ground that the fact of his being dead gives any additional force to the credibility of his statement, but on the ground that if he be alive he should be produced as a witness"; and this language is quoted with approval in *Shaffer v. Gaynor,* 117 N. C., 15; *Westfelt v. Adams,* 131 N. C., 379, and *Yow v. Hamilton,* 136 N. C., 358.

The question discussed by the defendant as to the right to maintain an action to remove a cloud from title, when the deeds of the defendant, if located according to the plaintiff's contention, are outside the lines of the plaintiff's deeds, is not presented, because the deeds of the defendant cover a *part* of the land in the deeds of the plaintiff in any event.

For the error pointed out there must be a

New trial.

BROWN, J., concurring: I concur in the ruling of the Court that the evidence of the declarations of certain witnesses admitted by the court as to the location of the Goodhue corner was incompetent as hearsay testimony and should have been excluded. But I am of opinion that instead of a new trial being ordered, the action should be dismissed.

The suit is one, according to the language of the complaint, brought to remove a cloud upon the plaintiff's title, when in (282) fact there is no cloud upon the title to the property claimed by him as located by the jury. The defendant claimed title under grant 3522, containing 640 acres. The plaintiff claimed title to his land under grant 7315.

The whole controversy was one of boundary and centered entirely upon the true beginning corner indicated by the letter "A" on the map, while the plaintiff contended that the beginning corner was not at "A," but at the point indicated by the letter "H" on the map, and asked that grant 3522 be canceled as a cloud on plaintiff's title. The two grants

adjoined each other, and one could not possibly constitute a cloud upon the title to the other, since the only question involved was the true location of the two grants.

There is no question of lappage involved, and no claim that one grant, properly located, covers any part of the other grant. As commonly understood, a cloud on title to property is an outstanding claim or encumbrance, which if valid would impair the title of the owner of a particular estate, such as conveyance of the identical property or a part of it, or mortgage, judgment, tax levy, etc. Black's Law Dic. (2 Ed.), 210.

Before equity will undertake to remove a cloud upon title, it must assume some semblance of a title, either legal or equitable, to the property in question. 32 Cyc., 1314.

A mere verbal claim to or assertion of ownership in land does not constitute a cloud on title, and neither can a dispute about the true location of the beginning corner of two adjoining grants constitute a cloud on the title to either. *Waters v. Lewis,* 106 Ga., 758; 3 Wait's Actions and Defenses, 189.

I do not think the act of 1893, Revisal, sec. 1589, has any bearing upon this case. It was not intended to substitute an action, remove a cloud on title for a processioning proceeding, or for an action of trespass *quare clausum fregit* to try title to land. *McNamee v. Alexander,* 109 N. C., 242; *Pearson v. Boyden,* 86 N. C., 585.

(283) The statute referred to was intended simply to remove the restriction that before a plaintiff could maintain an action to remove a cloud upon his title he must affirmatively show that he was in the rightful and actual possession of the land, and allege the bringing of the action by one not in the actual possession thereof. *McLean v. Shaw,* 125 N. C., 492.

To show the irregularity of this proceeding, although the jury have located the plaintiff's grant according to his contention, and therefore the defendant's grant covers no part of it according to such location, yet his Honor has given judgment that the defendant's grant constitutes a cloud upon the title of the plaintiff, and decrees that the defendant's grant, together with all mesne conveyances thereunder which the defendant claims title to said land, are hereby adjudged and declared to be void.

For these reasons I think the action should be dismissed.

MR. JUSTICE WALKER concurs in this opinion.

Cited: Roller v. McKinney, post, 321; *Lumber Co. v. Hinton,* 171 N. C., 30.

H. BREWER & CO. v. ABERNATHY, LYERLY & CO.

(Filed 28 May, 1912.)

Pleadings—Partnership—Corporation—Evidence—Demurrer—Waiver.

When suit is brought in the name of a partnership, objection that it does not appear whether the plaintiff is a partnership or a corporation is deemed to be waived unless taken advantage of by a written demurrer or answer, and comes too late upon demurrer to the evidence.

APPEAL from *Long, J.*, at December Term, 1911, of BURKE.

At the close of plaintiff's evidence the defendants moved for judgment as of nonsuit. This is an extract from the record:

"At the close of plaintiff's testimony the defendant demurs *ore tenus* to the evidence and insists the plaintiff should be nonsuited, for that there has no evidence been offered tending to show the names of the partners of the plaintiff's company, if they are partners, and (284) no evidence tending to show that the plaintiff company is an incorporation." Upon an inspection of the record, such as the court is able to make, it fails to find any evidence as to whether it is a partnership or incorporation. The court also fails to find anything in record, summons, or pleading disclosing whether the plaintiff is an incorporation or partnership. The court, therefore, being left in the dark in this matter, upon all the evidence and upon the record directs a judgment of nonsuit against the plaintiff, and to such order the plaintiff excepts and appeals to the Supreme Court.

J. T. Perkins for the plaintiff.
Avery & Ervin and A. A. Whitener for the defendant.

BROWN, J. The record discloses two assignments of error:

1. The exclusion of the affidavit of the plaintiff showing that the notes were given for goods sold and delivered as set forth in plaintiff's first assignment of error.

2. The order of nonsuit of plaintiff, and the sustaining of the defendant's demurrer to the evidence as set forth in the plaintiff's second exception.

It is not necessary to consider the first assignment of error, as we are of opinion that the court below erred in ordering a nonsuit on the ground that it did not appear whether the plaintiff was a partnership or a corporation, and, if a partnership, who the partners were. The ruling of his Honor was made, as stated in the briefs of the counsel, upon the authority of *Heaton v. Wilson,* 123 N. C., 398.

We do not think that case is by any means decisive of the question presented here. It was an action for the recovery of the possession of cer-

tain logs, accompanied with the ancillary proceedings of claim and delivery, and was not brought in the name of the partnership, but in the name of W. H. Heaton alone.

While the evidence showed that the logs belonged to Heaton and W. W. Avery and the court held that "Heaton could not recover all the logs, if a partner, more than he is entitled to," the idea of the court (285) seemed to have been that inasmuch as the the action was brought in the name of Heaton as an individual and not in the name of the partnership to which the logs belonged, therefore Heaton could not recover. We do not think the case is any authority for the position that motion to nonsuit can be sustained upon the grounds set out in his Honor's judgment quoted above.

This question was carefully considered and decided by us in the recent case of *Kochs v. Jackson,* 156 N. C., 327, in an opinion by *Mr. Justice Allen.* In that case it is held that a demurrer *ore tenus* will not be sustained on the ground that the plaintiffs' name appeared to be either that of an incorporated company or a partnership, and that neither the fact of incorporation nor the names of the partners were alleged.

This is in accordance with the statute, wherein such objections are deemed to be waived unless taken advantage of by a written demurrer or answer. In this case the suit is brought in the name apparently of a partnership, and the transaction seems to have been had with H. Brewer & Co., who are the plaintiffs. It is that title which appears in the written correspondence between the parties.

If the plaintiff desired to take advantage of the fact that the names of the copartners were not set out, he should have done so in apt time. By waiting until the close of the plaintiff's evidence, the defendant waived any right to object to the fact that the names of the individual copartners were not set out in the title of the case.

Reversed.

JOHN A. GARRISON AND WIFE v. CASE THRESHING MACHINE COMPANY.

(Filed 24 April, 1912.)

1. Issues, Form of—Court's Discretion—Appeal and Error.

The form of issues being within the discretion of the trial judge, his decision as to them is not reviewable on appeal, if they are sufficient for the parties to present their contentions and develop their case, and the verdict will determine their rights and support the judgment.

2. Contracts, Written—Condition Precedent—Parol Evidence.

While parol evidence may not, as a rule, contradict the express terms of a written contract, the principle does not extend to the competency of evidence tending to show that the written instrument was to be effective only upon the performance of an unfulfilled condition precedent, as in such a case there never was a valid execution of the contract.

3. Same—Mortgages—Delivery on Condition—Breach—Innocent Purchaser—Foreclosure—Measure of Damages.

The purchasers of an engine gave a note and mortgage on their lands to secure the purchase price, which were transferred before maturity to an innocent purchaser for value, who, upon default in the payment of the note, foreclosed the mortgage by sale. In an action brought by the buyers of the engine against the seller for damages, it was held competent to show by parol evidence that the delivery of the note and mortgage was upon the condition precedent that the engine should prove satisfactory for a certain kind of work, which it could not do; and held, further, in this case, as it was found that the vendor had sold the note and mortgage given by the purchasers of the engine, to an innocent holder, in violation of this condition, and the mortgagors could not therefore redeem, the measure of damages was the value of the land sold under the mortgage.

4. Issues—Immaterial—Judgment—Harmless Error.

In this action an issue as to the fraudulent procurement by defendant of the contract becomes immaterial, as the verdict is sufficient, upon the other issues, to support the judgment rendered.

APPEAL from *Lyon, J.*, at November Term, 1911, of ROCK- (286
INGHAM.

This action was brought to recover damages for the sale of certain land under mortgage, which was made under the following circumstances: The plaintiffs were solicited by two agents of the defendant to purchase one of its traction engines, they representing that the engine would haul from five to eight thousand feet of green lumber over the road from McIver to Reidsville in Rockingham County. The plaintiffs declined to buy the engine unless it would do this, and it was thereupon agreed that they should sign the usual order for the engine and also notes and a mortgage to secure the price, with (287) the understanding that the papers should be left with the agents and held by them until the engine was tested and it should be ascertained that it would haul the lumber as represented, and that the papers should not take effect until the test was made and the representation found to be true. The papers were accordingly signed and delivered to the agents under said agrement. The test of the engine was made by one of the defendant's engineers, and proved that the representation was utterly false and that the engine would be worthless to the plaintiffs. The defendant transferred the papers for value and before maturity, in violation of said agreement, to the Bank of

Racine, and the bank sold the land under the power contained in the mortgage, after the plaintiffs had refused to accept the engine and demanded a return of the papers, with which demand the defendant refused to comply.

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

1. Were the real estate mortgage and contract referred to in the complaint signed and placed with Bowden and Iseley, or either of them, under the agreement and condition precedent that the papers were not to be delivered to the defendant and become operative unless the engine should meet the tests alleged to have been guaranteed by the defendant that it would meet? Answer: Yes.

2. Did the machine, upon the test, meet the conditions guaranteed as a condition precedent to the delivery of the contract and mortgage to the defendant? Answer: No.

3. Was the said mortgage taken by the defendant and thereafter assigned by it to a bank, in violation of an agreement by defendant that it would not treat the mortgage and contract as being executed unless the engine, upon test made, came up to the standard of efficiency guaranteed by defendant? Answer: Yes.

4. Did the defendant procure the delivery of the contract and mortgage to Bowden and Iseley by fraud, as alleged in the complaint? Answer: Yes.

(288) 5. What amount was due the said bank at the time it received said mortgage? Answer: $1,542.

6. What was the amount of freight paid by the plaintiff and the value of the real estate described in the mortgage at the time of the sale of the property to satisfy said mortgage? Answer: $2,081.

7. Could the plaintiff have paid off the mortgage and have redeemed the real estate described in the mortgage? Answer: No.

Judgment was entered upon the verdict for the plaintiff, and the defendant appealed.

P. W. Glidewell, A. L. Brooks, J. H. Vernon, and E. J. Justice for plaintiffs.

Johnson, Ivie & Dalton and Dorman Thompson for defendant.

WALKER, J., after stating the case: The defendant tendered certain issues, and, without setting them out, it is sufficient to say that they did not embrace the questions raised by the pleadings, and were, therefore, properly rejected by the court. Those adopted by the court were sufficient for the defendant to present its contentions and to develop its case, and this is all that could be asked. The form of the issues is within the discretion of the judge, provided they are sufficient to determine the

rights of the parties and to support the judgment. *Roberts v. Baldwin,* 155 N. C., 276; *Clark v. Guano Co.,* 144 N. C., 71; *Kimberly v. Howland,* 143 N. C., 398; *Fields v. Bynum,* 156 N. C., 413. We also think that the testimony of the plaintiffs, as to the transactions and dealings between them and defendant's agent, was competent. It does not fall within the rule excluding parol evidence of the contents of a written instrument and requiring the production of the paper. This is not an action for the breach of a written contract, but the theory upon which it rests is that the instrument was never delivered, and this is the principal question in the case. If the contract had been executed, or the writing delivered to the agents, with the understanding that it should presently take effect, the plaintiff could not, by parol evidence, contradict or vary its terms. *Moffitt v. Maness,* 102 N. C., 457. But this is not what was proposed to be done, but, on the contrary, (289) the purpose was to show that the contract never had any existence in fact.

The case is governed, in all its features, by *Pratt v. Chaffin,* 136 N. C., 359, and *Bowser v. Tarry,* 156 N. C., 35. In the case last cited *Justice Hoke,* quoting from *Walker v. Venters,* 148 N. C., 388, and commenting upon the same and other cases, said: "Even when a contemporaneous oral stipulation would be otherwise received, because it too was a part of the contract, this will not be allowed when it contradicts the portion of the agreement which is reduced to writing. This is well stated by the present *Chief Justice* in *Walker v. Venters,* as follows: 'It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and in such case the oral part of the agreement may be shown; but this is subject to the well-established rule that a contemporaneous agreement shall not contradict that which is written. The written word abides.' While this position is unquestioned, it is also fully understood that although a written instrument purporting to be a definite contract has been signed and delivered, it may be shown by parol evidence that such delivery was on condition that the same was not to be operative as a contract until the happening of some contingent event, and this on the idea, not that a written contract could be contradicted or varied by parol, but that until the specified event occurred the instrument did not become a binding agreement between the parties. It never in fact became their contract. The principle has been applied with us in several well-considered decisions, as in *Pratt v. Chaffin,* 136 N. C., 350; *Kelly v. Oliver,* 113 N. C., 442; *Penniman v. Alexander,* 111 N. C., 427, and is now very generally recognized."

In *Ware v. Allen,* 128 U. S., 590, the Court held that "Parol evidence is admissible in an action between the parties to show that a written in-

strument executed and delivered by the party obligor to the party obligee absolute on its face was conditional and not intended to take effect until another event should take place." It is said in Anson on Contracts (Am. Ed.), 318: "The parties to a written contract (290) may agree that until the happening of a condition, which is not put in writing, the contract is to remain inoperative." The principle is a familiar one and is directly applicable to the facts of this case. It has been well stated, in its application to similar facts, by *Judge Devens in Wilson v. Powers,* 131 Mass., 539, as follows: "The manual delivery of an instrument may always be proved to have been on a condition which has not been fufilled, in order to void its effect. This is not to show any modification or alteration of the instrument, but that it never became operative and that its obligation never commenced." And also by *Crompton, J.,* in *Pym v. Campbell,* 6 Ed. and Bl., 88, thus: "If the parties had come to an agreement, though subject to a condition not shown in the agreement, they could not show the condition, because the agreement on the face of the writing would have been absolute and could not be varied; but the finding of the jury is that this paper was signed on the terms that it was to be an agreement if Abernathie approved of the invention, not otherwise. I know of no rule of law to estop parties from showing that a paper purporting to be a signed agreement was in fact signed by mistake or that it was signed on the terms that it should not be an agreement till money was paid or something else done." Those two cases were cited with approval in *Pratt v. Chaffin, supra.* See also 1 Elliott on Ev., sec. 575; *Gazzam v. Insurance Co.,* 155 N. C., 330. As practically all of the defendant's exceptions are based upon a misapprehension of this rule, as the one controlling the case, they cannot be sustained.

We do not think that the trial judge expressed any opinion upon the facts. He was merely stating the contentions of the respective parties in that part of the charge to which this exception was taken.

As the defendant passed the papers to an innocent purchaser for value, and plaintiffs cannot recover the land, they are entitled to be compensated by the defendant for the loss they have sustained by its wrongful act, which, in this case, is the value of the land. *Sprinkle v. Wellborn,* 140 N. C., 163; Hale on Damages, 72.

(291) It is unnecessary to discuss the exceptions relating to the fourth issue, as, without this issue, the verdict is sufficient to support the judgment (*Sprinkle v. Wellborn, supra*), though we think they are without merit, as there was some evidence of the fraud.

No error.

Cited: Rousseau v. Call, 169 N. C., 177.

W. C. VAN GILDER v. W. H. BULLEN.

(Filed 28 May, 1912.)

1. Deeds and Conveyances—Contracts—Equity—Fraud—Rescission—Unreasonable Delay.

Upon the principle that a party seeking to rescind a contract for fraud in its procurement must promptly act upon the discovery of the fraud, it is held that equity will not afford relief to a purchaser of lands in his action to rescind his deed for fraud when he has waited for two years without indicating his purpose to do so.

2. Same—Acquiescence.

A purchaser of lands seeking equitable relief upon the ground that the sale had been procured by the fraudulent misrepresentation of the vendor that he owned the fee, whereas he only owned a life estate therin, by acquiring the remainder indicates that he intended to perfect his title and abide by his contract.

3. Deeds and Conveyances—Contracts—Equity — Rescission — Unreasonable Delay—Damages—Actions at Law.

A purchaser of lands, having lost his right to have his deed rescinded for fraud because of his vendor's misrepresenting that he was the owner of the fee when he only had a life estate therein, subsequently acquired the remainder: *Held*, his measure of damages under the facts of this case is the amount paid by him to make his title in fee, as it was represented to him to be.

4. Same—Vendor and Vendee—Covenants.

One claiming under a deed wherein it is stipulated that the original vendee agrees to pay a certain mortgage indebtedness on the lands conveyed, as a part of the consideration, is bound by the terms of the deed to pay this indebtedness, and a personal judgment may be rendered against him for it.

5. Deeds and Conveyances—Contracts—Mortgages—Life Estates—Acquisition of Fee—Feeding Estoppel—Decree of Foreclosure—Equity.

A purchaser who acquired only a life estate in lands under a deed purporting to convey the fee, wherein there was a provision under which he assumed a certain existing mortgage indebtedness against the land, afterwards acquired by purchase the remainder in fee. In proceeding to foreclose the mortgage, after the death of the life tenant: *Held*, (1) the life estate, having fallen in, was not subject to foreclosure sale; (2) the purchaser had the right to perfect his title by acquiring the remainder by purchase; and (3) the doctrine of feeding an estoppel does not apply to the subsequent acquisition of the remainder, so as to subject it to an order of sale or a decree of foreclosure.

6. Deeds and Conveyances—Title—Common Source—Superior Title—Equity—Estates—Remainders.

The doctrine that when both parties to a controversy are claiming under a common source of title to the lands in dispute they may not deny

the title of the person under whom they both claim, does not prevent one of them from showing that he has acquired a better title, as, in this case, that the common source held only a life estate, which had fallen in, and that he is entitled to possession under a deed from the remainderman.

(292) APPEAL from *Whedbee, J.*, at February Term, 1912, of UNION.

Thomas S. Hemby, being the owner of the land hereinafter referred to, situate in Union County, died leaving a will of date 23 April, 1883, in which he devised said land to W. S. Hemby for life, and after his death to his children, if he left any, and if not, to D. J. Hemby.

On 23 October, 1903, the said W. S. Hemby conveyed said land to M. L. Dunlap, of the city of Chicago, by mortgage deed, to secure a note for $2,000, payable to said Dunlap, which mortgage deed purported to be in fee, but contained no covenants.

On the same day, 23 October, 1903, the said W. S. Hemby executed a deed to the defendant Bullen, purporting to convey said land in fee, subject to said mortgage, and with general covenants.

(293) The last mentioned deed contained the following agreement: "Subject to an encumbrance of $2,000, which the grantee assumes and agrees to pay as part of the purchase money; and subject also to the taxes of 1903 and thereafter," and was executed in consideration of the conveyance by the said Bullen to said Hemby of certain real property in Chicago, subject to a mortgage of $4,000 thereon.

On 24 October, 1903, the said M. L. Dunlap executed a deed to the plaintiff, W. C. Van Gilder, by which he transferred to him said note for $2,000, and the mortgage securing the same, and conveyed his interest in said land.

The property in Chicago, conveyed to W. S. Hemby by the defendant, was sold under the mortgage, which was an encumbrance thereon at the time of the conveyance, and the said Hemby never realized anything therefrom.

W. S. Hemby is dead, but the date of his death is not given, and the defendant has acquired the interest of D. J. Hemby in said land, for which he paid $11, and the plaintiff and the defendant agree that the defendant owns the remainder interest in the land.

This action is brought by W. C. Van Gilder against the said Bullen to foreclose the mortgage executed by W. S. Hemby, and the defendant entered a general appearance.

In his answer the defendant admits that he promised to pay said note of $2,000 secured by said mortgage, but he alleges that he was induced to enter into the contract with the said W. S. Hemby by reason of a conspiracy between said Hemby and the plaintiff to defraud him, and upon the representation that the said Hemby had title in fee to said land, which representation both the plaintiff and Hemby knew to be false.

The defendant knew nearly two years before this action was commenced that W. S. Hemby had only a life estate at the time of his conveyance, and he at no time tendered a reconveyance, nor did he demand that the Chicago property be reconveyed to him, nor do any act showing that he elected to rescind the contract.

The defendant offered evidence tending to establish his allegations of fraud, but his Honor held on the admitted facts, assuming fraud to be established, that the defendant had lost his right to recis- (294) sion by delay; that his remedy was to recover damages upon the false representation; that the measure of his damages was the amount he paid for the remainder interest; that the plaintiff could not recover a personal judgment against the defendant, but was entitled to have the land sold to pay his debt. Judgment was rendered accordingly, and the defendant excepted and appealed.

Adams, Armfield & Adams, Lemmond & Vann, and A. M. Stack for plaintiff.

Williams, Love & McNeely and Redwine & Sikes for defendant.

ALLEN, J., after stating the facts: The rulings of his Honor are upon the ground that the plaintiff is entitled to the judgment rendered, although the defendant may establish his contention that a fraud was practiced upon him and that the plaintiff was a party to it, and we must consider the case and determine the rights of the parties as if these facts were proven.

Assuming, then, for the purposes of the appeal, that the plaintiff and W. S. Hemby conspired to defraud the defendant, that pursuant to this conspiracy they represented to him that Hemby was the owner in fee of the land conveyed to the defendant, that this representation was false, and that it was an inducement to the contract, is the plaintiff entitled to any relief, and if so, to what relief?

The answer to the question depends upon the conduct of the defendant after the discovery of the fraud, as shown by the admitted facts.

As stated in Clark on Contracts, p. 234: "Fraud does not render the contract void, but renders it only voidable at the option of the party defrauded. In other words, it is valid until rescinded. It is for the party defrauded to elect whether he will be bound. He therefore has several remedies on discovering the fraud. First. He may affirm the contract, and bring an action for deceit to recover such damages as the the fraud has occasioned him, or set up such damages by way of recoupment or counterclaim, if sued upon the contract by the other party. . . . Second. He may rescind the contract, and (1) (295) sue in an action of deceit, for any damages he may have sustained by reason of the fraud; (2) if he has paid money under the contract,

he may recover it back; or (3) he may resist an action at law brought against him on the contract; or (4) he may resist a suit in equity by the other party for specific performance; or (5) he may himself sue in equity to have the contract judicially canceled and set aside."

It is also well established that the right to rescind must be exercised promptly, and if there is unreasonable delay, the right is lost, and the party defrauded is generally relegated to his action for damages. *Alexander v. Utley,* 42 N. C., 242; *Knight v. Houghtalling,* 85 N. C., 17.

In the first of these cases a delay of twelve months was held to be fatal to the right, and in the second, *Ruffin, J.,* speaking for the Court, says: "A party is not bound to abandon a contract brought about by fraud and imposition upon him, but he may, if he sees proper, adhere to the contract and seek his compensation for the fraud in an action at law for damages. . . . The law allows the purchaser in such a case to either abandon the contract absolutely or else abide by it and sue at law for the deceit, and the only requirement it puts upon him is to make and declare his election the moment the knowledge of the fraud is attained by him. . . . The rule of law is, that he who would rescind a contract to which he has become a party must offer to do so promptly on discovering the facts that will justify a rescission, and while he is able of himself, or with the aid of the court, to place the opposite party substantially in *statutu quo;* he must not only act promptly upon the first discovery of the fraud, if fraud be the cause assigned for the rescission asked, but he must act *decidedly,* so that his vendor may certainly know his purpose, and thereby have the opportunity afforded him to assent to the rescission, resume the property, and look out for another purchaser. In no case is he permitted to rescind when he has continued to treat with his vendor upon the basis of the contract after his discovery of the fraud practiced upon him, and neither is it allowed him to rescind in part and to affirm in part; but if done at all it must be done (296) *in toto.* This rule is founded on the plainest principles of justice, and has been universally recognized."

Applying these principles to the facts, we must hold that the defendant has no right to a rescission of the contract, as there was a delay of about two years, after the discovery of the alleged fraud, before this action was commenced, during which time the defendant retained the deed procured by the contract, and did no act indicating a purpose to rescind. On the contrary, his purchase of the title of the remainderman would suggest that he intended to perfect his title and abide by the contract.

The defendant, having lost his right to a rescission of the contract, was entitled to recover damages, and in our opinion the rule adopted by his Honor, limited the recovery of damages to the amount paid out by the defendant to make his title as it was represented to be, was correct.

Bigelow on Estoppel, 357; *Westall v. Austin,* 40 N. C., 1; *Kindley v. Gray,* 41 N. C., 445; *Ramsour v. Shuler,* 55 N. C., 487; *Bank v. Glenn,* 68 N. C., 35.

In *Kindley v. Gray, supra,* the Court says: "Instead of availing himself of the power to annul the contract, the plaintiff took a deed from Cooper (who held the outstanding legal title against him), and then filed this bill, asking peremptorily in the first place to have the contract rescinded. But he cannot get that, for he has now a title to the thing he bought from the defendant. The plaintiff shall be reimbursed by the defendant what it cost him to get the legal title. That is the utmost he can claim."

We do not, however, approve the judgment rendered. The defendant entered a voluntary appearance in the action, and he has accepted a deed in which it is stipulated that he agrees to pay the mortgage debt as a part of the consideration. This agreement, if not in writing, would not come within the statute of frauds. (*Peele v. Powell,* 156 N. C., 553), and one who claims the benefit of a deed must assume its burdens. *Drake v. Howell,* 133 N. C., 166. We see no reason, therefore, for denying the plaintiff a personal judgment against the defendant.

We are further of opinion that the plaintiff is not entitled (297) to an order of sale or a decree of foreclosure.

At the time W. S. Hemby executed the mortgage to Dunlap, which the plaintiff now owns, he had only a life estate in the land, and the only security for the debt was the conveyance of that estate. No decree can be rendered that will operate on the life estate, because Hemby is dead, and the remainder interest cannot be subjected to the payment of the debt, as it was not conveyed by the mortgage, unless because this interest was afterwards purchased by the defendant, and we do not think the purchase by the defendant has this effect. The doctrine of feeding an estoppel by the acquisition of an interest or estate after the execution of a deed does not apply, because the defendant executed no deed for this land to the plaintiff, nor to any one under whom he claims, nor does the fact that both parties claim under W. S. Hemby prevent the defendant from claiming the remainder.

As stated in *McCoy v. Lumber Co.,* 149 N. C., 1, and approved in *Sample v. Lumber Co.,* 150 N. C., 161, and in *Bryan v. Hodges,* 151 N. C., 414, the rule, enforced in the trial of title to land, that when both parties claim title under the same person, it is not competent for either to deny the title of such person, "is not in strictness an application of the doctrine of estoppel, but is a rule established for the convenience of parties in actions of this character, relieving them of the necessity of going back further than the common source when it is apparent that both parties are acting in recognition of this common source as the

true title," and is never permitted to prevent one from showing that he has acquired a better title. *Love v. Gates,* 20 N. C., 363; *Copeland v. Sauls,* 46 N. C., 73; *Forbes v. Hunter,* 46 N. C., 231; *Ray v. Gardner,* 82 N. C., 146.

Practically the same doctrine is announced, in different language, and the reasons for it given by *Chief Justice Marshall,* in *Bright v. Rochester,* 7 Wheat., 540. He says: "It is contended that he is so restrained because John Dunlap sold to Hunter, and Hunter has conveyed to the present defendant. It is very certain that these sales do not create a legal estoppel. The defendant has executed no deed to prevent
(298) him from averring and proving the truth of the case. If he is bound in law to admit a title which has no exsitence in reality, it is not on the doctrine of estoppel that he is bound. It is because, by receiving a conveyance of a title which is deduced from Dunlap, the moral policy of the law will not permit him to contest that title. This principle originates in the relation between lessor and lessee, and so far as respects them is well established, and ought to be maintained. The title of the lessee is, in fact, the title of the lessor. He comes in by virtue of it, and rests upon it to maintain and justify his possession. . . . The propriety of applying the doctrine between lessor and lessee to a vendor and vendee may well be doubted. The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this, nor is either the letter or the spirit of the contract violated by it. The only controversy which ought to arise between him and the vendor respects the payment of the purchase money. How far he may be bound to this by law, or by the obligations of good faith, is a question depending on all the circumstances of the case; and in deciding it, all those circumstances are examinable."

The following authorities sustain the same view: *Merryman v. Brown,* 76 U. S., 592; *Ousterhout v. Shoemaker,* 3 Hill, 518; *Sands v. Davis,* 40 Mich., 18; *Averill v. Wilson,* 4 Barb., 185; *Mattison v. Ausmuss,* 50 Mo., 553.

For the reasons given, and because there is no agreed statement of facts upon which a judgment might be entered, there must be a

New trial.

Cited: Torrey v. McFayden, 165 N. C., 241.

MRS. R. M. THOMASON v. HACKNEY & MOALE COMPANY.

(Filed 28 May, 1912.)

1. Mental Anguish—Photographer—Lost Films—Contracts—Party in Interest—Notice.

A photographer lost certain films taken with a kodak of a deceased child shortly before and after her death, which he had received from the aunt of the child, its mother's sister, for development, who informed the agent "to be careful of them, as they were the only films of the little dead girl." There was no suggestion or notice to the photographer that the one delivering the films was acting for her sister, the mother of the child. In an action to recover damages for mental anguish, brought by the mother against the photographer for the negligent loss of the films: *Held*, compensatory damages were not recoverable, as the interest of the plaintiff in the transaction was not disclosed at the time.

2. Same—Measure of Damages—Sentimental Values.

In an action to recover damages of a photographer for the negligent loss of the only films taken of a child just before and after its death from which a likeness of the child could be had and of which the defendant was notified at the time he received them for development, nominal damages and the value of the films are at most recoverable. Whether the jury may, in such instances, consider the "*pretium affectionis*," or the sentimental value of the films, discussed by WALKER, J.

CLARK, C. J., dissenting.

APPEAL by defendant from *Long, J.*, at January Term, 1912, (299) of BUNCOMBE.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

H. C. Chedester for plaintiff.
Merrick & Barnard for defendant.

WALKER, J. This is an action upon contract. The plaintiff alleges that, having been advised that her infant child was about to die, she caused a number of photographic negatives to be made by a friend with her kodak, and that said negatives or films were taken to defendant to be developed and finished, and the films returned and the photographs delivered to the plaintiff, the defendant at the time being engaged in the business of developing such negatives (300) and making photographs from them. The defendant received the films and undertook to develop and finish the same, for a price to be paid by the plaintiff, but having lost them, he failed to return them with the photographs, according to the contract. The plaintiff further alleges that these negatives were the only ones she had of the deceased

child, and she had no other pictures or likeness of her, and defendant received and accepted the films or negatives with full knowledge of the facts. He knew the child was dead and that if the films were lost and the photographs not delivered, the plaintiff would not be able to have a likeness of her child taken. The evidence shows that the films were taken to the defendant on 10 July, 1906, by Mrs. Dora Phillips, a sister of the plaintiff, who delivered them to a clerk of the defendant at its place of business, and he promised to develop them and make photographs from them. The plaintiff, it seems, from her complaint, seeks to recover damages for mental anguish suffered by her, resulting from the loss of the films and photographs from them of her child who died. It may be that, by a very liberal construction of the complaint, we may gather that the plaintiff has alleged that she suffered other damages by the breach of the contract; but this, perhaps, is immaterial, as the recovery was confined by the judge's charge to damages for the mental anguish which she suffered. The jury rendered a verdict for the plaintiff, upon which judgment was rendered, and the defendant appealed.

In order to determine whether there was error in allowing the recovery of damages for mental anguish, it will be necessary to set out particularly what was said by Mrs. Dora Phillips when she delivered the films to the clerk of the defendant. She testified as follows:

"When I went in, he said, 'Lady, can I wait on you?' and I answered: 'Yes; I have some films to be developed of my sister's little girl.' He was behind the counter and had waited on me before, when I bought some books from him. I left the films with him, and told him that I wanted them developed; that they were pictures of my sister's little girl, and that she was dead. I told him there were several of
(301) them and I hoped some would be good, and he replied, 'You can get them Monday,' and I said that it was the last we had of them, and if any were good, to finish a dozen and put them on the cards they had, and that I would want more if they were good. He laid the films on the counter and I said, 'Be careful of them, as they are the only films we have of the little dead girl.' The films or pictures were taken with a kodak on 3 July, and the child died the next day."

As the films were delivered to the defendant by Mrs. Dora Phillips and the contract was to develop them and make photographs from them for her, without any suggestion or notice to the defendant that she was acting for her sister, Mrs. Thomason, who is the plaintiff, we do not think that, under the cases recently decided by this Court, the latter can recover damages solely for mental anguish.

We held in *Helms v. Telegraph Co.*, 143 N. C., 386, that a party who is not mentioned in a telegraphic message, or whose interest therein is

not otherwise disclosed to the company, cannot recover substantial damages for mental anguish alleged to have been sustained by reason of the non-delivery of the message, and it was said by *Justice Brown,* who spoke for the Court in that case, that the principle thus announced is supported by the "overwhelming weight of authority." The evidence in that case, of the company's knowledge as to who was the principal, or, in other words, as to the identity of the person in whose behalf the message was sent, was quite as strong as, if not stronger than, the evidence in this case, to fix the defendant with notice of the fact that Mrs. Phillips was acting in behalf of her sister, the plaintiff. In the course of the opinion in the *Helms case, Justice Brown* says: "The same principle applies where the message is sent for the benefit and at the instance of any one whose name does not appear on its face. The well-known rule laid down in *Hadley v. Baxendale,* 9 Exch., 345, decided in 1854, has been applied by the Supreme Court of the United States to telegraph cases, and it is held that where the telegraph company is not informed of the nature of the transaction to which the message relates, or of the position which the plaintiff in the action would probably (302) occupy, the measure of damages for negligence is the sum paid for sending. *Primrose v. Telegraph Co.,* 154 U. S., 29; *Hall v. Telegraph Co.,* 124 U. S., 444. Our own Court has adopted the same principle of law as applicable to this class of cases. In *Williams v. Telegraph Co.,* 136 N. C., 82, it is said: 'The principle uniformly sustained by the cases upon the subject, some of which we have cited, is that, unless the meaning or import of a message is either shown by its own terms or is made known by information given to the agent receiving it in behalf of the company for transmission, no damages can be recovered for failure to correctly transmit and deliver it, beyond the price paid for the service.' In *Cranford v. Telegraph Co.,* 138 N. C., 162, the plaintiff was not permitted to recover because her interest in the telegram was not shown upon the face of it, and was not brought to the attention of the company, and it is specifically held that 'there can be no recovery of damages for delay in the transmission and delivery of a telegram when it does not appear in any way that the plaintiff was the intended beneficiary of the message.' See, also, *Kennon v. Telegraph Co.,* 126 N. C., 232."

We have more recently affirmed the same doctrine in *Holler v. Telegraph Co.,* 149 N. C., 336, and in so far as it is applicable to telegraphic messages, the rule is settled by that case, which cites and reviews all prior cases in this Court upon the subject. A careful reading of that case will show that it was not intended to decide that the beneficial interest of a third party or party not named in the message should be ascertained, and appear by answer to a distinct issue containing an in-

quiry as to the fact. We were there dealing with issues inadequate to support the judgment. It would clearly be sufficient if it appeared from the evidence, the charge of the court, and the verdict upon the issues, when considered and construed together, that the defendant had notice of such beneficial interest at the time of the making the contract, or, as held in *Peanut Co. v. R. R.*, 155 N. C., 148, at some intermediate time, under certain circumstances and restrictions therein indicated.

The last cited case sustains the proposition hereinbefore stated.
(303) Referring to the matter, *Justice Hoke* says, in substance, that in the *Helms case, supra,* the contract had been finally broken and was not in the course of performance, and the sole question at issue being the amount of damages for mental anguish suffered, and due to the defendant's negligent act or breach of the contract, "the personality of the party and his relationship to the subject of the message" was material and should have appeared.

Applying the principle thus established to this case, there was nothing said by Mrs. Phillips to defendant's clerk which would lead him to suppose that she was acting for her sister and not solely for herself. There was nothing unusual in having the films developed and the photographs made for herself. The child was her niece and it was perfectly natural that she should place a special and peculiar value upon the films, and desire to preserve a photograph of her. The jury might have guessed or conjectured that she was acting for her sister, but this will not do. *Byrd v. Express Co.*, 139 N. C., 273.

The plaintiff, if she establishes her cause of action, will be entitled, at least, to nominal damages, and she may recover the value of the films if she can prove the same. Whether, in ascertaining this value, the jury may consider the *"pretium affectionis"*—that is, an imaginary value placed upon a thing by the fancy of its owner, growing out of his or her attachment for the specific article, its associations and so forth, which, perhaps, may not inaptly be called its sentimental value—we need not say, as there was no recovery for the value of the films; but it may not be irrelevant to refer to the question, and this being so, we cannot do better than to quote what is said in Hale on Damages at p. 184: "In most cases the market value of the property is the best criterion of its value to the owner, but in some its value to the owner may greatly exceed the sum that any purchaser would be willing to pay. The value to the owner may be enhanced by personal or family considerations, as in the case of family pictures, plate, etc., and we do not doubt that the *'pretium affectionis,'* instead of the market price, ought then to be considered by the jury or court in estimating the value. When analyzed, the damage caused by the loss or destruction of property of this nature consists of two elements: First, the loss of the real property value;

second, the grief or mental suffering at the loss of the cherished (304) article. From this we gather what we apprehend to be the true rule, which is that, where property is of such a nature that its loss or destruction, under the circumstances, naturally and proximately causes mental suffering, compensation for such mental suffering may be recovered, in a proper action, in addition to the actual value of the property." *Suydam v. Jenkins,* 3 Sandf., 621. There is some conflict in the authorities relating to this matter, and we will not now attempt to reconcile them or decide what is the correct principle. It has been held that the sentimental value of property, the *"pretium affectionis,"* as it is called, cannot be recovered as compensation for the destruction or conversion of such property. *Moseley v. Anderson,* 40 Miss., 49. It has been said that the satisfaction and pleasure which the possession of an article gives, like the satisfaction which comes from having a contract respected and performed, is of a nature that the law does not recognize as a subject for compensation. Sedgwick on Damages, sec. 251. We find it stated in Parsons on Contracts (3 Ed.), 209, that this *pretium affectionis* cannot be recovered, unless in cases where the conversion or appropriation of the property by the defendant was actually tortious. Hale on Damages, *supra.*

We barely allude to the subject in *Lumber Co. v. Cedar Co.,* 142 N. C., at pp. 416 and 417, when discussing the jurisdiction of courts of equity in cases of injunctions, as follows: "The courts of equity finally assumed jurisdiction for the prevention of torts or injuries to property by means of an injunction, under certain safeguards and restrictions, and two conditions were required to concur before it would thus interfere in those cases, namely, the plaintiff's title must have been admitted or manifestly appear to be good, or it must have been established by a legal adjudication, unless the complaint was attempting to establish it by an action at law and needed protection during its pendency, and, secondly, the threatened injury must have been of such a peculiar nature as to cause irreparable damage, as, for instance, in the case of the destruction of shade trees or of any wrongful invasion of property which, by reason of the character of the property or the form of the injury, rendered the wrong incapable of being atoned (305) for by compensation in money, such as torts committed on property and things having a value distinct from their intrinsic worth; for instance, a *pretium affectionis,* though not a merely imaginary value."

Of course, damages which are merely imaginary or have no real or substantial existence, should not be allowed. In this case the question is purely academic, as it is not presented by any exception, but we con-

sidered it proper that we should make some reference to it, as it is contended that the films had a value peculiar to plaintiff, apart from their intrinsic value.

There was error in the charge under which damages for mental anguish were awarded.

New trial.

CLARK, C. J., dissenting: Upon this evidence, the reasonable inference was that the plaintiff in desiring to get the film of the "little dead girl" developed was acting as agent of her sister, the mother of the little girl, and that the defendant's agents must have understood as much. The court left that issue of fact to the jury and they found that such was the case. Indeed, this is the only natural inference to be drawn from the evidence.

The defendant's agent was told that the little girl was dead and that these films had been taken, some just before and some just after her death, and that they were the only films there were of the child. The defendant's agent must have known that there would be mental anguish if these films were negligently destroyed. Any knowledge of a mother's heart would have told him that.

In *Young v. Telegraph Co.*, 107 N. C., 370, this Court said: "Damages for injury to feelings, such as mental anguish, are given, though there may be no physical injury, in many cases. They are allowed where a party is wrongfully put off a train; in action for breach of promise of marriage; for slander; for libel; for criminal conversation; for seduction; for malicious prosecution; for false arrest, and for wrongfully suing out an attachment." Such damages have been allowed in
(306) many other cases where the natural result of the breach of contract, or a tort, was the infliction of mental anguish. The verdict and judgment of $400 should be sustained.

LIZZIE PENN v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 28 May, 1912.)

1. Telegraphs—Mental Anguish—Measure of Damages—Notice.

Under certain circumstances substantial damages for mental anguish may be recovered against a telegraph company for wrongful and negligent failure to deliver or correctly transmit a telegraphic message, independently of bodily or pecuniary injury, by the sender, addressee, or the beneficiary, whose interest therein has been sufficiently made known to the company.

2. Telegraphs—Public-service Corporations—Messages — Contracts — Public Policy.

Damages for mental anguish are permitted to be recovered in this State, not only as a rule of interpretation and adjustment of the rights of the parties growing out of the contract between them, but because of our public policy, adopted and recognized as necessary to enforce the proper performance of duties incumbent on telegraph companies as public-service corporations.

3. Same—Torts.

A party entitled to recover damages from a telegraph company for its failure in its duty to transmit and deliver a message may bring his action either in contract or in tort.

4. Same—Negligence—Delivery—Jurisdiction—Measure of Damages.

The sendee of a telegram delivered to the telegraph company in another State, where damages for mental anguish were not recoverable, may bring his action in this State in tort for negligent breach of duty occurring here, and recover such as may have naturally resulted from the wrong, that is, such as were reasonably probable under the circumstances existent at the time according to the law, statutory or otherwise, of North Carolina. Cases in which the measure of damages were regulated by rules obtaining on breach of contract discussed and distinguished by HOKE, J., showing that under the circumstances of the case at bar, where recovery in tort is sought, they were inapplicable, and, if otherwise, they were not intended to be controlling.

5. Same—Stare Decisis.

The doctrine of *stare decisis* does not apply when the former decisions are clearly found to be erroneous, and contrary to our declared public policy; and in this case it is held that the former decisions of our Court upon the mental anguish doctrine, measuring the damages as if arising in contract, if applicable, will not control in an action brought in tort for the failure of a telegraph company to use proper efforts in the delivery of a message here which had been received for transmission in another jurisdiction where damages of this character are not recoverable.

6. Telegraphs—Mental Anguish—Tort—Parties in Interest.

When a recovery for mental anguish for the negligence of a telegraph company in transmitting or delivering a telegram is laid in tort, it is confined to the parties to the contract, or to those whose interest, as beneficiaries of the message, have been sufficiently disclosed to the company, this being the only damage that could be considered reasonable or probable for such breach of duty.

7. Same—Stipulations—"Sixty Days."

The regulations of a telegraph company requiring presentation of claims for damages within sixty days, etc., are upheld, and held to have no bearing upon the doctrine of holding a telegraph company responsible

for its negligence in delivery in North Carolina of a message received by it in another jurisdiction where a recovery for mental anguish alone is denied.

CLARK, C. J., concurring; WALKER, J., concurring in result; BROWN, J., dissenting.

(307) APPEAL from *Lyon, J.,* at December Term, 1911, of FORSYTH.

Action to recover damages for negligently failing to deliver a telegram.

The evidence tended to show that on morning of 3 July, 1911, at 8 a. m., a message was delivered to defendant company by Herbert Penn, at Roanoke, Va., addressed to plaintiff at Winston-Salem, N. C., announcing the death of a child of Herbert Penn and grandchild of plaintiff, and that same was duly and properly transmitted by defendant to its office at Winston-Salem and there defendant negligently failed to deliver it to plaintiff, whose place of residence was well known, and she only had notice that such a message was in the Winston

(308) office through a postal card from defendant's agent, delivered on the morning of 5 July, and by reason of such negligence and wrong on the part of defendant company and its agents, plaintiff was prevented from going to Roanoke and being with her son in the time of his bereavement and from attending the funeral of her grandchild, etc.

Defendant, denying negligence, alleged further that the contract for transmission and delivery of the message was made in Roanoke, Va., and plaintiff's cause of action, if she had any, arose in that State, and that, by the law of that State, substantial damages for mental anguish could not be awarded in such an action, and the jury rendered the following verdict:

First. Did the defendant negligently fail to deliver the message, as alleged in the complaint? Answer: Yes.

Second. If so, did the acts and omissions constituting negligence occur in the State of North Carolina? Answer: Yes.

Third. If the message had been delivered in a reasonable time, could and would the plaintiff have gone to Roanoke to be present at the funeral, as alleged in the complaint? Answer: Yes.

Fourth. Under the law of the State of Virginia can damages for mental suffering, independent of any injury to person or estate, be recovered against a telegraph company for negligent failure to deliver a message or for negligent delay in the delivery of a message, although the company is advised of the character of the message? Answer: No.

Fifth. What damage, if any, has the plaintiff sustained on account of mental anguish caused by the negligence of the defendant? Answer: $200.

The court having declined to enter judgment on verdict for defendant, gave judgment thereon for plaintiff, and defendant excepted and appealed.

John M. Robinson and W. Reade Johnson for plaintiff.
George H. Fearons and Manly, Hendren & Womble for defendants.

HOKE, J., after stating the case: It is well-established doctrine in this State that under given circumstances substantial damages for mental anguish may be awarded for wrongful and negligent (309) failure to deliver or correctly transmit a telegraph message, and this independent of bodily or pecuniary injury. The authorities are also to the effect that such recovery may be had by the sender or the addressee of the message or the beneficiary whose interest in its proper delivery has been sufficiently made known to the company. *Christmon v. Telegraph Co., ante,* 195; *Kivitt v. Telegraph Co.,* 156 N. C., 296; *Woods v. Telegraph Co.,* 148 N. C., 1; *Dayvis v. Telegraph Co.,* 139 N. C., 80; *Cranford v. Telegraph Co.,* 138 N. C., 162; *Green v. Telegraph Co.,* 136 N. C., 489; *Williams v. Telegraph Co.,* 136 N. C., 82; *Bright v. Telegraph Co.,* 132 N. C., 317; *Kennon v. Telegraph Co.,* 126 N. C., 232; *Young v. Telegraph Co.,* 107 N. C., 370. A perusal of the numerous cases on the subject will disclose that this position allowing recovery for mental anguish not only obtains with us as a rule of interpretation and adjustment of the rights of the parties growing out of the contract between them, but it has become also a part of our public policy, adopted and recognized as necessary to enforce the proper performance of duties incumbent on these companies as public-service corporations. Crosswell on Law of Electricity, sec. 634. From this it has been said to follow that in a certain class of injuries involving a breach of these duties, an action may lie either in contract or in tort, a position upheld here as a general principle in reference to corporations of this character. *Carmichael v. Telephone Co.,* 157 N. C., 21; *Peanut Co. v. R. R.,* 155 N. C., 148, and authorities cited, more especially the concurring opinions of *Associate Justice Allen,* and applied directly to telegraph companies in several well-considered decisions in this State. *Cordell v. Telegraph Co.,* 149 N. C., 402; *Green v. Telegraph Co.,* 136 N. C., 506; *Cogdell v. Telegraph Co.,* 135 N. C., 431; *Landie v. Telegraph Co.,* 124 N. C., 528, and sustained in numerous cases elsewhere by courts of recognized authority; *McGehee v. Telegraph Co.,* 169 Alabama, 109; *Gray v. Telegraph Co.,* 108 Tenn., 39; *Mentzer v. Telegraph Co.,* 93 Iowa 752; *McLeod v. Telephone Co.,* 52 Oregon, 22; *Baily v. Western Union,* 227 Pa., 522; *Stewart & Co. v. Postal Telegraph Co.,* 131 Ga., 31; *Telegraph Co. v. Schrewer,* 141 Fed., 538; Thompson Electricity, sec. 424. (310)

In the present case the verdict has established an action in tort arising by reason of negligent default on the part of defendant company, within the State of North Carolina, and the damages have been properly awarded which have naturally resulted from the wrong, that is, such as were reasonably probable under the circumstances existent at the time and according to the law of the jurisdiction, statutory or otherwise, where same occurred. *Young v. Telegraph Co.*, 107 N. C., 370; *Peanut Co. v. R. R., supra; Gray v. Telegraph Co., supra; Hughes v. Telegraph Co.*, 72 S. C., 39; *Harrison v. Telegraph Co.*, 71 S. C., 386; *Geuth v. Telegraph Co.*, 85 Ark., 75, 742; *Western Union v. James*, 162 U. S., 650; Hale on Damages, 50; Jones Telegraph and Telephone Companies, sec 518.

It is objected for defendant that the court in numerous decisions has said that the rules which obtain in awarding damages for breach of contract were properly applicable to cases of this character and has repeatedly referred to *Hadley v. Baxendale* as the controlling authority on the subject. In many of the cases the action was brought for breach of the contract, and the position as stated was in strictness correct. In others the rules established or declared in *Hadley v. Baxendale* were applied because they afforded a very safe guide to a correct estimate of damages and because of the facts as presented there was no call for making discrimination in the two kinds of action. In so far as mental anguish is concerned, except in cases where punitive damages are sought and allowable and except as to the time, when the relevant circumstances are to be noted and considered, the amount is very much the same whether the recovery is had in contract or in tort. In the one case those damages are allowed which were in the reasonable contemplation of the parties when the contract was made, and in the other the consequential losses resulting from the tort and which were natural and probable at the time the tort was committed. Hale on Damages, page 48.

Speaking to these principles and their practical application in Scott and Jarnagan's "Law of Telegraphs," it is said: "But when (311) the contract between the parties does not show they had in contemplation this wider range in the estimate of damages (in contract), the measure of damages seems to be substantially the same in either kind of action. The true rule for estimating damages in actions *ex contractu* may be stated thus: The defendant is liable only for such damages as may fairly and substantially be considered as arising naturally, *i. e.*, according to the usual course of things, from the breach of the contract, or—and here is where the measure of damages takes a wider range—for whatever damages may fairly be supposed to have been within the contemplation of the parties. The rule in actions

ex delicto is that the damages to be recovered must be the natural and proximate consequence of the act complained of. This is the rule when no malice, fraud, oppression, or evil intent intervenes. The damages which may be considered as arising naturally, according to the usual course of things, from the breach of the contract, are substantially the same as damages which are the natural and proximate consequences of the wrong complained of." And in Jones on Telegraph and Telephone Companies, sec. 518, the author, while saying that under some circumstances the recovery in tort may take a wider range, is in support of the proposition that the amount of damages are usually the same. It was in deference to this view, that, under all ordinary conditions, the damages to be awarded for mental anguish are practically one and the same, whether the action be in contract or in tort, that the Court has thus far allowed the rules in *Hadley v. Baxendale* to prevail; but it was never intended in cases requiring that the distinctions between the two classes of actions be observed, that when a tort was clearly established and committed within this jurisdiction that the usual rules for awarding damages in actions of that character should be modified or ignored. Thus in *Dayvis v. Telegraph Co., supra,* the Court, in speaking to this position, said:

"In awarding damages for mental anguish, however, when the right thereto has been established, the decisions of this Court have thus far uniformly applied the law governing cases of breach of contract." And in *Williams v. Telegraph Co.,* 136 N. C., 84, *Associate Justice Walker,* delivering the opinion, said: "In order to ascertain the dam- (312) ages which a plaintiff, who sues for a breach of contract, is entitled to recover, the rule laid down in *Hadley v. Baxendale* has generally been adopted as the one which will give the complaining party a fair and reasonable recompense for any loss he may have sustained or for any injury he may have suffered"—opinions giving indication that when the action is for a tort and under some conditions the rules applied are not, necessarily, exclusive, and those which ordinarily obtain in actions of tort might, in proper cases, be applied.

Pursuing this same objection, there were several decisions called to our attention which, it is claimed, are in express denial of plaintiff's right to recover on the present verdict, notably *Hancock v. Tel. Co.,* 137 N. C., 497; *Hall v. Tel. Co.,* 139 N. C., 469. *Bryan v. Tel. Co.,* 133 N. C., 603, and *Johnson v. Tel. Co.,* 144 N. C., 410, and the doctrine of *stare decisis* is earnestly invoked in support of defendant's position.

In *Hancock's case, supra,* the action was by the sender and was brought upon the contract, and it does not definitely appear that the default occurred in this State. In *Hall's case, supra,* the right to recover for mental anguish was left as an open question to be determined

on the facts as they should be ultimately made to appear. In *Bryan's case* the action was upon breach of the contract, and recovery was sustained on the express ground that the contract was made in this State. In *Johnston's case,* 144 N. C., 410, the language of opinion is much broader and seems to be an authority sustaining defendant's position, but a perusal of the case will clearly disclose that the learned judge was treating it throughout as an action for breach of the contract and the decision was made to rest on *Bryan's case* and other decisions applying the familiar principle that, in actions for breach of contract, when same originates in one State and is to be partly performed there, the laws of such State are ordinarily allowed as controlling on the question of interpretation and adjustment of the rights of the parties. These cases, then, when properly understood, do not, in our opinion, call for or permit an application of the doctrine of *stare decisis.* In *Mason v.*
(313) *Cotton Co.,* 148 N. C., 509, speaking of this doctrine of *stare decisis* and its proper application, the Court said:

"We are not insensible to the great importance of the doctrine of *stare decisis,* a doctrine of recognized value in all countries whose jurisprudence, like our own, is founded so largely on precedents. We know that the courts in such countries, as a general rule, will adhere to a decision found to be erroneous, when it has been acquiesced in for a great length of time, so as to become accepted law, constituting a rule of property. And there are other conditions, restricted in their nature, where the doctrine may be properly applied, but none of them requires or permits that a court should adhere to a decision, found to be clearly erroneous, which affects injuriously a general business law, and under the circumstances indicated here. As it has been well said, 'Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence upon all future time, it becomes the duty as well as the right of the Court to consider them carefully and to allow no previous error to continue, if it can be corrected. The foundation of the rule of *stare decisis* was promulgated on the ground of public policy, and it would be a grievous mistake to allow more harm than good to come from it.' 26 Am. & Eng. (2 Ed.), 184"; and the important and valuable case of *Hill v. R. R.,* 143 N. C., 539, is in illustration of the same view.

Recurring to the position sustained by these authorities, and more especially to the citation from 26 A. & E., *supra,* even if the doctrine of *stare decisis* was presented, it should not be allowed to prevail where a tort involving a breach of public duty, occurring within this State, has been clearly established and damages awarded on a principle recognized as necessary to enforce proper performance of such duties in this and all other cases of like kind.

It is also contended that if this proceeding and the principle upon which it rests are upheld, many persons could institute actions for the same breach of duty; that recoveries would be unduly multiplied and, in many instances, grave injustice done; but there would (314) seem to be no good reason for this apprehension. As we have endeavored to show, in the large number of cases the amount of damages to be awarded for mental anguish is practically the same whether the action is on tort or contract. Where a tort is established the consequential damages are only those which are natural and probable under the circumstances existent or as they reasonably appeared at the time the same occurred, and, applying the principle, when recovery for mental anguish is had in tort, the damages are properly confined to the parties to the contract or to those whose interest, as beneficiaries of the message, has been sufficiently disclosed to the company. It is only as to those persons that such damages could be reasonably held either probable or natural.

It is further insisted that the regulations of the company, requiring presentation of claims of this kind within sixty days, would be annulled, but, to our minds, no such result follows. These regulations, to the extent that they are reasonable, and not in excuse for negligence, have been upheld with us by express decision, and we see no reason why they should not be allowed to prevail, whether the action is in contract or tort. *Forney v. Telegraph Co.*, 152 N. C., 494; *Sherrill v. Telegraph Co.*, 109 N. C., 527.

We are aware that there are decisions to the contrary in other jurisdictions, more especially in respect to the addressee of the message, but they are not in accord with the principles established here. We were referred by counsel to the case of *Cannady v. R. R.*, 143 N. C., 439, as authority in contravention of our present ruling, but that was a case where the contract and all the facts relevant to plaintiff's cause of action had their origin and existence in another State, and the case has no application to the facts appearing in this record, and, in two cases from Supreme Court United States, to which we were cited, *Primrose v. Telegraph Co.*, 154 U. S., 444, and *Western Union v. Hall*, 124 U. S., 444, the actions were considered and dealt with as for breach of the contract. In the present case a tort committed in this State having been established by the verdict, we are of opinion that the damages have been awarded on correct principles, and the judgment in plaintiff's favor must be therefore affirmed. (315)

Affirmed.

CLARK, C. J., concurring: When a message is sent from a point in this State to a point in another State, recovery can be had for mental

anguish resulting from the breach of contract of prompt delivery. This is in accordance with the law of place of contract. *Bryan v. Telegraph Co.*, 133 N. C., 603, and numerous cases since.

When the message is sent from another State into this State, and there is a failure to deliver promptly after the arrival of the message in this State, the party in interest is entitled to recover damages for the breach of the public duty which has occurred here. Such damages are to be measured according to the public policy of the State where the breach of duty has occurred. Hence, mental anguish can be allowed when it has been caused by reason of such breach of duty.

The first cases in this State in which mental anguish was allowed were cases in which the message had been sent from a point out of the State to a point in the State. *Young v. Telegraph Co.*, 107 N. C., 371, was the case where the message was sent from Greenville, S. C., to the plaintiff at New Bern, N. C. In *Thompson v. Telegraph Co., ib.*, 449, the message was sent from Danville, Va., to Milton, N. C. These were the first two cases in which recovery was had for mental anguish.

There have been numerous cases since in which mental anguish has been recovered where the message was sent from a point outside of the State to a point in the State. Among them are *Sherrill v. Telegraph Co.*, 109 N. C., 529; *s. c.*, 116 N. C., 656; *s. c.*, 117 N. C., 354; *Lewis v. Telegraph Co., ib.*, 436; *Lyne v. Telegraph Co.*, 123 N. C., 130; *Higdon v. Telegraph Co.*, 132 N. C., 726; *Williams v. Telegraph Co.*, 136 N. C., 82; *Hall v. Telegraph Co.*, 139 N. C., 370; *Whitten v. Telegraph Co.*, 141 N. C., 361; *Woods v. Telegraph Co.*, 148 N. C., 9; *Marquette v. Telegraph Co.*, 153 N. C., 156; *Sherrill v. Telegraph Co.*, 155 N. C., 251. At this term, in *Alexander v. Telegraph Co.*, 158 N. C., 473, mental anguish was allowed in a case where the message was sent (316) from Norfolk, Va., to a point in this State.

The only case contrary to the above was *Johnson v. Telegraph Co.*, 144 N. C., 410, which has not been followed since. In Jones on Telegraphs, sec. 598, it is said: "Under the rulings of the courts in those States which permit a recovery of damages for mental anguish or suffering, such damages may be recovered from the negligent transmission or delivery of a message sent into these States from those which refuse to allow such damages. *Gray v. Telegraph Co.*, 108 Tenn., 39; 56 L. R. A., 301n; 91 Am. St., 706; *Telegraph Co. v. Blake*, 29 Tex. Civ. App., 224. The same rule applies where the messages are sent from those States which permit, to those which do not permit, such recovery, when the action is brought in the former State. So, also, damages may be recovered where the message is sent, although it is to be delivered in a State which does not allow a recovery of such damages. *Bryan v. Telegraph Co.*, 133 N. C., 603; *Telegraph Co. v. Waller*, 96

Tex., 589; *Telegraph Co. v. Cooper,* 29 Tex. Civ. App., 591. But if both the States from, and to which, the message is sent refuse to allow damages for mental suffering, such damages cannot be recovered, although the suit is brought in a State which does allow such damages, and is one through which the company has a line. *Thomas v. Telegraph Co.,* 25 Tex. Civ. App., 398. It seems that the statutes in those States (and, we may add, decisions) permitting a recovery of such damages raise the duty of these companies above that assummed in the contract of sending, and base their reasons upon the fact that a public duty has been violated for which damages may be recovered either at the place of sending or receiving." The author cites, to sustain the view that this is a breach of public duty, Thomp. Elec., sec. 427. This ground of recovery has always been recognized in this State. *Woods v. Telegraph Co.,* 148 N. C., 9.

In 2 Joyce Tel., sec. 812c., it is said: "Under a South Carolina case, if a mistake occurs at the office in a State from which the telegram is sent, recovery may be had therein by the addressee for mental anguish, where it is a ground for recovery in such State, and it need not be shown that there has been a change in the common law of the State to which the message is sent. *Walker v. Telegraph Co.,* (317) 75 S. C., 512. It is also determined in that State that, although the telegram is received for transmission in another State, yet, if there was a failure to deliver in South Carolina an action was maintainable there for the resulting mental suffering."

If there is breach of public duty, and damages for mental anguish are recoverable therefor, it logically follows that when the action is brought in this State such damages are recoverable, whether the message originated or was received here. And, for the very reason that permits either the sender, sendee, or beneficiary of a message to recover upon showing injury to himself from a breach of such duty, this State has allowed damages for mental suffering, irrespective of whether the message was originated here or was received here.

The sole case to the contrary is *Johnson v. Telegraph Co.,* 144 N. C., 410, which is opposed to the numerous cases above cited and in which the first paragraph in the headnotes requires us to overrule what is stated in the second headnote.

WALKER, J., concurring in result: I agree with the majority of the Court that damages are recoverable by plaintiff, the sendee of the message, in this State, to whom it was addressed by the sender at Roanoke, Va., although it appears that damages for mental anguish are not recoverable by the law of the latter State; but I cannot assent to the position that this decision is in harmony with *Johnson v. Telegraph Co.,* 144

N. C., 410, for I must think that the two cases are in irreconcilable conflict, at least in principle. In the *Johnson case* the suit was brought by the sendee, who was in this State, and the message originated in Virginia, where damages for mental anguish were not recoverable. The same principle, in my opinion, must necessarily govern both cases. In *Bryan v. Telegraph Co.,* 133 N. C., 603, the sendee, who lived in South Carolina, where damages for mental anguish are not recoverable, was allowed to recover, but not for the reasons stated in support of the opinion of the Court in this case.

(318) BROWN, J., dissenting: I am of opinion that this case is governed wholly by the decision in *Bryan's case,* 133 N. C., 603, and *Johnson's case,* 144 N. C., 410. *Bryan's case* was decided in 1903, and the opinion was written by *Clark, Chief Justice.* It has been cited and approved in eleven cases, which are cited in the notes to the report of the case. The *Johnson case* was decided solely upon the authority of the *Bryan case,* and by a unanimous Court, and it was understood by every member of this Court, including the author of the opinion in the *Bryan case.*

In *Bryan's case* and in *Johnson's case* following, it is held that "the liability of a telegraph company for damages for mental anguish, for negligence in transmitting telegraph messages from its office in one State to that of another for delivery, is determined by the laws of the State in which the message was received for transmission."

In *Bryan's case,* which was followed without deviation since its decision, the *Chief Justice* says: "A case exactly in point is *Read v. Telegraph Co.,* 34 L. R. A., 492 (Mo.), which holds that if a telegraph message is delivered to the company in one State to be by it transmitted to a place in another State, the validity and interpretation of the contract, as well as its liability thereunder, is to be determined by the laws of the former State. The contract was made at Mooresville, in this State; it is a North Carolina contract, and damages for its breach are to be assessed according to the liability attaching to such contract under our laws."

It is to noted that at the time that decision was rendered the laws of South Carolina did not permit a recovery upon the ground of mental anguish, and the sendee of the message, who lived in South Carolina, was permitted to come into this State and bring action in its courts in order to recover damage for mental anguish.

Now that the defendant company relies upon the very same principle announced in that case for its protection, the case is practically ignored. "It is a poor rule that doesn't work both ways."

Cited: *Raiford v. Telegraph Co.*, 160 N. C., 490; *Byers v. Express Co.*, 165 N. C., 545, 546; *Hornthal v. Telegraph Co.*, 166 N. C., 605; *Betts v. Telegraph Co.*, 167 N. C., 79; *Young v. Telegraph Co.*, 168 N. C., 37.

(319)

WILL ROLLER v. T. M. McKINNEY ET ALS.

(Filed 22 May, 1912.)

1. New Trial—Newly Discovered Evidence—Cumulative Evidence—Appeal and Error.

The newly discovered evidence upon which a motion for a new trial is based in this case, being mostly cumulative and having very little bearing upon the controlling issue, the motion is denied.

2. Pleadings—Motion to Strike Out—Impanelment of Jury—Practice.

A motion to strike out portions of the pleadings comes too late if made after the jury has been impaneled to try the cause, and should be denied.

3. Partnership—Action of Debt—Parties—Pleadings.

A partner cannot recover on a note owned by the partnership, in an action thereon brought solely in his own name, for all the partners are necessary parties, and the action must be brought in the partnership name. The answer in this case denied the ownership of the plaintiff, and *Brewer v. Abernathy*, *ante*, 283, cited and distinguished.

APPEAL from *Foushee, J.*, at January Term, 1912, of McDOWELL.

The action was tried by the plaintiff against these defendants to recover judgment upon certain notes which the plaintiff alleged he had purchased for value before maturity.

These issues were submitted to the jury:

1. Were the defendants, and each of them, induced to sign the notes in question by fraud, as alleged in the answer? Answer: Yes, except as to T. M. McKinney.

2. Is the plaintiff a purchaser of said notes for value and without notice of said fraud? Answer: No.

3. Is the plaintiff the owner of the notes sued on? Answer: No.

From the judgment rendered, the plaintiff appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE BROWN.

Pless & Winborne for the plaintiff.

S. J. Ervin for the defendant.

(320) BROWN, J. We have considered the motion for a new trial upon the ground of newly discovered evidence submitted by the plaintiff, and we are of opinion that the motion should not be granted. The evidence offered was mostly cumulative, and has very little bearing upon the third issue, upon which we think the case turns.

After the jury was impaneled, the plaintiff moved to strike out a portion of paragraphs 2, 3, 4, and 5 of the defendant's answer, which the court overruled, and the plaintiff excepted. We think his Honor properly overruled the motion, as it came too late after the impaneling of the jury; but even if his ruling was erroneous, it was a harmless error.

There are thirty-one assignments of error relating to the different issues passed upon by the jury, but we think exception No. 17, which is to the charge of his Honor relating to the third issue, is the only assignment of error necessary to be considered, as that assignment relates to the third issue, upon which we think the case turns. A portion of the charge excepted to is as follows:

"If you find that in purchasing said notes the plaintiff was not acting for himself alone, but for the partnership, and purchased them as the agent of the firm, then you will answer the third issue 'No.'"

This action is instituted by the plaintiff individually to recover on three notes of $1,000 each, executed by the defendants to Bauhard Brothers, for the purchase of a horse, and the plaintiff claims to be purchaser for value and without notice of any defect or infirmity in the notes, or of the alleged fraud by which the defendants claim the execution of the notes was procured.

There are several defenses set up in the answer. Among others, it is alleged in the answer that the plaintiff is not the owner of the notes sued on, and that he is not the real party in interest, in whose name the suit must be brought. *Vaughan v. Davenport, post* 369.

There is abundant evidence in the record tending to prove that if the note was purchased at all for value, it was purchased in behalf of the partnership, of which the plaintiff was simply a member.

(321) If this is true, as the jury have found, then the plaintiff was not the sole owner of the note, and had no right to maintain the action in his own name as an individual. *Heaton v. Wilson,* 123 N. C., 398, in which case it is held that it is the general rule that in all suits relating to a partnership, all the partners are necessary parties, and the action must be brought in the name of the partnership.

The case at bar is to be distinguished from *Brewer v. Abernathy, ante,* 283. In that case the point was attempted to be raised under a motion to nonsuit after the evidence was all in, and had not been pleaded either by way of demurrer or answer. In this case it is specially pleaded

in the answer that the note sued on was the property of the partnership, and not the individual property of this plaintiff.

We think, therefore, the instruction of his Honor was correct, and inasmuch as the jury have found the third issue in favor of the defendant, it terminates the action so far as this plaintiff as an individual is concerned.

No error.

R. L. WILLIAMSON ET AL. v. CASPER R. BITTING ET AL.

(Filed 1 May, 1912.)

1. Contracts, Written—Interpretation—Intent.

The plain intent gathered from a paper-writing will control its construction, and it will not be defeated by any omission to use technical words or expressions if equivalent words are employed for the purpose.

2. Same—Mortgages—Prior Registration—Attaching Creditors.

It appearing from a paper-writing that the maker intended it for a mortgage of certain personal property devised to him by his father, in the hands of the executors of his father's will, and made to them individually for moneys loaned by them to him: *Held*, that the registration of the mortgage prior to attachments issued by his creditor makes it superior to the creditor's lien, but only on property situated in the county where the mortgage was registered.

3. Appeal and Error—Additional Findings—Power of Court—Practice.

Upon appeal the Supreme Court will not examine the proof and find facts additional to those reported by the referee, and approved by the judge of the lower court.

4. Chattel Mortgages—Form of Registration—Interpretation of Statutes.

There is no special statutory mode presented for the registration of a chattel mortgage (Revisal, sec. 1040). The provisions of Revisal, sec. 982, relate merely to an inexpensive form of mortgage.

5. Reference—Findings of Fact—Widow's Year's Support—Appeal and Error.

A finding of the referee, confirmed by the lower court upon supporting evidence, that the widow of a decedent was reasonably entitled to the sum of $3,000 as a proper support during several years, will not be disturbed on appeal, upon the exception of the creditors of an heir at law that it had been wrongfully applied to her support, the will providing that she should have a reasonable support from his estate.

6. Mortgages—Proceeds of Sale—Interest—Equity—Distribution—Attacking Creditors.

Creditors secured by a mortgage, which was registered prior to attachments of other creditors of the mortgagor, when the mortgaged property has been sold under an agreement that the proceeds be held in place of

the property and subject to the rights of the parties therein, are entitled to interest on their mortgage debt to be ascertained and paid to them in the final settlement.

7. Executors and Administrators—Partition—Commissions—Interpretation of Statutes.

An executor who sells his testator's land for partition, and not in the execution of any trust under the will, is only entitled to commissions as provided by the statute. Revisal, sec. 2792.

8. Mortgages—Other Property—Assignments for Creditors.

A mortgage given by a devisee on the property he is to receive under a will is not an assignment for the benefit of his creditors, in the absence of evidence that he owned no other property.

APPEAL from *Lyon, J.*, at September Term, 1911, of FORSYTH.

(323) The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

L. M. Swink and D. H. Blair for plaintiff.
Manly, Hendren & Womble for interpleaders.

WALKER, J. These are actions brought by the plaintiffs, as creditors of Casper R. Bitting, to recover the amount due by him to them. They were consolidated, and an order was then made by which the cause was referred to Mr. J. E. Alexander, who afterwards reported his findings of fact and conclusions of law to the court. It appears therefrom that attachments were issued in the several suits and levied on the interest of Casper R. Bitting in the lands devised by the will of his father and situated in Forsyth and Yadkin counties, and the funds due to him under said will were garnisheed by writs or notices duly served upon W. A. Whitaker and L. P. Bitting, executors of the will. Before these actions were brought, Casper R. Bitting became indebted to W. A. Whitaker and L. P. Bitting for money loaned, in the sum of $1,600, and in order to secure payment of the same he executed to them a paper-writing, which was in the form of a chattel mortgage, and conveyed to them certain articles of personal property described therein, and also all of the other property "due or to become due from his father's estate"; and afterwards, but before these suits were commenced, he executed another instrument, by which he assigned and transferred to them all his interest in the estate, to secure the payment of the said sum of $1,600 and an additional indebtedness of $275, and for the purpose of saving them harmless as his indorsers, and authorized them to retain so much of his interest in the estate as was necessary to pay the said indebtedness and for the other purpose recited in the paper. These instruments were proven and registered in Forsyth County before these suits were com-

menced, but were never registered in Yadkin County. The first instrument is called therein a "mortgage," and contains a power of sale, authorizing the mortgagees to sell the property at public auction, after advertising the same, and to apply the proceeds of sale to the payment of the debts. The defendants W. A. Whitaker and L. P. Bitting interpleaded and, as executors, answered the notice of garnishment, denying that they held any property of Casper R. Bitting subject (324) to plaintiff's attachment or garnishment, and as individuals claimed the entire interest of Bitting in his father's estate, under the instruments executed by him to them. It was agreed between the parties that the property should be sold by W. A. Whitaker, as commissioner, free and clear of all liens, and the proceeds held by him, subject to the rights and interests of the parties herein, which should not be impaired by reason of the sale, the fund being substituted for the property which had been sold. The property was sold by the commissioner, and there is now a fund of $1,527.88, which is to be disposed of according to the rights and interests of the parties therein.

We are of the opinion that the two instruments executed by Casper R. Bitting to W. A. Whitaker and L. P. Bitting, with the declared purpose of securing his debts, are sufficient to pass his entire interest in the estate of his father. They were informally and inartificially drawn, but the intent to mortgage all he had in his father's estate, whether real or personal property, is perfectly evident. The law will not allow the plain intention to be defeated by any omission to use technical words to express it, if equivalent terms are employed for the purpose. This we held in *Triplett v. Williams,* 149 N. C., 394; *Gudger v. White,* 141 N. C., 513, and very recently in *Acker v. Pridgen,* 158 N. C., 337. *Judge Story,* in *Tiernan v. Jackson,* 5 Peters, 58, said that "Whatever may be the inaccuracy of expression, or the inaptness of the words used in an instrument, in a legal view, if the intention to pass the legal title to property can be clearly discovered, the court will give effect to it, and construe the words accordingly." In *Hutchins v. Carleton,* 19 N. H., 487, it was held that the words "assign" and "make-over" are as effectual, when a consideration is expressed, to raise a use or pass an estate as many other forms that have been sanctioned by the courts as sufficient for the purpose. Many cases are cited in the brief of defendant's counsel in that case, to which the Court refers as fully sustaining the liberal and practical rule which has generally been adopted for the construction of deeds. *Patterson v. Carneal,* 3 A. K. Marshall, 618; *Chapman v. Charter,* 46 W. Va., 769; *Gordon v. Haywood,* (325) 2 N. H., 402; 13 Cyc., 542-543, and notes. Attempts have been made to establish artificial rules for discovering the intention, and the offices of terms of general and particular description defined. The truth

is, no positive rule can be laid down; for as each subject differs in some respects from another, and each writer will be more or less precise and perspicuous in expressing himself, the whole instrument is to be looked at, and the inquiry then made, Can it be found out, from this, what the party means? *Proctor v. Pool,* 15 N. C., 370.

While we decide that the writings are sufficient to pass the title or interest of Casper R. Bitting, they will not affect any land in Yadkin County, as they were not registered.

Plaintiffs say that, while the referee held that the unsold lands were, for this reason, subject to the lien of the attachment, he made no ruling as to lands which had been sold; but there is no finding of fact in the report upon which to base this exception, and we cannot find any additional facts. We can only consider those which were reported by the referee and adopted by the judge. *Frey v. Lumber Co.,* 144 N. C., 759; *Harris v. Smith,* 144 N. C., 439; *Cotton Mills v. Cotton Mills,* 115 N. C., 475; Pell's Revisal, sec. 525 and note. If a fact is found, of which there is no evidence, or upon incompentent evidence, we can review the ruling below, because there a question of law is involved. But there are no facts before us upon which we can make any ruling. It seems that the referee reported that the plaintiffs are entitled to enforce their attachment liens against certain land in Yadkin County, but it does not appear, by any finding of fact, whether or not those lands are sufficient in value to pay their claims. If they are, nothing has been lost by the adverse decision of the referee, which was approved and confirmed by the court. The two paper-writings or mortgages were properly registered. The law does not designate in what particular book instruments of this character shall be recorded. If they were actually registered and indexed, it is sufficient. The provision in regard to chattel mortgages (Revisal, sec. 1040) does not determine the mode of registration. That was intended simply to prove an inexpen-
(326) sive form of chattel mortgage. This case is governed by Revisal, sec. 982.

The plaintiffs complain that the executors have paid to the widow of J. A. Bitting $3,000 without authority, and that Casper R. Bitting is entitled to one-tenth of this amount so wrongfully misapplied. But the referee finds as a fact that the widow, under J. A. Bitting's will, was entitled to "a proper support," and that the amount paid to her, during several years and aggregating $3,000, was a proper and reasonable support for her, and did not exceed what was necessary for that purpose. This being so, we do not see why the allowance of this sum, in stating the account, was not correct.

As we have held that the instruments executed by Casper R. Bitting to W. A. Whitaker and L. P. Bitting are, in law, sufficiently definite in their language to constitute them mortgages upon his entire interest in J. A. Bitting's estate, which would entitle them to receive the fund of $1,527.88 realized from the sale of the property under the consent order in this case, they are entitled also to the interest accrued on the fund, to the extent that it is necessary to pay the indebedness secured by those papers. The exception as to the interest on that fund, amounting to $144, is, therefore, overruled, but the interest on the fund will not be applied to the debts until there is a final settlement in this suit, and if it has already been applied, it must be restored.

The defendants excepted to the report of the referee because he had allowed W. A. Whitaker, as commissioner, on the proceeds of the sale of the land, more than the amount fixed by the statute for sales in partition proceedings. This was a sale for partition and not in the execution of any trust by the executors. It is such in form and substance, and the commissioner or executors should be allowed commissions only at the statutory rate. Revisal, sec. 2792; *Ray v. Banks,* 120 N. C., 389. This exception is sustained.

The other exceptions are covered by the ruling that the two writings given by Casper R. Bitting to Whitaker and Bitting are valid as mortgages to the extent we have already stated, and the said defendants are entitled to apply so much of the mortgagor's interest in his father's estate as will be necessary for the payment of the indebt- (327) edness secured by them, but no more.

The paper-writings executed by Casper R. Bitting to secure his indebtedness are *bona fide* mortgages, and not assignments for the benefit of cerditors. They do not cover, or purport to cover, his entire estate, but only a part thereof, or at least it does not appear that he did not have other property than that described in them. *Odom v. Clark,* 146 N. C., 544.

The judgment will be modified as herein indicated, each party to pay his own costs in this Court.

Modified.

Cited: Beacom v. Amos, 161 N. C., 366; *Drainage District v. Parks,* 170 N. C., 440; *In re Inheritance Tax,* 172 N. C., 175.

F. W. ALLEY v. CHARLOTTE PIPE AND FOUNDRY COMPANY.

(Filed 8 May, 1912.)

1. Master and Servant—Safe Appliances—Negligence—Delegated Authority.

It is the duty of the master to furnish the servant reasonably safe appliances with which to do the work, which it cannot delegate to another servant and escape liability.

2. Same—Res Ipsa Loquitur—Substantial Evidence.

When one engaged in a foundry, and in the scope of his employment is injured by an explosion of gas which drove the molten metal out of an arbor which he was using, latently defective and made by another employee, who was unskilled in such work, which was known, or should have been known, to the master by the exercise of reasonable care, the negligence of the master in employing, or continuing to employ, the unskillful servant to make cores for the use of other employees in their work is actionable negligence.

3. Same—Inexperienced Employee—General Reputation—Expert Evidence.

Upon the issue of defendant's negligence in employing an unskillful core-maker for making cores to be used in a foundry, with evidence tending to show that plaintiff was injured while handling molten iron with one of them, by reason of a latent defect therein, evidence is competent which tends to show the reputation of the core-maker for inefficiency, by those who are acquainted with it; and, also, the opinions of experts in that line of work as to whether, under the evidence, the cores were properly made.

4. Master and Servant—Personal Injury—"Probable" Results—Words and Phrases—Expert Evidence—Measure of Damages.

Upon evidence tending to show that the plaintiff was injured by the defendant while working in a foundry with an imperfect appliance furnished him for the purpose, it is competent for his physician to testify, on the measure of damages, that the character of the wound inflicted was such that an eating cancer was "liable" to ensue, the word "liable" as used by him being in the sense of a "probable" consequence, and not speculative; and it was also competent as tending to prove the acute mental suffering caused by the injury.

5. Instructions—Negligence—Phases of Evidence—Harmless Error.

When, under certain phases of the evidence, the jury should have been instructed that the defendant was guilty of negligence, if they found the evidence to be true, it is not error of which the defendant can complain, that the charge left to the determination of the jury whether or not all the facts constituted negligence, the burden being put upon the plaintiff, and the charge being otherwise correct.

(328) APPEAL from *Lyon, J., at* January Term, 1912, of MECKLENBURG.

These issues were submitted:

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

2. Did the plaintiff voluntarily assume the risk and danger of being injured in the manner in which he was injured as an incident of his employment? Answer: No.

3. Did plaintiff, by his own negligence, contribute to his injuries, as alleged in the answer? Answer: No.

4. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $6,000.

From the verdict and judgment the defendant appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE BROWN.

T. L. Kirkpatrick, Osborne, Lucas & Cocke, and Miller for plaintiff.
Burwell & Cansler, Davis & Davis for defendant.

BROWN, J. The plaintiff was a pipe molder for several years in defendant's foundry. On 28 November, 1910, while engaged (329) in molding, he was injured by the explosion of a core, which caused a stream of molten iron from the arbor to strike plaintiff's foot, set his trousers afire, and seriously burn him. This core had been made by a core-maker named Nance, and furnished to plaintiff for use in connection with the arbor in molding.

The principal negligence alleged is in providing an imperfect core, the defects in which were not apparent, and in providing an unskillful and deficient workman to make the core supplied to plaintiff.

There are twenty-one assignments of error set out in the record and discussed in the briefs. We deem it unnecessary to review them all.

1. The motion to nonsuit was properly denied. It is unnecessary to discuss the doctrine of *res ipsa loquitur* as applicable to this case. The plaintiff need not rely on it. There is substantive evidence of negligence for which the defendant may properly be held liable.

There is evidence tending to prove that plaintiff was injured by an explosion of gas which drove the molten iron out of the arbor on plaintiff; that this arbor was made by defendant; that the explosion was caused by a defective core furnished plaintiff by defendant; that plaintiff could not well have discovered the defect; that the core was made by Sam Nance, an incompetent and unskillful core-maker, and there was evidence that defendant had full knowledge of Nance's incompetency and continued him as core-maker notwithstanding. There is evidence from which it may be clearly inferred that the core was defective when it left Nance's hands.

It is now elementary learning that the master must furnish the servant a reasonably safe place to work in and reasonably safe and properly constructed appliances to work with, consistent with the character of the work.

And it is likewise true that if the defendant, with full knowledge of Nance's incompetency, continued to permit him to make cores for the use of other workmen employed in a dangerous business, the de-
(330) fendant is liable for Nance's negligence, for in that particular Nance represented the master, and was discharging a duty the defendant itself owed to its servants. *Tanner v. Lumber Co.,* 140 N. C., 475; *Barkley v. Waste Co.,* 147 N. C., 585.

2. It is contended that the court erroneously received evidence relating to Nance's repuation as a core-maker. Three witnesses, found by the court to be experts, declared that Nance was an incompetent core-maker. One said that he ripped through his work and did not half make his cores; rings in them and soft places. We think it was proper to admit the opinion of experts upon that disputed question, as well as to put in evidence Nance's general repuation in his particular specialty. *Ives v. Lumber Co.,* 147 N. C., 306.

In *Lamb v. Littman,* 132 N. C., 978, it is held competent to prove the reputation of a man's special fitness for any employment in which he is engaged. *R. R. v. Jewel,* 46 Ill., 99.

Mr. Wigmore says, sec. 1894, Work on Evidence: "Testimony to professional skill concerning professional persons qualified to know is generally regarded as receivable."

As one or several acts of negligence would not necessarily make a workman an incompetent servant, we think the best rule is that a servant who is familiar with the servant complained of, and who is competent to judge of his competency and the character of his work, should be permitted to give his opinion of it.

3. It is assigned as error that the court permitted the physician to state that the character of the plaintiff's wound was such that a sarcoma, or eating cancer, was liable to ensue. We recognize the general rule that an expert physician testifying to the consequences of a personal injury should be confined to probable consequences, but in this instance we do not think the physician indulged in pure speculation. Jones on Evidence, sec. 378. The word "liable" is defined as "exposed to a certain contingency more or less probable." Webster's Dictionary. The word was used by the witness in the sense of probable, and was doubtless so understood by the jury.

The identical phrase was used in *Montgomery v. Scott,* 34 Wis.,
339, and upheld as a legitimate expression of opinion by a medi-
(331) cal expert.

In *Kansas City v. Stoner,* 49 Fed., 209, the Court held that the plaintiff was entitled to recover for the *probable* effects of the injury, even though at the time not apparent.

We think the evidence competent also as tending to prove acute mental suffering accompanying a physical injury. The liability to cancer must necessarily have a most depressing effect upon the injured person. Like the sword of Damocles, he knows not when it will fall.

This exception relates only to the issue of damages, and if erroneous it was of little consequence, as his Honor laid down clearly the correct rule of damage, as follows:

"Plaintiff is to have a reasonable satisfaction—if he is entitled to recover—for loss of bodily or mental powers, or for actual suffering, both of mind and body, which are the immediate and necessary consequences of the injury."

4. The defendant excepts to the following charge: "Now, if you find from the evidence, gentlemen of the jury, that the plaintiff was injured by an explosion, throwing molten iron against his foot, and that said explosion was caused by a defective core, and you further find that said defective core was furnished to the plaintiff by the defendant, and you further find that said core was defective in its construction, and that it was constructed by Sam Nance, the core-maker, and you further find that Sam Nance was an incompetent and inefficient core-maker, and you further find from the evidence that the defendant knew that Sam Nance was an incompetent and inefficient core-maker, or that it ought to have known the fact, and you find that this is negligence, under the definition of negligence that I have given you, you will answer the first issue 'Yes'; otherwise, you will answer it 'No.'"

The only fault to be found in this charge is that his Honor left to the jury to decide whether or not all of these facts constituted negligence, when he ought to have charged that if the jury found these facts to be true, the defendant was guilty of negligence.

This is an error of which the defendant has no reason to (332) complain. The charge put the burden of proof squarely on the plaintiff, and eliminated entirely from the case any evidence of negligence arising from the mere fact of an explosion, under the *res ipsa loquitur* doctrine.

We think it useless to discuss the remaining assignments of error. We have examined them and find them without merit. The charge of the court was a full and clear presentation of the case to the jury, and as favorable as the defendant could reasonably expect.

No error.

Cited: Walters v. Lumber Co., 163 N. C., 542; *Ammons v. Mfg. Co.,* 165 N. C., 452; *Ridge v. R. R.,* 167 N. C., 528.

DAVID OVENS v. CITY OF CHARLOTTE.

(Filed 1 May, 1912.)

Cities and Towns—Streets and Sidewalks—Obstructions—Negligent Driving—Proximate Cause.

In an action against a city for personal injuries caused by plaintiff's being thrown from a vehicle which was overturned at night by one of its wheels striking a stump alleged to have negligently been left by the city on a street near the curbing, it appeared from the evidence of the plaintiff that he knew of the stump and could readily have seen it by an electric light, if he had been attentive to his driving: *Held*, the injury complained of was proximately caused by the inattention of the plaintiff, and a judgment of nonsuit was properly granted.

APPEAL by plaintiff from *Lyon, J.*, at January Term, 1912, of MECKLENBURG.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

W. T. Harding and McCall & Smith for plaintiff.
Maxwell & Keerans for defendant.

WALKER, J. Plaintiff brought this action to recover damages for injuries received while driving along a street or avenue in the city of Charlotte, known as Ransom Place, and striking a stump which overturned his buggy and threw him to the ground. He alleges that the city had cut down a tree which stood in one of the small parks or (333) places in the avenue, leaving a stump which projected a little in the driveway, though plenty of space was left for the safe and convenient passage of vehicles. Ransom Place was about 68 feet wide and 400 feet long, and extended from Morehead Street to Vance Street. The parks were not part of the driveway, but well defined in their boundaries, and were curbed. The evidence introduced by the plaintiff tended to show that he had often seen the stump, as he lived in Ransom Place very near it, and "there was no trouble about seeing it." Plaintiff admitted that if he had been thinking of the stump, he could easily have avoided it. He was not looking for the stump, and was driving along and not thinking about it; although he knew that it was there. He was not looking out for anything ahead of him, but thinking of something else. If he had driven in or near the middle of the street, and not to the extreme right side, he would not have struck the stump. There was an electric light burning at the intersection of Ransom Place and Vance Street, about two hundred feet distant.

It would seem clear that plaintiff's injuries were caused by his negligent indifference to his own safety. He was evidently driving careless-

ly, if not recklessly, and not thinking about what he was then doing. *Walker v. Reidsville,* 96 N. C., 382, is a case which closely resembles this one in its facts, and with reference thereto the Court said:

"A reasonably prudent and careful man would not forget the presence of such danger in his immediate neighborhood—one that he had seen and observed every day for more than a fortnight, and but a few hours before he received the hurt. He was bound to act upon his information, and use ordinary care and prudence in shielding and protecting himself from what he knew to be a menacing danger to every one who passed near it. He forgot, and failed to be careful at his peril, and in his own wrong. *Parker v. R. R.,* 86 N. C., 221; *R. R. v. Houston,* 95 U. S., 697; Dillon Mun. Corp., sec. 789; Beach on Cont. Neg., 40. In *Bruker v. Covington,* 69 Ind., 33, is was held that when a party knows of the existence of an open cellar-way in a sidewalk, and attempts to pass the place in the night, he will be considered as taking the risk upon himself, even if he had forgotten the existence of the obstruction, and if he receive injuries from falling into such (334) cellar-way, he is chargeable with contributory negligence, and cannot recover damages. There are many cases to the like effect. *Gribble v. Sioux City,* 38 Iowa, 390; *Wilson v. Charlestown,* 8 Allen, 137; *Gilman v. Deerfield,* 15 Gray, 577; *Moore v. Abbott,* 32 Me., 46." But the case of *Neal v. Marion,* 126 N. C., 412, is more to the point, and seems to be decisive of this case. The Court there said that "The plaintiff had been long a resident of Marion, and had been thoroughly familiar with the walk, having traveled it hundreds of times, as she testified. Now, if she knew that the hole was in the path, and at night walked along it, and through forgetfulness carelessly walked into it, she negligently contributed to her own injury. It was not reasonable care on her part to forget such a menace to her safety; and even if it should be conceded that the town was negligent, if she, through the want of proper care and prudence, contributed to her own injury, both parties being negligent, she cannot recover." The cases of *Walker v. Reidsville, supra,* and *Bruker v. Covington, supra,* are cited with approval by the Court, and it distinguishes *Russell v. Monroe,* 116 N. C., 720, and other cases, because it appeared in them that the plaintiff had no knowledge of the defect in the street, and, therefore, might well assume that the town had performed its duty and kept its street in proper repair.

In this case it appears that the plaintiff was grossly inattentive to his surroundings, not thinking at all about what he was doing, when if he had exercised any, even the least, care to avoid the stump, he could have done so with the greatest ease. The injuries he received when he was thrown from the buggy were directly traceable to his own negligence, and about this no two reasonable minds could differ.

There was consequently no error in dismissing the action upon the evidence.

Affirmed.

Cited: Darden v. Plymouth, 166 N. C., 494.

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(335)

W. A. BUNCH v. COMMISSIONERS OF RANDOLPH COUNTY.

(Filed 28 May, 1912.)

1. County Commissioners—Control of County Affairs—Constitutional Law—Interpretation of Statutes.

Under the Constitution and Public Laws of North Carolina the board of county commissioners are generally given supervision and control of governmental matters in the several counties. Constitution, Art. VII, sec. 2; Revisal, sec. 1318 *et seq.*

2. Same—Roads and Highways—"Necessary Expenses."

The well ordering and maintenance of the public roads of a county are "necessary expenses" within the meaning of our Constitution and statutes, and for this purpose the county commissioners are invested with full power to direct the application of all moneys arising by virtue of chapter 23 of the Revisal, in the absence of some public-local law enacted under Art. VII, sec. 14, of the Constitution, making contrary provision.

3. Interpretation of Statutes—Repeal—Implication.

As a general rule, the law does not favor that construction of a statute which repeals a former statute by implication.

4. Same—Roads and Highways—Road Districts—Taxation—Direct Appropriation—County Funds—Constitutional Law.

Chapter 567, Laws 1909, purporting to provide for the "constructing and keeping in repair the public roads of Randolph County," was adopted by the county, as the act requires, and was designed to establish a system for working the public roads of the county, to a large extent, by the township system, primarily giving the trustees of each township the right to maintain and repair the roads therein, subject to appeal to the county commissioners in proper cases. Where the road extends through two or more townships the power to lay out, alter, or discontinue it remains with the county commissioners, but after action taken, the road is considered as divided in sections, and its control is left with the local boards. The county commissioners are authorized and directed to levy a tax of not less than 8 1/3 cents on the $100 worth of property nor more than 15 cents thereon, the funds to be kept separate and apportioned to the various townships. It is admitted in this case that the amount thus derived was insufficient and that the roads are in a poor condition: *Held,* the Laws of 1909 relating to Randolph County did not have the effect of

repealing the provisions of section 1379, etc., of the Revisal, so as to prevent the county commissioners from expending the general county funds for the maintenance, etc., of the roads of the county.

APPEAL from *Allen, J.*, at Spring Term, 1912, of RANDOLPH. (336)

Case agreed. The action was instituted by W. A. Bunch, Esq., a citizen and taxpayer of Randolph County, to restrain the board of commissioners of said county from making a proposed appropriation of $3,500 out of the general county funds, in aid of the construction of a public road through two or more townships of said county and extending from Asheboro, the county-seat, to the Montgomery line. There was judgment restraining the appropriation, and defendants, the county commissioners, excepted and appealed.

J. A. Spence for the plaintiff.
H. M. Robins for the defendant.

HOKE, J., after stating the case: Under the Constitution and Public Laws of the State, except where changed by special enactments, the boards of county commissioners are given supervision and control of governmental matters in the several counties. Constitution, Art. VII, sec. 2; Revisal, sec. 1318 *et seq.*, and, in addition to powers conferred generally throughout the Revisal and, in more especial reference to the fiscal affairs of the county, section 1379 enacts: "The board of commissioners is invested with full power to direct the application of all moneys arising by virtue of this chapter for the purposes herein mentioned and to *any other good* and necessary purpose for the use of the county."

There are numerous decisions of this Court to the effect that the well ordering and maintenance of the public roads of the county is to be properly considered and dealt with as a "necessary expense" within the meaning of our Constitution and statutes (*Board of Trustees v. Webb*, 155 N. C., 383; *Crocker v. Moore*, 140 N. C., 429; *Tate v. Commissioners*, 122 N. C., 812); and the appropriation in question here comes well within the powers generally conferred on defendant board, and the same must be upheld unless there is some public-local law enacted under Article VII, sec. 14, of the Constitution making contrary provision.

It is earnestly contended for plaintiff that this very condition exists here by reason of chapter 567, Laws 1909, purporting to provide for the "constructing and keeping in repair the public roads of (337) Randolph" County, and adopted by the board of commissioners at a regular meeting, as the act itself requires.

The statute is designed to establish a system of working the public roads of the county, to a large extent by the township system, and, when the roads lie wholly within a given township, the power to lay out, order, or discontinue such road, and to maintain or repair the same, is vested primarily in a board of township trustees appointed by the board of commissioners, subject to an appeal to said last-mentioned board, in proper cases. Where a road extends through two or more townships, the power to lay out, alter, or discontinue the same remains in the county commissioners as heretofore, but where this action has been had, the road is considered as divided into sections, and the control thereof as to its repair, etc., is referred by the act to the local boards as in other cases. Section 5. By section 15, the commissioners of the county are authorized and directed to lay a tax of "not less than 8 1-3 cents nor more than 15 cents on the hundred dollars worth of property, to be collected as other taxes, the amount to be kept separate and apportioned to the several townships, to be paid out in maintenance and repair of the roads in that township, on the written order of the chairman and secretary of the board of trustees."

On the hearing it was made to appear, by the admission of the parties, as follows:

"That the public roads of Randolph County are in very poor condition and badly in need of improvement; that there are no roads in the county permanently improved by macadam, gravel, top-soil, or sand-clay, according to modern methods; and the road which is to be improved under order of the commissioners in question is a rough road and is in very bad condition. And the defendants propose, as far as they can, to assist in the improvement of other roads in the different parts of the county in the same manner; and the boards of road trustees of the different townships through which the road runs that is to be built or improved under said order have consented and do consent that the improvements be made in accordance with the terms of said order.

"It is further agreed that the funds derived from the 8 1-3
(338) cents tax levied under and in accordance with chapter 567 of the Public Laws of North Carolina, Session 1909, are insufficient and will in the future be insufficient to do all the work needful and proper to be done upon the public roads of said county; nor would sufficient funds for that purpose be secured by raising the tax to the 15 cents on the $100 valuation, as authorized by the provisions of said act."

Upon these, the facts chiefly relevant to the controversy, the Court is of opinion that there is nothing unlawful in the proposed appropriation, the same to be made out of the general county funds available for the purpose and raised by taxation within the constitutional and general statutory limitations bearing on the subject. On perusal of this local

statute, there is doubt if it permits the construction that the officers and agents of the county, in carrying out its provisions, are confined to the means afforded under the terms of the law. In various sections of the act it is clearly contemplated that these general county funds may be used when required, and, more especially where, as in this case, the road is to extend through two or more townships. In such case, the power to lay out, alter, or discontinue a highway, as heretofore stated, remains with the board of commissioners. Section 25 requires board of commissioners to "purchase the road machinery, tools, and implements, which are to remain the property of the county." In section 33, the commissioners are given supervision and control of all bridges, their location, construction, and maintenance, etc., and the general county funds are made available for the purpose. Section 34. When the road extends into two or more townships, the county commissioners are to employ the engineer or surveyor to "be paid out of general county funds," etc. And even if a contrary view should ordinarily prevail, there is no recognized rule that would sanction or uphold the interpretation that the statute was intended to withdraw from the county commissioners the right to expend the general county funds to the best interests of the county and repeal the powers expressly conferred by section 1379 and other cognate provisions of the Revisal.

There is no express repealing clause contained in the law, and it is well understood that implied repeals are not favored as (339) a general rule. *S. v. R. R.*, 141 N. C., 846; *Winslow v. Morton*, 118 N. C., 486; Black on Interpretation of Laws, p. 112; Sedgwick on Statutory and Constitutional Law, p. 126. In this last citation, the author says:

"But, though it is thus clearly settled that a statute may be repealed by implication, and without any express words, still the leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of the Legislature together. 'It must be known,' says Lord Coke, 'that forasmuch as acts of Parliament are established with such gravity, wisdom, and universal consent of the whole realm, for the advancement of the commonwealth, they ought not, by any constrained construction out of the general and ambiguous words of a subsequent act, to be abrogated; *sed hujusmodi statuta tanta solemnitate et prudentia edita* (as Fortesque speaks, cap. 18, fol. 21) ought to be maintained and supported with a benign and favorable construction.'

"So in this county, on the same principle, it has been said that laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject; and it is, therefore, but reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless

the repugnancy between the two is irreconcilable; and, hence, a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law, if the two acts may well subsist together."

We do not consider that *Hornthall v. Commissioners,* 126 N. C., 26, to which we were referred by counsel, is in necessary antagonism to our present ruling. In that case a system had been provided for working the public roads by contract and a fund was created by the law especially designated as applicable to the purpose. A contractor, having an amount due him for work done, under the law, sued on his demand, and the commissioners resisting payment, recovery was denied. The decision seems to have been made to rest on the ground that the fund applicable to the claim having been exhausted, and the statute having been repealed by which any further sum could be raised, collection of the claim, (340) as a matter of right, could not be enforced. There was a strong and earnest dissent by *Judge Furches,* concurred in by *Chief Justice Faircloth,* and the position of the Court, in denying all relief, may be open to some question; but the power of the county commissioners to dispose of general county funds, in their discretion, for the county's best interests, was in no way presented and the authority is not in contravention of our present decision.

The restraining order will be dissolved and the appropriation by the commissioners upheld.

Reversed.

F. H. ABERNATHY v. SOUTH AND WESTERN RAILWAY COMPANY.

(Filed 8 May, 1912.)

1. Railroads—Rights of Way—Damages—Limitation of Actions—Interpretation of Statutes.

Revisal, sec. 394, in regard to bringing an action against a railroad for damages for a right of way taken by it without condemning the same or acquiring the easement by purchase, is a statute of limitation, and must be specially pleaded by the railroad company, if relied on; and it is not required of the owner to affirmatively show that he has commenced his action within the time specified, as it is not a condition annexed to his cause of action.

2. Railroads—Rights of Way—Damages—Interest—Court's Discretion—Appeal and Error.

It is within the power of the lower court, in passing upon a report of a referee in an action against a railroad company for the value of an ease-

ment in lands, to allow interest on the amount found by him since the actual taking by the railroad company of the owner's land for its right of way, as a part of the damages.

3. Railroads—Rights of Way—Damages—Judgment — Interest — Interpretation of Statutes.

A judgment in the owner's favor, in the assessment of damages for lands taken for a right of way by a railroad company, bears interest by express provision of the statute. Revisal, sec. 1954.

4. Railroads—Rights of Way—Conveyance of Lands—Damages—Interpretation of Statutes—Parties.

After the owner of lands has commenced his action against a railroad company to recover damages for taking a right of way thereon without compensation, the amount of the damages to be awarded is not affected by the fact that he conveyed a part of the *locus in quo* to another; and when the purchaser is not a party to the action, his claim upon his vendor in respect to the damages will not be considered.

APPEAL by defendant from *Foushee, J.*, at November Term, (341) 1911, of MITCHELL.

This is an action which was heard on exceptions to the report of referees. The defendant railway company, without purchasing or condemning the same, entered upon the land of the plaintiff, appropriated the same to its own use as a right of way, and constructed and is now operating its railroad across said land, without ever having compensated the plaintiff therefor. This action was instituted by the plaintiff before the clerk of the Superior Court, under Code, sec. 1944 (Revisal, sec. 2580), for the purpose of having assessed the compensation for the right of way taken by the defendant. The construction of the road, as located by defendant, not only deprived plaintiff of a part of his land, but it is alleged, destroyed and rendered worthless a valuable mica mine on the property. The clerk duly appointed commissoners, as provded by the statute, who viewed the property and filed their report, as shown in the record. To this report both parties excepted and demanded a jury trial on appeal to the Superior Court. The defendant, by leave of court, amended its answer, after the cause reached the Superior Court, and denied the title of the plaintiff, alleging title in the heirs of one J. L. Rorison. The issues were then tried before *Moore, J.*, and a jury, and from a verdict and judgment for plaintiff, the defendants appealed to this Court, and obtained a new trial upon the ground that the court below had committed error in excluding certain testimony tendered by defendant on the issue of title.

The cause again came on to be heard in the Superior Court, and upon plaintiff's demand for a trial by jury, the defendant moved that the

(342) cause be referred. The court, over objection of plaintiff, allowed the motion, and entered the order set out in the record, referring the cause.

Upon the coming in of the report of referees, both excepted, and the matter was heard before *Foushee, J.*, who, after consideration of the evidence and argument of counsel, modified and confirmed the report of referees, and from this judgment the defendant now appeals.

Erwin & Newland and Merrimon, Adams & Adams for plaintiff.

J. Crawford Biggs, W. L. Lambert, James J. McLaughlin, and J. Norment Powell for defendant.

WALKER, J., after stating the case: The defendant contended that plaintiff was not entitled to recover because he had not alleged and shown that this proceeding was commenced within five years after the land had been taken or entered upon by the defendant, or within two years after the road was first operated, and reliance was placed upon Laws 1893, ch. 152, brought forward in the Revisal as section 394 (1), which provides as follows: "No suit, action, or proceeding shall be brought or maintained against any railroad company owning or operating a railroad, for damages or compensation for right of way or occupancy of any lands by said company for use of its railroad, unless such suit, action, or proceeding shall be commenced within five years after said lands shall have been entered upon for the purpose of constructing said road, or within two years after said road shall be in operation." It was argued that this section should be read in connection with section 2580 of the Revisal, as the two relate to the same subject-matter, and, as thus considered, the provision as to the time within which the proceeding must be commenced is not a statute of limitations, but a condition annexed to the cause of action, and therefore it was incumbent upon the plaintiff to show affirmatively that this proceeding was commenced within the said period so fixed by the statute. We cannot assent to this proposition. The act of 1893 (ch. 152), now Revisal, sec. 394, contains a saving clause as to persons under disability, which shows, though perhaps not conclusively, that the Legislature intended that it (343) should be a statute of limitations. In addition to this, similar provisions have been construed by this Court. The section is not materially unlike that to be found in the charter of the North Carolina Railroad Company, which was construed in *Vinson v. R. R.*, 74 N. C., 513, and in which the following language was used: "This is a positive statute of limitations, and it clearly bars the plaintiff's action, unless it be saved by the special circumstances relied upon by the plaintiff for that purpose, which are stated in the case agreed, and which the

reporter will set forth in full. The plaintiff has not been vigilant, and if he has lost anything by sleeping on his rights, we can only say, the law is so written." That decision has been since followed in many cases. *R. R. v. McCaskill,* 94 N. C., 746; *Gudger v. R. R.,* 106 N. C., 481; *Dargan v. R. R.,* 131 N. C., 623. The provision is not like that contained in Lord Campbell's Act (Revisal, sec. 59), which was construed in *Gulledge v. R. R.,* 148 N. C., 567. As it is a statute of limitations, it should have been pleaded, and as it was not, the defendant cannot now have the benefit of it. Revival, sec. 360; *Insurance Co. v. Edwards,* 124 N. C., 116; *Boone v. Peebles,* 126 N. C., 824.

The defendant assigned as error the fact that the judge, in reducing the assessment of damages, as made by the referee, to $3,000, stated that, in fixing this amount, he had considered the interest on the amount of compensation from the time the railroad was constructed, and also allowed interest from the date of the judgment on said sum of $3,000. But the court may consider the interest as part of the damages, or in order to ascertain the amount justly due the plaintiff. *Patapsco v. McGee,* 86 N. C., 350; *Devereux v. Burgwin,* 33 N. C., 490. Hale on Damages, sec. 68, p. 167, states the rule very broadly, and cites numerous cases to sustain it: "The taking of property under the right of eminent domain is analogous to a sale. If not agreed on, the damages are assessed as of the time of taking, and interest on the amount ascertained is allowed as compensation for the detention of the money from that time. The reason for the rule was well stated in a Pennsylvania case: 'If the plaintiff was entitled to compensation by reason of her property being taken at a particular time, she was certainly entitled to interest as compensation for its wrongful detention. (344) The company, as well as the plaintiff, could have had the damages assessed as soon as they pleased after locating the road, and it was no reason for withholding compensation that its amount was unknown or unascertained. As the company was the party to pay, it ought to have had the amount ascertained, and paid it. Failing to do so, it has no right to complain at having to meet an incident of the delay in the shape of interest.' "

It is not necessary that we should go all the way with him, and hold that interest is recoverable as of right. We only hold that it was within the judge's discretion to consider interest in estimating the damages. Hale on Damages, sec. 67; *Frazer v. Carpet Co.,* 141 Mass., 126; *Lincoln v. Clafin,* 7 Wall., 132. In the case last cited, the Court held (p. 139) that in cases of tort, as trover, trespass, and other like actions, the allowance of interest as damages rests in the sound discretion of the jury. *Stevens v. Koonce,* 103 N. C., 266. The judgment bears interest

by express provision of the statute, whether the cause of action was in tort or contract. Revisal, sec. 1954; *Stephens v. Koonce, supra.*

The defendant assigned as error the ruling of the referees, and the judge in approval thereof, upon the finding of fact that the plaintiff, Abernathy, since the institution of the proceeding, had conveyed one-third interest in the land to L. A. Berry, and insisted that the plaintiff should, therefore, be permitted to recover only two-thirds of the compensation awarded for the land taken by it for a right of way. Counsel for defendant relied upon *Livermon v. R. R.*, 109 N. C., 52; *Phillips v. Telegraph Co.*, 130 N. C., 513, and *Beal v. R. R.*, 136 N. C., 298, as authorities sustaining their contention; but an examination of those cases will disclose that in all of them the transfer of title occurred before the proceeding of an appraisal or for condemnation had commenced. Our statute, Code, sec. 1950 (Revisal, sec. 2594), provides as follows: "When any proceedings of appraisal shall have been commenced, no change of ownership by voluntary conveyance or transfer of the real estate or any interest therein or of the subject-matter of the appraisal shall in any manner affect such proceedings, but the same may (345) be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made." Our case is governed by this section, as the conveyance of title to Berry was not made until after the proceeding had been started. We are not required to consider what claim Berry may have upon the plaintiff, as that matter is not before us. L. A. Berry is not a party to this suit.

The other exceptions have either been abandoned or are without merit.

Affirmed.

Cited: Durham v. Davis, 171 N. C., 208; *Caveness v. R. R.,* 172 N. C., 310.

MARY E. BENNETT v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 8 May, 1911.)

1. Negligence—Wrongful Death—Suit by Wife—Parties.

A wife cannot maintain an action in her individual capacity to recover damages for the negligent killing of her husband.

2. Negligence—Wrongful Death—Executors and Administrators—Interpretation of Statutes—Parties.

The right to maintain an action for a negligent killing of a human being is regulated solely by statute, and must be brought by the personal representative, etc., of the deceased. Revisal, sec. 59.

3. Negligence—Wrongful Death—Condition Annexed—Burden of Proof.

The provision of Revisal, sec. 59, that suit shall be brought within one year from the wrongful killing of another, is a condition annexed to the recovery in an action for damages, and it must be proved by the plaintiff that he is within the time prescribed. It is not required to be pleaded.

4. Power of Courts—Process—Amendments—Change of Cause.

The court has no power to convert a pending action that cannot be maintained into a new or different action by amendment of process or pleadings.

5. Same—Wrongful Death—Executors and Administrators—Interpretation of Statutes.

In an action to recover for the wrongful death of another (Revisal, sec. 59), brought by the wife individually, the court has no power to allow an amendment to the summons so as to change the action into one by her in an administrative capacity.

APPEAL from *Lyon, J.*, at Spring Term, 1912, of MECKLEN- (346) BURG.

Motion to amend the summons. From the order of his Honor allowing amendment by adding the word "administratrix" after the plaintiff's name, the defendant excepted and appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE BROWN.

E. R. Preston for the plaintiff.

O. F. Mason, Shannonhouse & Jones for the defendant.

BROWN, J. This action was commenced on 4 July, 1910, by the issuing of a summons in the individual name of Mary E. Bennett, plaintiff, v. North Carolina Railroad Company, a corporation, defendant.

The amendment made at Spring Term, 1912, converted the action into one brought by the plaintiff in her capacity as administratrix of J. A. Bennett, and it appears from the affidavit upon which the said amendment was allowed that the purpose of amending the summons is to recover for the alleged negligent killing of one J. A. Bennett, the plaintiff's intestate and husband.

It is well settled that the plaintiff individually had no cause of action against the defendant for the alleged death of her husband by reason of the defendant's negligence. This cause of action arises solely out of the statute commonly called "Lord Campbell's Act." Revisal 1905, sec. 59.

Under this statute, giving a cause of action on account of the wrongful killing of another, the provision that suit shall be brought within one year after death is a condition annexed, and must be proved by the

plaintiff to make out a cause of action, and is not required to be pleaded as a statute of limitation. This matter is fully discussed in *Gulledge v. R. R.*, 147 N. C., 234; 148 N. C., 568.

It is plain to us that the effect of the amendment is to change the entire character of the action, and to convert that which was the individual action of Mary E. Bennett into one by her in her representative capacity as administratrix, brought under the provisions of section 59 of the Revisal. As the surviving widow cannot maintain an (347) action for the recovery of damages for the negligent death of her husband, it was necessary that she should sue in her capacity as administratrix. *Howell v. Commissioners,* 121 N. C., 362.

While courts are liberal in permitting amendments, such as are germane to a cause of action, it has been frequently held that the court has no power to convert a pending action that cannot be maintained into a new and different action by the process of amendment. *Best v. Kinston,* 106 N. C., 205; *Merrill v. Merrill,* 92 N. C., 657; *Clendenin v. Turner,* 96 N. C., 416.

In the last case it is said: "The court has no power, except by consent, to allow amendments, either in respect to parties or the cause of action, which will make substantially a new action, as this *would not be to allow an amendment, but to substitute a new action for the one pending.*"

In *Hall v. R. R.,* 146 N. C., 345, this question is discussed very fully by *Mr. Justice Walker,* and the Court refused to permit an amendment whereby an administrator who had qualified in North Carolina should be permitted to come in and take the place of one who had qualified in Virginia. The Court said: "The action by the plaintiff as administrator, qualified in this State, is deemed to have been commenced when he was made a party to the action as such and joined in the amended complaint. *Hester v. Mullen,* 107 N. C., 724. *Indeed, the court should not have allowed the amendment, but the plaintiff under his qualification as administrator in this State should have been required to bring a separate and independent action.*"

We are of opinion upon well-settled authority that the amendment allowed by his Honor changed the entire character of the action, and was beyond the power of the court to allow. *Ely v. Early* and cases herein cited, 94 N. C., 1.

Reversed and action dismissed.

Cited: Renn v. R. R., 170 N. C., 46.

(348)

LOUIS R. ABELL v. THORNTON LIGHT AND POWER COMPANY.

(Filed 8 May, 1912.)

Justice Court—Appeal—Docketing—Motion to Dismiss—Practice.

In an appeal from a judgment of a justice of the peace, the appellant paid the justice his fee for a transcript of the record, and at the next term of the Superior Court, which was held more than ten days after the rendition of the judgment, he inquired of the clerk of the court if the appeal had been sent up, and was mistakenly informed by him that it had not. The appellant, although he knew the case had not been docketed, did not apply for a *recordari*, nor to the justice for another return, nor did he file a verified copy of the return, under leave of the court, but attempted to docket his appeal at a subsequent term: *Held*, that he was in laches, and the appeal was properly dismissed, on motion of appellee, under the ruling in *Peltz v. Bailey*, 157 N. C., 166.

BROWN, J., dissenting.

APPEAL by defendant from *Foushee, J.*, at October Term, 1911, of CATAWBA.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

A. A. Whitener for plaintiff.
Charles L. Sykes for defendant.

WALKER, J. Action for goods sold and delivered, tried before a justice of the peace, 16 May, 1911, when judgment was rendered for the plaintiff. Notice of appeal given at once by defendant, and, defendant alleges, the fee for docketing appeal was paid. On 7 July, 1911, defendant inquired of the justice if the case had been sent up and docketed, who answered that it had not been returned to court, because fees were not paid. The fee was then paid, with a request that return be sent up and docketed, so that the case would stand for hearing at the next term, which commenced on 10 July, 1911. The justice, immediately made out the return and delivered it to the clerk of the Superior Court, who, by inadvertence, misplaced it, so that it could not be found at July term. The case was not docketed at that term, nor was there any motion to docket, nor any application for a *recordari*. No action was taken at July term. The return (349) of the justice to the appeal was found by the clerk about 1 October, 1911, and the case was then docketed, the next term being the one which commenced on the 30th day of that month, at which term the plaintiff moved to dismiss the appeal. The motion was granted, and defendant appealed. There is no error in this ruling. *Ballard v. Gay*, 108 N. C., 544.

The case is governed in every respect by *Peltz v. Bailey,* 157 N. C., 166, and the cases therein cited. This Court referred, in the opinion delivered by the *Chief Justice* in *Peltz v. Bailey,* to *Davenport v. Grissom,* 113 N. C., 38, and held, under the authority of that case and others, that "An appeal from the judgment of a justice of the peace, rendered more than ten days before the next ensuing term of the Superior Court, should be docketed at that term, and an attempted docketing at a subsequent term is a nullity. Hence, that such an appeal was not in the Superior Court, and the plaintiff could not take a nonsuit. The judge properly held that he 'had no discretion to permit the appeal to be docketed at a subsequent term to the one to which it should have been returned. The appellant had his remedy (if in no default) by an application for a *recordari* at the first ensuing term of the Superior Court after appeal taken. *Boing v. R. R.,* 88 N. C., 62.' This case has been cited since with approval. *Pants Co. v. Smith,* 125 N. C., 588; *Johnson v. Andrews,* 132 N. C., 380; *Johnson v. Reformers,* 135 N. C., 386; *Blair v. Coakley,* 136 N. C., 407; *McKenzie v. Development Co.,* 151 N. C., 278." The case of *Davenport v. Grissom,* 113 N. C., 38, seems to be directly against the contention of the appellant.

It is supposed that this case bears a close resemblance to *Johnson v. Andrews,* 132 N. C., 380, but we do not think so. The facts of the two cases are materially different. *Johnson v. Andrews* is distinguished by the *Chief Justice* in *McKenzie v. Development Co., supra,* and *Peltz v. Bailey, supra,* from those cases and the others we have cited. It rests upon its own peculiar facts. In that case the appellant had done all that the law required of him, and he was misled by a statement of the clerk, made, as it turned out, inadvertently, but not less positively, that the appeal had been docketed, when in fact
(350) it had not been. We held this to be excusable, as the failure to docket was the fault of the clerk, and appellant proceeded thereafter, without laches, in ignorance of the true situation. But no such case is presented here. The appellant, it is true, paid the justice his fee, and requested him to make return to the appeal, which he did. Appellant did not tender the fee for docketing to the clerk. He inquired of him if he had docketed it, and was told that it had not been, nor had the return been received. This was both before the July term and during the term, and appellant had ample time to supply the missing document. The clerk was mistaken as to the fact, and the return was in his office, but he was not mistaken when he told the appellant that the appeal had not been docketed, and when informed of the fact it was the plain duty of the appellant to see that it was docketed at that term. But he took no steps by applying to the justice for another return, or by filing a verified copy, under leave of the court, or by

application for a *recordari,* or in any other way. This was not such diligence on his part as the law required of him. In *Johnson v. Andrews* the appellant believed that the appeal had been docketed, as he had been so informed by the clerk, while in this case the appellant knew that his appeal had not been docketed and was not likely to be, as the clerk had so told him, and he did not move in the matter. These facts differentiate the two cases. In *Johnson's case* the appellant did all that prudence required of him, but in this case he failed to do so.

The result of the decisions is that where the judgment is rendered by the justice more than ten days before the term of the Superior Court to which the appeal is taken, the return must be made to that term, and it is the duty of the appellant, in the use of proper diligence, to see that the case is properly entered upon the docket, and if it is not, he loses his appeal, unless he applies at that term for a *recordari,* or takes such other steps as are necessary to have it done. After the return term, the judge has no discretion which he can exercise in his favor. *Johnson v. Andrews* was an exceptional case, but this is not.

No error.

BROWN, J., dissenting: I differ with my brethren in the con- (351) clusion that the defendant, appellant, has been guilty of any laches by which he has forfeited the right to have his appeal docketed in the Superior Court of Catawba and tried *de novo.*

The cause was tried by a justice of the peace on 16 May, 1911. The defendant appealed to the Superior Court. On 7 July, 1911, the defendant's attorney, having duly appealed in open court and given notice of appeal, paid the justice of the peace his fee of 30 cents for sending up the transcript of appeal. The justice of the peace, on 7 July, 1911, made his return to the notice of appeal, and delivered the transcript to the clerk of the Superior Court.

It is admitted that the said transcript was in the clerk's hands on the said date, and that by inadvertance he failed to place it upon the trial docket, or calendar, in time to be heard at the court which convened on the 10th day of July.

I do not think that this case is governed by the rule laid down in *Peltz v. Bailey,* 157 N. C., 166. In this case the defendant could not properly apply for *recordari* at the July term of Catawba Superior Court for the reason that the justice of the peace had already filed the record and transcript with the clerk of the court, and the defendant had a right to suppose that the clerk had discharged his duty and entered it upon the trial calendar.

I am of opinion that when the appellant discharges every duty required of him by law, and causes the transcript of the appeal to be de-

livered to the clerk of the Superior Court, and pays all of the legal fees, that the appeal is to all intents and purposes then and there docketed in contemplation of law, and the court will not permit a litigant to be prejudiced by the inadvertence of the clerk in failing to place the appeal upon the trial calendar.

It is found as a fact that if the appeal had been placed upon the trial calendar at the July Term, 1911, it could not have been tried on account of the crowded condition of the docket, and that it could not have been reached for a hearing at that term.

(352) The defendant was, therefore, excusable in not examining the trial calendar to see if his appeal had been placed upon it, for he had a right to suppose that the clerk had performed his duty in all respects.

I think that the disposition of this case is directly antagonistic to the decision of this Court in *Johnson v. Andrews,* 132 N. C., 377, in which it is held that where an appellant pays the fees for the return and docketing of an appeal from a justice of the peace the appeal will not be dismissed for the failure of the clerk of the Superior Court to docket the same.

In that case *Mr. Justice Walker* well says: "It appears that the counsel for the defendant did everything that the law requires of him or his client. He caused the return to the notice of appeal to be made by the justice, and paid the fee therefor within the time fixed by law. The return was immediately filed with the clerk. His fee for docketing the appeal was paid, and he was requested to docket it. What more could counsel have done, or was he required to do, in order to protect the interests of his client and save his right to have the case heard *de novo* in the Superior Court? When he caused the return to be filed with the clerk, and paid the fee for docketing, it became the duty of the clerk to docket the appeal, and surely the law will not permit the defendant to be prejudiced or deprived of his right to have a trial in the Superior Court by any fault or neglect of the clerk, when the counsel has been vigilant at every stage of the case up to the very point where his duty ended and that of the clerk began."

I know of no precedent or statute which requires the defendant in this case to examine the trial calendar or docket at the July term to ascertain if the clerk had done his duty and docketed the appeal there.

The defendant had a right to suppose that the clerk had discharged his duty, and that if the case was reached upon the call of the docket, it would be tried in its order. I do not think a technicality like the one insisted on in this case should be permitted to defeat the purposes of justice.

While the facts of this case are nearly but not exactly identical (353) with *Johnson v. Andrews,* it is apparent that the principle of practice stated by *Mr. Justice Walker* is broad enough to cover this case to the extent that the attorney, or his client should not be held responsible for the oversight of the clerk.

Cited: Arundell v. Mill Co., 164 N. C., 240; *Tedder v. Deaton,* 167 N. C., 480; *Rawls v. R. R.,* 172 N. C., 212.

JOHN A. WOODIE v. TOWN OF NORTH WILKESBORO.

(Filed 15 May, 1912.)

1. Evidence—Character of Witnesses—Impeachment—Collateral Matters.

When a witness has testified to the good character of one of the parties litigant, it is incompetent, on cross-examination, to ask the witness if he could consider a man as having a good character who would be guilty of certain specified acts, for questions of this character would seek to inject into the case questions of fact foreign to the issues involved.

2. Cities and Towns — Waterworks — Overflow — Negligence — Frightened Horses—Proximate Cause.

When there is evidence tending to show that a city engaged in supplying its citizens with water has failed to provide a water gauge at its pump-house, by which its operator there could tell whether the standpipe, placed at a distance, was overflowing, and that its overflow frightened the horse of a person driving past, causing him injury, which would not otherwise have occurred, it is sufficient upon the question of actionable negligence; the overflowing standpipe, if causing the injury, being the proximate cause.

3. Cities and Towns—Waterworks—Business of Supplying Citizens—Governmental Functions.

An incorporated town or city supplying its own citizens with water, etc., owes the same duties towards its employees and the public as an individual or private corporation under like circumstances, and to the same extent is responsible for its negligent acts, since in operating such public utilities it is exercising a corporate and not a governmental function.

4. Cities and Towns—Waterworks — Overflow — Contributory Negligence—Rule of Prudent Man—Questions for Jury.

There being evidence in this case tending to show that defendant by its negligence in failing to supply its operator at its pumping station

with an accurate water gauge, caused water to overflow its standpipe and frightened the horses of the plaintiff to his injury, it is held that the plaintiff was only required, under the circumstances, to exercise that care which a man of ordinary prudence would have used, and that the question of contributory negligence was properly submitted to the jury.

(354) APPEAL from *Foushee, J.*, at Fall Term, 1911, of WILKES.

The following issues were submitted to the jury:

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

2. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: No.

3. What damage, if any, is the plaintiff entitled to recover? Answer: $800.

From the verdict and judgment rendered, the defendant appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE BROWN.

W. W. Barber, C. B. Spicer, and T. C. Bowie for the plaintiff.

Frank D. Hackett for the defendant.

BROWN, J. This action is brought by the plaintiff against the defendant to recover damages for the alleged negligence of the defendant in the operation of its waterworks. The plaintiff alleges that the defendant, a municipal corporation, was duly authorized to construct and maintain a system of waterworks, and lease, sell, and dispose of water and water privileges to the citizens of the town for compensation.

It appears in the evidence that the standpipe of the said waterworks is situated some distance from the pumping station, and the alleged negligence consists in not having a proper water gauge at the pumping station to indicate to the pumper when the standpipe was full of water, so as to prevent dangerous overflow.

On 4 October, 1910, plaintiff was driving his horses and wagon by the pumping station, and alleges that the overflow of the standpipe was so great that it frightened his horses, caused them to run away, threw him out, as well as his daughter who was with him, damaged the wagon, and greatly injured the plaintiff.

(355) Several assignments of error relate to testimony offered tending to prove the condition of the wagon after the accident, the repairs that were put on it, the injury to the habits of the horses, caused by the runaway, and as to the worth of the horses before the accident and immediately afterwards. We think it unnecessary to discuss these assignments of error, as in our opinion the testimony was plainly competent.

The plaintiff's witness David Hart, after testifying to facts material to the case, stated that he had known the plaintiff for thirty years, and that his general character was good. The defendant then asked him the following question:

"Do you think a man that will go to a distillery and try to run another man away with gun and sticks and other weapons, and attend a lynching bee, and help lynch a man, is a man of good character?"

The question was plainly incompetent, as it sought to inject into the case questions of fact utterly foreign to the issues in the case.

As said by *Mr. Justice Allen* in *S. v. Holly,* 155 N. C., 493, "If one collateral question of this character can be raised and tried, the same rule would permit a hundred others. The authorities in this State are numerous and uniform that it is an error to allow such questions on the cross-examination of a witness as to character." The learned judge cites practically all of the precedents in our reports.

The defendant entered the usual motion to nonsuit, which we think was properly overruled.

There was evidence tending to prove that the standpipe was overflowing at the time the plaintiff drove by with his horses, wagon, and daughter; that there was no accurate water gauge by which the operator at the pumping station could ascertain whether the standpipe was overflowing or not; testimony is to the fact that he had to depend upon somebody's telephoning him, and that after this accident the defendant caused a proper water gauge to be put in.

From examination of the evidence we are of opinion that it was a fair inference to be drawn by the jury as to whether the overflow of the water caused the horses to run away, and that his Honor properly left the question to the jury to determine. (356)

The evidence as to the damage is plenary.

As to the defendant's contention in regard to the proximate cause of the injury, we think it too plain for argument that if the horses were frightened by the overflowing standpipe, causing them to run away, that was the proximate cause of the injury, and the sole cause. *Clark v. R. R.,* 109 N. C., 430.

We have held at this term that when a city operates an electric light plant, its duties towards its employes, as well as towards the public, are the same as those of an individual or private corporation under like circumstances, since in operating such public utilities the city is exercising a corporate and not a governmental function. *Terrell v. Washington,* 158 N. C., 281.

It was plainly the duty of the defendant to have provided a proper water gauge so as to have prevented the overflow of its standpipe,

and it is evident from the testimony that if one had been provided the overflow of water would have been prevented by the operator at the pumping station.

It is very doubtful whether there is any evidence of contributory negligence. Under conditions similar to those in which the plaintiff was placed, he was not required to act with absolute wisdom, but only to exercise that care which a man of ordinary prudence would have exercised when so placed. *Hinshaw v. R. R.*, 118 N. C., 1047.

In leaving this question of contributory negligence to the jury under what is known a the "rule of the prudent man," we think his Honor gave the defendant the benefit of everything it was entitled to.

No error.

Cited: Harrington v. Greenville, post, 636.

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(357)

O. L. FRY v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 15 May, 1912.)

Railroads—Master and Servant—Disobedience of Orders—Proximate Cause—Instructions.

In an action for damages brought by an employee of a railroad for an injury to his hand received in uncoupling an air-brake between two cars, the evidence upon the issue as to defendant's negligence was conflicting, alone presenting to the jury the question as to whether the uncoupling was done after the train had stopped or while it was in motion, which would be disobedience of the defendant's rules, of which the plaintiff was aware at the time. A charge was held to be erroneous which made no distinction, on the issue of negligence, whether the plaintiff attempted to disconnect the air-brake when the train was at a standstill or while it was in motion, and also in that the court instructed the jury that the defendant was not negligent if the injury was received by plaintiff's act in disobedience of orders, leaving out the question of proximate cause.

ALLEN and HOKE, JJ., concurring; CLARK, C. J., dissenting.

APPEAL by defendant from *Lyon, J.*, at January Term, 1912, of MECKLENBURG.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

McCall & Smith, E. R. Preston, and N. R. Graham for plaintiff.

O. F. Mason and Shannonhouse & Jones for defendant.

WALKER, J. This action was brought by the plaintiff to recover damages for injuries received while uncoupling an air-hose between two cars, and which he alleges were caused by the negligence of the defendant. The rules of the railroad company prohibited employees from going between cars, while in motion, for the purpose of coupling or uncoupling cars, and plaintiff was aware of this rule at the time of the accident, and knew that he was also forbidden by it to go between cars, while in motion, even by the order of the conductor. He testified that when he was ordered to uncouple cars it was his duty to wait until the train had stopped, and then execute the order. He was ordered by the conductor to uncouple the cars, but knew, as he stated, (358) that he was to do so only when the cars had stopped. He also knew that he was not bound or permitted to obey an order to uncouple cars when moving, and he was fully protected by the rules in refusing to do so, and he testified that he would not have obeyed such an order and he did not receive any such order, but he was ordered to uncouple after the cars had stopped. He further testified that the cars had come to a full stop when he went between the cars to uncouple. While performing his duty, the cars were started, and his left hand was caught between the dead blocks or bumpers and crushed. This was his version. The defendant alleged and offered evidence to show that the cars were in motion when he attempted to uncouple, and he was hurt by this movement of the cars, and not by starting them after they had stopped. So that the issue was squarely made, whether he was injured by the starting of the cars after they had once stopped or by going between moving cars. The plaintiff had agreed in writing to abide by the rules of the company and observe the same while in the discharge of his duties, and not to hold the company liable for any injuries to himself resulting from his own disobedience or infraction of the rules. Upon this state of facts the court charged the jury, with reference to the first issue, as follows: "It is the duty of an employee of a railroad company to obey the orders and directions of the master, and if you should find by the greater weight of the evidence in this case that W. R. Murray was acting as yardmaster for the defendant's lessee, as alleged in the complaint, and was engaged in making up a train of cars in the defendant's yard in or near the city of Charlotte on 2 December, 1910, and that while thus engaged he ordered the plaintiff, who was an employee of the defendant's lessee, to go between two of the cars and to cut off or uncouple the air-hose attached to said cars, and if you should further find that the plaintiff, in obedience to said order, went between the cars, and while he was between the cars, and in the act of uncoupling the air-hose, the defendant's lessee jerked or shoved the train and injured the plaintiff, as alleged, the court instructs you that this would be negligence on the part of the de-

(359) fendant's lessee, and you should answer the first issue 'Yes.'" We think that this instruction was erroneous in two respects. It authorized the jury to find that there was negligence if the plaintiff went between the cars to uncouple the air-hose, while the train was in motion and in disobedience of the rule, and was thereby injured, whereas the defendant, by its rule or regulation, had provided a perfectly safe way for the work to be done, that is, by waiting until the cars had stopped, when it was the duty of the engineer to protect him and not to move the train until he had uncoupled the hose and notified the engineer of the fact by the proper signal. It will be observed that the court, in the instruction, makes no distinction between uncoupling when the cars were in motion and when they were not. Besides, the jury could have answered the first issue in the affirmative, if they had found that his going between the cars in obedience to an order was not the proximate cause of his injury. In this respect a similar instruction has been condemned by this Court. *Edwards v. R. R.,* 129 N. C., at marg. p. 81. There was no reference in the instruction to proximate cause, the charge being that negligence on the part of the defendant was, of itself, sufficient to warrant a finding for the plaintiff on the first issue.

The court charged the jury, upon the second issue, as follows: "The second issue is, 'Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer?' Now, if you find from the evidence, by the greater weight thereof, the burden being on the defendant to so satisfy you, that the plaintiff was guilty of contributory negligence in that he went between the cars when they were moving, and attempted to release the air-brakes, and you find that the going between the cars, while they were moving, was the proximate cause of the injury complained of, then you will answer the second issue 'Yes'; otherwise, you will answer it 'No.'" The jury returned a verdict for the plaintiff, and judgment having been entered thereon, defendant appealed.

We think the charge upon the issue as to contributory negligence was erroneous, and the judge should have told the jury that if the plaintiff was injured because he went between the cars, while in (360) motion, to uncouple, in disobedience of the rule, it was, in law, the proximate cause of his injury, which could not be imputed to the negligence of the company, but to his own carelessness and deliberate violation of the rule which was made for his protection. It is plain that if the cars were moving, the plaintiff's injury was caused solely by his disobedience of the rule, in trying to uncouple the hose when the cars were thus moving. Nothing done by the engineer in the movement of the train, if it caused the injury, would be negligent as it was not expected that the plaintiff would go between the cars while they were moving, and jerks will frequently occur in such cases. If the engineer

knew he was between the cars, even though they were moving, and did something willfully and for the purpose of injuring him, or even negligently, a different question would be presented, but there is no such evidence in this case. The plaintiff was injured by the starting of the cars, when he was between them for the purpose of uncoupling the hose, according to his contention, or he was injured by his own folly and disobedience of the rule in going between the cars when they were moving. In the latter case the law refers the injury to the plaintiff's own negligent and disobedient act.

In *Stewart v. Carpet Co.,* 138 N. C., 60, discussing a similar question, we said: "It follows that if the jury had taken the defendant's view of the evidence and found that plaintiff was, at the time of his injury, acting in disobedience of orders, no negligence could be imputed to the defendant, even if the elevator was defective, as defendant omitted no duty to the plaintiff in respect to its condition, as we have stated, and the plaintiff's own act in disobeying instructions would, in law, be regarded as the proximate and, indeed, the only cause of his injury. The defendant was entitled to have this view of the case submitted to the jury, but the charge of the court excluded it." And in *Whitson v. Wrenn,* 134 N. C., 86, the same principle is stated, as follows: "Instead of the plaintiff having been commanded to do a dangerous act, it is assumed in the instruction, and there was evidence to show, that he was ordered to do the particular work assigned to him in a safe way, but elected to do it in his own way, which turned out to be a dangerous one, and which actually resulted in his injury. The (361) law, under such circumstances, refers the injury to his own fault, and not to any wrong on the part of his employer."

It has been held directly in other jurisdictions that, if an employee attempts to couple or uncouple cars while they are in motion, in violation of the company's rules, which are known to him and which provide a safe way for doing the work, and is injured, he is guilty of such negligence as bars his recovery of damages. *Sedgwick v. R. R.,* 76 Iowa, 340; *Darracott v. R. R.,* 83 Va., 288; *Johnson v. R. R.,* 38 W. Va., 206; *Fennill v. R. R.,* 129 N. Y., 669.

In *Johnson v. R. R., supra,* the Court said: "It appears from the plaintiff's own testimony that, if he did not in fact read the rule of the company, he frequently had it in his hands with opportunity to read it, and from the testimony of one of his witnesses, that 'men are always notified not to go in between the cars to uncouple, while they are in motion, and that it is unnecessary, and obviously dangerous at all times'; and it it is equally clear from plaintiff's own testimony, and that of his witnesses, that his violation of this rule was the proximate cause of his injury, without which it would not have happened. To

hold otherwise would be giving a party the advantage of his own wrong." See, also, *Mason v. R. R.*, 111 N. C., 499, and 114 N. C., 724.

He was not ordered to uncouple while the cars were in motion, but to do so after they had stopped; there was not any defect in the construction of the cars, if that would make any difference in this kind of case; the plaintiff knew that he had been forbidden to uncouple the angle cock or the hose while the cars were moving, and that it was dangerous to do so, and he would not have done so because of the danger and the rule of prohibition. This is his own testimony. The question of fact, as to whether he attempted to uncouple the cars while they were in motion, or when they were at rest, was one for the jury.

The error in the instruction of the court consists in leaving to the decision of the jury, as a question of fact, whether, if he attempted to uncouple moving cars, his disobedience of the rule was the proximate cause of the injury, as it was plainly so as matter of law. If (362) his testimony is accepted as true, he was not ordered to go between moving cars, but to wait until the cars had stopped; so that it necessarily follows that the engineer and conductor did not know he was between the cars while they were in motion, and there is no evidence that they did. How, then, could they be guilty of negligence with respect to him? By his own words, he had assumed a perilous position, if he violated the express order and went between moving cars, and his own confessed negligence was not only the proximate cause, but the sole cause of his injury. This is in accordance with reason and the acknowledged rule of law. It is not opposed to the precedents nor does it violate any statutory provision or change the burden of proof as fixed by law.

There was error in the following instruction as to damages: "If you find that he has been permanently injured, and that such injury partially incapacitates him to earn money, then he would be entitled to recover damages for partial incapacity, if you find the injury was caused by the negligence of the defendant. He would be entitled to recover the difference between what he is able to earn at the present time, and in the future, and what he would have been able to earn if the accident had not happened; and passing upon his expectancy, the mortuary table has been read to you, and you will bear that in mind in awarding damages, if you find that the plaintiff is entitled to recover anything." In an action for injuries by negligence, such as this one, the plaintiff is only entitled to recover the reasonable *present value* of his diminished earning power in the future, and not the difference between what he would be able to earn in the future, but for such injury, and such sum as he would be able to earn in his present condition. *R. R. v. Paschall*, 41 Tex. Civ. App., 357. Where future payments for the loss of earning

power are to be anticipated by the jury and capitalized in a verdict, the plaintiff is entitled only to their present worth. *Goodhardt v. R. R.,* 177 Pa. St., 1. The damages to be awareded for a negligent personal injury resulting in a diminution of earning powers is a sum equal to the *present worth* of such diminution, and not its aggregate for plaintiff's expectancy of life. *O'Brien v. White,* 105 Me., 308. The rule, as we see, may be stated with varying phraseology, but they all (363) carry the same idea, that the estimate should be based upon the present value of the difference between plaintiff's earning capacity, and not the total difference caused by the injury. The rule is supported by many authorities in this and other jurisdictions. *Pickett v. R. R.,* 117 N. C., 616; *Wilkinson v. Dunbar,* 149 N. C., 20; *Benton v. R. R.,* 122 N. C., 1007; *Watson v. R. R.,* 133 N. C., 188; *R. R. v. Carroll,* 184 Fed., 772; *Fulsome v. Concord,* 46 Vt., 135; *Kenny v. Folkerts,* 84 Mich., 616.

Nothing said in this opinion conflicts with the decision in *Boney v. R. R.,* 155 N. C., 95, as in that case it was adjudged that the defendant had the last clear chance to avoid the injury to the plaintiff, by displaying the proper signal at the switch, notwithstanding any negligence of the plaintiff in disobeying the rule of the company which limited the speed of the train at the place of the accident to six miles an hour.

New trial.

ALLEN, J., concurring: I agree with the opinion of the Court that the question of proximate cause is involved in the first issue, and that before the jury can answer that issue in the affirmative they must find that the defendant was negligent and that this negligence was the proximate cause of the injury.

Otherwise, the jury could find that the defendant was negligent and that the plaintiff was not guilty of contributory negligence, and could award damages to the plaintiff without finding that the negligence of the defendant caused the injury to the plaintiff.

I also concur in the opinion expressed by the *Chief Justice,* which I do not understand to be controverted, that the negligence of the plaintiff, before it will bar his recovery, must be contributory, and that to be contributory it must be either the sole proximate cause of the injury or it must concur in point of time with the negligence of the defendant in bringing it about; but I do not think there is any reasonable view of the evidence in this case tending to show that the plaintiff went between the cars while they were in motion, that the cars stopped, and that he was then injured by a sudden movement of the train, and it is upon this view that the opinion of the *Chief Justice* is predicated. (364)

The only question of fact in dispute between the plaintiff and the defendant was whether the cars were in motion when the plaintiff went between them, and the plaintiff did not testify or contend that he went in while the cars were in motion, that they then stopped, and that he was afterwards injured by the movement of the cars; and I agree to a new trial because I do not think that the jury could have understood from the charge that the determination of the issue depended almost entirely upon this one fact.

HOKE, J. I concur in the decision that a new trial should be awarded, being of opinion that there was error in the instruction as to damages.

CLARK, C. J., dissenting: "Notwithstanding the rules of the company prohibited employees from going between cars while in motion, if the plaintiff had orders to do so from the yardmaster, and was injured in consequence, the company is liable. *Mason v. R. R.*, 111 N. C., 485; *s. c.*, 114 N. C., 718.

On the first issue, "Was the plaintiff injured by the negligence of defendant?" there is no question of proximate cause, but of direct cause. The language of the issue itself is clear as to this, "Was the plaintiff injured by the negligence of the defendant?" The court charged in accordance with the precedents and the jury found in the affirmative.

The second issue is, "Was the plaintiff guilty of contributory negligence?" Upon the very frame of the issue the question of proximate cause is its essential element, which the statute requires the defendant to allege and prove. Unless the negligence of the plaintiff contributed to the injury, *i. e.*, was the proximate cause thereof so as to exculpate the defendant from liability for the injury which on the first issue the jury found the defendant caused the plaintiff by its negligence, then the defendant is liable. The very heart of the issue is the inquiry of fact as to whether the plaintiff contributed to the injury, and by such negligence as was the proximate cause of the injury he sustained.

(365) The charge of the court properly presented the real issue of fact in controversy, and that was, "Did the plaintiff by stepping in between the moving cars, if he did so step in (which the plaintiff testified that he did not), contribute to his injury, or was it an act entirely disconnected with the injury, which was caused solely by attempting to uncouple the hose while the train was stationary?"

The jury found either that the plaintiff did not step in between the cars while in motion, which was his testimony, or that, if he did, this did not contribute to—that is, that it was not the proximate cause of—the injury, but was totally disconnected with the injury, which was caused by the sudden jerking of the car while the plaintiff was uncoupling the

hose after the train had stopped. This was a question of fact for the jury, as to which the judge could have expressed no opinion.

The lawmaking power of a just and humane people has often found it necessary to legislate for the protection of employees injured in the service of railroad companies. It has been enacted (now Revisal, 483), contrary to the former ruling of this Court in *Owens v. R. R.*, 88 N. C., 502, that the burden is upon the defendant to allege and prove contributory negligence. It must not only prove negligence on the part of the plaintiff, but that his negligence was the proximate cause of his injury. A later act (now Revisal, 2646) cut off the defenses of the assumption of risk and that an injury was caused by the negligence of a fellow-servant. The Federal statute not only embraces the above provisions, but it has gone further and has provided that contributory negligence shall not be a bar to any action, but can only be considered by the jury in estimating the amount of the recovery. This is doubtless the result of the decisions of some courts upon above statutes, not in accord with their spirit.

To hold that the proximate cause is a question of law for the court, and not one of fact for the jury, is to reverse our entire doctrine in regard to negligence. When we adopted the "rule of the prudent man" we made negligence an issue of fact and not of law. Proximate cause has always been an issue of fact to be found by the jury.

On the issue of damages the court erred in the respect pointed (366) out, but this entitles the defendant merely to a new trial upon that issue, for the error is totally disconnected from the issues as to negligence and contributory negligence.

There should be a partial new trial over the issue as to damages only.

Cited: *Johnson v. R. R.*, 163 N. C., 451; *Walters v. Lumber Co.*, 165 N. C., 392; *Embler v. Lumber Co.*, 167 N. C., 464; *Lassiter v. R. R.*, 171 N. C., 286.

L. N. RUSSELL v. TOWN OF TROY.

(Filed 28 May, 1912.)

1. Cities and Towns—Bond Issues—Legislative Amendments—Constitutional Law—Vote of the People.

When an act has been passed by the Legislature authorizing a graded school district to vote on the question of issuing bonds for a graded school in a certain amount, and amended at a subsequent session so as to author-

ize bonds to a larger amount and to run a longer time, both acts having been passed upon their several readings, with aye and no vote according to Article II, sec. 14, of the Constitution, an issue of bonds under a still later and similar act for a larger amount and upon a greater rate of taxation is invalid *in toto* when the later act is not likewise passed in accordance with the constitutional requirements. Const., Art. VII, sec. 7, does not apply to such districts.

2. Same—Distinct Propositions—Assent of Voters.

Bonds issued under an act which has not been passed by the Legislature according to the Constitution, Art. II, sec. 14, amending a valid act authorizing a town to submit an issue of bonds for school purposes to its voters, which increases the amount, term, and rate of taxation of the bonds specified in the former act, are invalid even as to the amount authorized to be issued under the valid act, for that amount was only authorized at a less rate of taxation, etc., as to which the voters upon the proposition under the invalid act have not assented.

3. Same—Repealing Acts.

A constitutional act of the Legislature authorizing a town to vote on "twenty-year" school bonds is repealed by a later act, though not passed in accordance with Article II, sec. 14, of the Constitution, which only authorizes the issuance of the bonds for a greater amount and rate of taxation and for a longer term.

APPEAL by plaintiffs from order of *Allen, J.*, from MONTGOMERY, rendered at chambers, 10 May, 1912.

(367) The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

J. A. Spence and Jerome & Price (by brief) for plaintiffs.
W. A. Cochran and R. T. Poole (by brief) for defendants.

CLARK, C. J. Chapter 441, Laws 1903, created a graded-school district including the town of Troy, and authorized a vote on the question of issuing $5,000 in bonds to establish the school and provided machinery for holding the election. Chapter 54, Private Laws 1909, amended the above act of 1903 by striking out $5,000 and inserting $15,000. Both the above acts were passed in the manner required by Constitution, Art. II, sec. 14.

Chapter 69, Private Laws 1911, sec. 1, amended the act of 1903, by "striking out the word 'twenty' and inserting in lieu thereof the word 'thirty.'" The effect of this was to repeal and strike out the authority given by the act of 1903 to issue twenty-year bonds. Section 3 of the act of 1911 further amended the act of 1903 by "striking out the word 'thirty,' in line eleven, and inserting the word 'sixty.'" The effect of this was to strike out the authority conferred by the act of 1903 to

issue bonds based upon a levy of 30 cents on the $100 of property and requiring the bonds to be based upon a levy of 60 cents on the $100.

The act of 1911 further amended the act of 1903 by striking out "$5,000" and inserting "$20,000" as the amount of bonds authorized to be issued, and amended the machinery for holding the election.

After the act of 1911, and under the authority and machinery of said act, an election was held at which the school district voted to issue $20,000 of thirty-year bonds, and has contracted for the sale of $20,000 in thirty-year bonds. The said act of 1911 is invalid as an authority to issue the bonds, because it was not passed in the mode required by the Constitution, Art. II, sec. 14. The defendants contend, however, that $15,000 of the bonds are valid under the acts of 1903 and 1909. But it will be seen at once that an authority given at the ballot box to issue $20,000 in thirty-year bonds, based upon a tax rate of 60 cents per $100, will not authorize the issuance of $15,000 in twenty-year bonds based upon a 30-cent tax rate. The people have not (368) voted their assent to the latter proposition.

Besides, the authority to issue "twenty-year" bonds is not in existence. It was repealed by the act of 1911. The legislative act to that effect was valid, though the attempt to substitute $20,000 in thirty-year bonds was invalid for failure to comply with the Constitution.

In *Glenn v. Wray,* 126 N. C., 733, this Court held that though an act had passed in the constitutional mode under Article II, sec. 14, the three readings in both houses and with the yea and nay vote on second and third readings, in each house, duly recorded, yet if there was a material amendment upon the last reading in the second house, the act was invalid. The Court said that when such amendment is in a material matter, "it would be necessary that the amended bill should be read over again three times in each house, with yea and nay vote on the second and third readings, entered on the journals. It is the bill, in its final shape, not in another and different form, which requires these preliminaries to its validity. It would be a clear evasion of the constitutional guarantees and of the restrictions upon legislative power, if after a bill had passed one house and two readings in the other in the required manner, it could then be amended into something else. . . . In ordinary legislation, material amendments may be made even on the last reading in the second house, and when concurred in by the other house the bill is law. In such cases the ratification is conclusive of the passage of the act. But it is otherwise as to legislation which the Legislature is restricted from passing except in a manner specifically pointed out and prescribed. In the latter case any substantial amendment requires the passage of the amended bill in the prescribed manner *de novo. Norman v. Kentucky,* 18 L. R. A., 557."

This being so, even where the amendment is made in the passage of the bill itself, and when the bill has passed three readings in each house with the aye and no vote recorded on the journals on the second and third readings in each house, for a stronger reason the bonds are invalid when the material amendment is made in a subseqnent act.

The act of 1911 striking out "twenty years" was one which (369) the Legislature in 1911 could enact without recording the ayes and noes, as was also the provision striking out $5,000 and inserting $20,000, and was valid as ordinary legislation.

There is no authority to issue $15,000 in "twenty-year bonds," both because the people have not voted for such bonds and because the provision authorizing such bonds has been stricken out by the Legislature of 1911. It is true, the school district has voted to issue $20,000 in "thirty-year bonds," but this was not authorized, because the act of 1911 was not passed in the constitutional mode. Constitution, Art. VII, sec. 7, does not apply to school districts.

The bonds are therefore invalid and the injunction should have issued as prayed for.

Reversed.

Cited: Pritchard v. Commrs., ante, 637.

VAUGHAN & BARNES ET AL. v. J. R. DAVENPORT.

(Filed 15 May, 1912.)

1. Contracts of Sale—Cotton—Chose in Action—Assignment—Parties.

A contract for the sale and delivery of merchantable cotton is a chose in action, assignable, and an assignee thereof must sue in his own name, and not in the name of his assignor.

2. Evidence—Motions—Demurrer—Practice.

Defendant's motion, in this case, for judgment upon the entire evidence is regarded as a motion of nonsuit under the statute, and comes too late after verdict.

3. Contracts of Sale—Assignment—Defect of Parties—Power of Courts—Ex Mero Motu—Practice.

It appearing of record in this case that a contract for the sale and delivery of merchantable cotton was assigned by the plaintiff, and that defendant, notwithstanding recovery by plaintiff, would still be liable to plaintiff's assignee thereon, and the latter not being a party to the action,

the appellate court, upon its own motion, orders a new trial, with leave to the defendant to have plaintiff's assignee made a party so that he will be bound by whatever judgment that may be rendered.

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

This case comes before the Court upon a petition to rehear. It is reported in 157 N. C., 156.

Jacob Battle and Moore & Long for plaintiff. (370)
Aycock & Winston and F. G. James & Son for defendant.

BROWN, J. Upon the former hearing of this case it was held by the Court that the plaintiffs could not recover because it affirmatively appeared that the plaintiff had assigned the contract for the purchase of the cotton to Hogan & Co., who are not parties to this action, and upon that ground it was held that the motion of the defendant for nonsuit should have been granted on the ground that the evidence discloses that the plaintiffs were not the owners of the claim sued on.

It is contended by the plaintiff upon the rehearing that there is no evidence that Vaughan & Barnes, the plaintiffs, have assigned the contract for the purchase of the cotton entered into by the defendant to Hogan & Co., but that the evidence is that Vaughan & Barnes contracted to sell the cotton to Hogan & Co., but did not assign the contract, and that therefore Vaughan & Barnes may still sue for a breach of the contract.

Upon reëxamination of the record, we find that there is evidence that Vaughan & Barnes did assign the contract to Hogan & Co., as contradistinguished from the sale of the cotton.

There are three letters in evidence, signed by Vaughan & Barnes, and directed to the defendant Davenport. In the one dated 22 November the plaintiffs Vaughan & Barnes refer to a sale of the said cotton to Messrs. Hogan & Co., made by them, in which they say: "We will thank you to make settlement in accordance with the terms of sale, which contract was indorsed to us by Moseley Brothers . . . and we want to know by return mail what you propose to do in order that we may be able to tell the buyer here when he may expect the delivery of the 100 bales of cotton in question."

In the letter dated 11 October, Vaughan & Barnes refer to the hypothecation of the contract with them by Moseley Bros. and refer to the contract as "sold by us to one of the buyers here for November delivery," and again refer to the assignment of the contract and request that the cotton due under it be shipped at once to the buyer.

That a cotton contract of the character sued on is a chose in action and assignable, admits of no controversy. Every action 371)

must be prosecuted in the name of the real party in interest. *Chapman v. McLawhorn,* 150 N. C., 166; *Martin v. Mask,* 158 N. C., 436.

The assignee of a chose in action must sue in his own name and not in the name of the assignor. Under modern code procedure, the rule seems to be universal that the action cannot be brought in the name of the assignor. Pomeroy Code Remedies, sec. 63.

The assignee of a chose in action must sue in his own name and not in the name of the assignor. Under modern code procedure, the rule seems to be universal that the action cannot be brought in the name of the assignor. Pomeroy Code Remedies, sec. 63.

We find upon examination of the record that the defendant did not make on the trial of the case in the Superior Court a formal motion for nonsuit. The record discloses that after the verdict had been rendered, the defendant moved the court for a judgment against the plaintiff upon the entire evidence. We gathered from this and from the argument of counsel, as well as the brief, that this motion was made at the conclusion of the evidence and before the cause was submitted to the jury.

We readily acknowledge that a motion for nonsuit under the Hinsdale act cannot be made after the verdict of the jury has been rendered. We take it that the motion of the defendant was intended as a motion for nonsuit, although made too late.

We think under the circumstances that we were in error in dismissing the action, as a motion to nonsuit was not made in time, but it is plain that upon the letters sent by the plaintiffs Vaughan & Barnes to Davenport there was evidence of an assignment of the contract, itself, to Hogan & Co., and that the defendant Davenport would still, notwithstanding a recovery in this case against him, be exposed to an action by Hogan & Co., and it would be a manifest miscarriage of justice to permit the plaintiffs to recover in this case, and leave the defendant still exposed to such an action.

This Court has sometimes upon its own motion ordered a new trial and remanded a cause when it appeared that a necessary party was missing from the case, or that the issues were not determinative of the cause of action, and that manifest justice required a new trial. *Meadows v. Marsh,* 123 N. C., 189; *McManus v. R. R.,* 150 N. C., 662; *Bryant v. Insurance Co.,* 147 N. C., 181.

(372) The petition to rehear is allowed and the former opinion modified, and a new trial of the case is ordered, with leave to the defendant to have Hogan & Co. made parties to the action in order that they may be bound by whatever judgment is rendered.

New trial.

Cited: Roller v. McKinney, ante, 320.

WRIGHT GROSS v. T. C. McBRAYER.

(Filed 15 May, 1912.)

1. Issues Sufficient—Appeal and Error.

Issues are sufficient when they embrace all matters in dispute and afford an opportunity for the parties to present and develop their contentions, and, when answered, are sufficient to determine the rights of the litigants and to support the judgment.

2. Judgments—Execution Sales—Fraud—Burden of Proof.

In an action to set aside a judgment and sale for fraud in procuring title to lands, the burden is upon the plaintiff to establish the fraud complained of by the greater weight of the evidence.

3. Judgments—Execution Sales—Lands—Remote Values—Evidence—Harmless Error.

In an action to set aside a judgment and sale for fraud in procuring title to lands, a plaintiff's evidence offered to show their value many years before the sale complained of was too remote, and inadmissible. There was barely sufficient evidence of fraud to be submitted to the jury, but the plaintiff cannot be heard to complain that the jury were permitted to consider it.

APPEAL by plaintiff from *Long, J.*, at August Term, 1911, of RUTHERFORD.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

D. F. Morrow and Quinn & Hamrick for plaintiff.

McBrayer, McBrayer & McRorie and Murray Allen for defendant.

WALKER, J. This action was brought to impeach the sale of land under a decree for a foreclosure. The plaintiff, in one section of his complaint, seeks to recover $1,000 as damages resulting from (373) a fraudulent sale of the land, and, in the prayer, he demands judgment that defendant be declared a trustee for him, that he be required to account to him for rents and profits received, and that a sale of the land be ordered and the proceeds applied according to the rights of the parties. In the one view there would be a ratification of the sale and an election to recover damages for the fraud, and in the other there would be a repudiation of the sale. But we do not consider it material which view we take of the action. The following appear to be the facts: On 12 November, 1893, Sherman Gross gave his note to the defendant for $350, and to secure the same he, at the same time, executed a mortgage upon 52 acres of land. Sherman Gross died in June, 1897, leaving his widow, Eliza Jane Gross, and an infant son, Wright Gross, who is

plaintiff in this case. The mortgagee commenced a suit on 27 October, 1898, for a foreclosure of the mortgage, alleging that there was due, at that time, on the debt, the sum of $312.40. Summons was duly served upon the widow and on Wright Gross, the minor, and a guardian *ad litem,* R. W. Logan, was duly appointed for the minor, who was under fourteen years of age. The widow filed an answer and the guardian was notified to file his answer. There appears on the back of the widow's answer the following: "Answer of guardian filed 31 December, 1898." The administrator was a party to the suit and served with process. A judgment was rendered for the debt and a sale of the land, which was afterwards sold by the commissioner and bought by the mortgagee, who is the defendant in this case. The sale was duly reported and confirmed by the court, and a deed made to the purchaser, who has since sold the land to other parties. It is not very clear, from a reading of the complaint, what is the particular fraud alleged against the defendant, but we gather that he prosecuted the foreclosure suit to judgment and bid it off at the sale, when he knew that plaintiff, Wright Gross, was a minor and under " a pretended appointment of a guardian *ad litem* for him, and without any answer having been filed by him, as plaintiff is informed and believes, he did not have his day in court." The court

(374) submitted two issues to the jury, which, with the answers thereto, are as follows:

1. Did the defendant with intent to cheat and defraud the plaintiff, under a pretended mortgage and judgment, have the land bid in at the sale for himself, as alleged in the complaint? Answer: No.

2. Did the defendant procure judgment for sale of the lands by securing a pretended appointment of a guardian *ad litem* for the plaintiff, as alleged? Answer: No.

Plaintiff objected to these issues, but tendered no issues himself. It seems to us that the issues submitted by the court were those made by the pleading, and if the plaintiff desired any other issue, he should have tendered it. When issues embrace the real matters in dispute and afford an opportunity for the parties to present and develop their contentions, and, when answered, are sufficient to determine the rights of the litigants and to support the judgment, they are sufficient within the requirement of the statute. *Clark v. Guano Co.,* 144 N. C., 64; *Shoe Co. v. Hughes,* 122 N. C., 296; *Hatcher v. Dabbs,* 133 N. C., 239 (Anno. Ed.) and notes. This exception is, therefore, overruled.

There was evidence which, if believed, was sufficient to support the verdict, and it was submitted to the jury under proper instructions from the court. The plaintiff excepted to an instruction of the court, by which the jury were told that the plaintiff must establish the affirmative of the issues by the greater weight of the evidence, but this is not un-

favorable to the plaintiff, and he has no reason to complain of it. This is an action to set aside the judgment and the sale for fraud in procuring title. The plaintiff was required to take the laboring oar and the burden rested upon him to make good his allegation of fraud.

There was evidence that the land brought its full value at the sale, and that which the plaintiff offered, to show its value, not at the time of the sale, but many years before, was too remote to have any bearing upon the question. The court allowed the plaintiff much latitude in his attempt to show the value of the land at the time of the sale, as a circumstance involved in the issue of fraud. It may well be (375) doubted if the plaintiff offered any evidence of fraud sufficient for the consideration of the jury, but he cannot complain, as the court permitted the jury to hear what evidence there was and to pass upon the issue of fraud. The charge was very fair and liberal to the plaintiff, and an adverse verdict has been the result upon what was substantially a mere question of fact.

No error.

Cited: *R. R. v. Baird,* 164 N. C., 256; *McPhail v. Walters,* 167 N. C., 184.

C. W. YOUNG v. CHAMPION FIBER COMPANY AND WILLIAM BATTERSON

(Filed 29 May, 1912.)

1. Nonsuit—Evidence, How Considered.

Upon a motion for nonsuit, under the statute, or for defendant's prayer that on the entire evidence, if believed, the verdict should be for the defendant, the evidence should be construed in the light most favorable for the plaintiff, according to the doctrine announced in *Deppe v. R. R.,* 152 N. C., 79.

2. Master and Servant—Safe Appliances—Safe Place to Work—Negligence—Evidence—Nonsuit.

In an action for damages for a personal injury received by the plaintiff while at work in the defendant's pipe foundry, there was evidence tending to show that while plaintiff was endeavoring to fix, at night, under protest to his superior, a badly worn and out of repair machine, for the purpose of cutting a heavy piece of pipe, he gave one of the dies a slight tap with a hammer which had been furnished him for the work, which was an improper one, and caused a small particle of steel to break and fly off from the die or hammer and strike the plaintiff in the eye, inflicting the injury complained of; that there was an insufficiency of light, by reason of two of the three incandescent electric lights at the place

being negligently out of fix, leaving only one, which the plaintiff had to hold, causing his eye to be nearer his work, in a position not required had the light been sufficient, and that the injury would not otherwise have been inflicted: *Held*, a permissible inference that the proximate cause of the injury was the failure of the defendant to furnish a proper hammer and to provide adequate lights; that it was sufficient upon the question of actionable negligence, and defendant's motion to nonsuit was properly disallowed.

3. Same—"Ordinary Tools."

It being established that the master furnished the servant a hard-tempered steel hammer with which to fix an old, badly worn machine to be used in cutting a heavy iron pipe in his foundry; that the hammer furnished was known to be dangerous for that class of work, a soft-metal hammer being safer for the purpose: *Held*, the master is responsible in damages for an injury proximately caused to the servant by the use of the improper hammer furnished him, and the doctrine of the use by the servant of "ordinary everyday tools and under ordinary everyday conditions," does not apply.

(376) APPEAL from *Long, J.*, at March Term, 1912, of BUNCOMBE.

Civil action to recover damages for loss of eye caused by alleged negligence of defendant company and of William Batterson, superintendent, having general supervision of the pipe department of defendant company and the laborers employed therein. Defendant denied the alleged negligence and pleaded contributory negligence and assumption of risk on part of plaintiff.

On issues submitted as to negligence, contributory negligence, assumption of risk and damages, there was verdict for plaintiff. Judgment on verdict, and defendant excepted and appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE HOKE.

Craig, Martin & Thomason for plaintiff.

Bourne, Parker & Morrison and Martin, Rollins & Wright for defendant.

HOKE, J. It was chiefly contended for defendant that the motion for nonsuit, under the statute, should have been allowed or the prayer given, that, on the entire evidence, if believed, the verdict should be for defendant, and more especially on the first and second issues. It has been repeatedly held with us that, in either case, "The evidence must be construed in the view most favorable to plaintiff, and every fact which it tends to prove, and which is an essential ingredient of the cause of
(377) action, must be recognized as established." *Deppe v. R. R.*, 152 N. C., 79; *Edge v. R. R.*, 153 N. C., 212, and, on the facts in evidence, when so considered, the position cannot for a moment be

maintained. There was allegation, with evidence on part of plaintiff tending to show, that he was an employee of defendant company, working in the pipe department, and on the night 13 November, 1910, or in the early morning about 2 a. m., while plaintiff, in obedience to orders of one of his superiors, was engaged in adjusting a machine with a view of cutting a heavy piece of pipe, he gave one of the dies a slight tap with his hammer, causing a small piece or particle to break and fly off from the die or hammer, striking plaintiff in the eye and resulting in the loss of his sight. That the machine furnished him by defendant company and with which he was working at the time was badly worn and out of repair, and, as it did not work properly, defendant attempted to fix and adjust it; that he had no tools with which to do this except a hammer of hardened steel, and it was the duty of defendant to have furnished him some soft-metal hammer to settle the dies, these being also of highly tempered steel; that the defendant had provided no sufficient light and no one to help plaintiff while he was attempting to operate and fix the heavy machine and to cut and fix the pipe, and while attempting to fix it, it was necessary, on account of the insufficient light and help, for him to have his face in close proximity to the machine, and as he struck with the hammer in his attempt to adjust it a small piece of steel flew off and struck plaintiff's eye, causing the loss of the sight as stated.

A very correct synopsis and partial excerpt from the testimony, tending to support a right of recovery by plaintiff, appears in the brief of counsel as follows: "Plaintiff replied, 'What about this pipe? Can't we leave it here until morning? There will be two men here who can cut it.'" Sears (plaintiff's superior) said: "He had to have it the first thing in the morning and could not wait" (12). Plaintiff testified that he "needed help to use that machine on that pipe," and continuing said:

A. I was looking at the dies, and I seen that one of the dies was a little bit higher than the other, and I took my hammer in (378) my hand, to see if I could knock it down, and I had the light in one hand, pulling it up. There was just one light over this machine that was burning. There were three lights, but something was the matter with the others; and I had my head close to it, and I tapped it one little tap with the hammer, and a piece flew into my eye (12).

Q. What sort of a hammer was it? A. It was a steel hammer, I suppose.

Q. How many lights over that machine? A. There were three lights over it, but only one of the lights would burn, and it was about 8 feet from the machine.

Q. What kind of a light was burning about 8 feet from this machine? A. Just a small light.

Q. What candle-power, if you know? A. Not over 16.

Q. Why did you have to hold your eyes so close to that machine? A. *Because there was not much light around the machine,* and I had to put it close up to see it (13).

Q. You say there was one light over this machine—how many lights were over this machine that you got hurt on? A. Three.

Q. How many were burning? A. One.

Q. Why were the others not burning? A. They were out of fix.

Q. What did you have to hold in your hand? A. I had to hold the light.

Q. And what in the other hand? A. I had to do the work with the other hand.

Q. If there had been more lights there, so that it would not have been necessary for you to hold the light over it, how could you have done the work? A. I could have taken both hands, and I then could have done my work without getting hurt.

Q. What was the condition of this machine? A. It was *old and worn and hard to set.* One could not hardly set it himself. I always had somebody to help me. I knew very little about how to do the work.

Q. How many times had you tried to work it by yourself? A. That was the first time I tried it, that night.

(379) Q. If there had been more lights there, how would it have been necessary for you to have held your face, with reference to the machine? A. No, sir; I could have stood back further from it.

Q. Do you know what kind of a hammer ought to have been provided at that machine? A. There ought to have been *some soft-metal hammer* to settle the dies.

Q. Did you ever see any one else settle the dies there? A. Yes.

Q. What did they use? A. A steel hammer.

Q. Hammer like this one you use? A. Yes; just like it.

Q. What other instrument was provided for you to settle these dies, except the steel hammer? A. None. Mr. Batterson gave me charge of the tools—

Q. How did that machine work—did it work well or badly, or how? A. It worked badly (14).

Q. Why? A. Because it was worn out and stayed broken about half the time, and you could hardly cut a pipe with it. Half of the threads stayed out of fix all the time that I was there.

Q. State the condition of the light there, with reference to its illuminating effect. A. It was very dimly lighted.

Q. You say a piece of steel flew from what? A. It was a piece of steel or a piece of iron. I reached over to the back part of the die to see if I

could loosen it—to see what was the matter—and when I tapped the die a piece flew in my eye (15).

The plaintiff said that he did not know that the die was made of tempered steel (18), nor did he know that it was dangerous to use the hammer (23), as that was the customary way of settling the dies (22, 23, 24, 64), by men of more experience than he had (64). He said that the lights had been out of fix a month (28); that he had tried to fix them that night and couldn't (28, 36); that the hammer belonged to the Champion Fiber Company (29); that he had complained of the lights and had asked the electrician to fix them (35). Batterson testified that the electrician was the proper person to whom he should report the defective condition of these lights (55).

The defendant Batterson testified, among other things, in sub- (380) stance as follows:

It is not safe to hit two highly tempered pieces of steel together; this is a matter of common knowledge among mechanics; this die was made of tempered steel (41). It was dangerous to hit this die with this hammer (42, 50).

Q. And you had hammers to fix those dies with? A. Yes (50).

Q. And you know—have learned—that it would have been a very improper thing to have done to put a man there to knock one of those dies with a hammer? A. Yes.

Q. That would have been very negligent in the company to have done that? A. Yes (51).

Batterson testified further that it was his duty to see that the lights were in proper condition; that all the lights ought to have been burning, and that he did not know whether they were in proper condition or not (52).

Brown, a witness for the defendant, testified that it was dangerous to hit two pieces of steel together, but could not say that this was common knowledge (55); that he had been engaged in the business twenty years (55).

A perusal of this testimony affords a fair and reasonable inference that there has been a breach of duty on the part of the defendants, the proximate cause of plaintiff's injury, in failing to supply sufficient light and in furnishing an improper tool for the work in which plaintiff was then engaged.

It was earnestly urged for defendants that the facts present a case of excusable accident within the principle of *House v. R. R.*, 152 N. C., 397, and other cases of like kind excusing the employer under given circumstances when the injury "occurred in the use of ordinary every-day tools and under ordinary everyday conditions requiring no especial care, preparation, or prevision, where the defects are readily observable

and there was no good reason to suppose that the injury complained of would result"; and *Martin v. Manufacturing Co.,* 128 N. C., 264, is relied on as decisive in favor of defendant's position, that being a case where "an employee was hurt in the eye by a particle of flying steel knocked off by the blow of a hammer"; but to allow this
(381) position on the facts presented here would be to ignore much of the significance of the evidence. The plaintiff, while saying that he was not aware of the extent of the danger or that he would likely be hurt by giving the light blow with the hammer, as he did, testified directly that he should have been supplied with "some soft-metal hammer to settle these dies."

And the defendant Batterson, himself, testified and offered other evidence tending to show that both the die and the hammer being of highly tempered steel, it was very dangerous to use the hammer for the purpose of settling the dies, and endeavored to impress upon the jury the view that the danger, in such case, was so obvious and of such common knowledge that plaintiff was guilty of contributory negligence in using the hammer for the purpose. This, then, was no instance of injury received in the ordinary use of a hammer, a proper tool for the purpose, and by reason of a defect therein, hidden or unobservable, as in *Martin v. Mfg. Co., supra,* but the facts present the case of supplying the employee with an improper tool for the work he was called on to do and one that was not unlikely to produce the result which followed, bringing the case clearly within the principle of *Mercer v. R. R.,* 154 N. C., 399; *Avery v. Lumber Co.,* 146 N. C., 592.

It was further insisted that the absence of sufficient light should not have been allowed to affect the result, because there was no satisfactory evidence showing that such condition in any way contributed to the injury, the position being that as a light was only required to look into the slot when clearing it out in preparation for the die, plaintiff could only use for the purpose the one drop light, it being necessary in any event to hold it up close so as to see the aperture; but here, too, the argument is in disregard of the testimony making for plaintiff's right to recover.

On this question the plaintiff, testifying in his own behalf, among other things, said: "That the machine worked badly; that it was worn out and stayed broken about half the time, and you could hardly cut a pipe with it; that it was hard to set, and one man could hardly set it himself at all, and he always had had somebody to help him;
(382) that he himself knew little how to do the work. That the light was very dim, so much so that he had lodged a complaint about it, and for this reason he was compelled to hold the drop light in one hand and do the work with the other, and was compelled also to hold

his eyes close to the machine, and but for this he could have taken both hands to the work and stood farther back and *done the work without getting hurt.*"

Under a comprehensive and learned charge, in which the principle of actionable negligence, contributory negligence and assumption of risk have been correctly stated and applied according to approved precedents obtaining with us, the jury have accepted plaintiff's version of the occurrence, and this being true, we are of opinion that an actionable wrong has been clearly established against defendants. *Avery v. Lumber Co., supra; Mercer v. R. R., supra; Pritchett v. R. R.*, 157 N. C., 88-102; *Walker v. Manufacturing Co.*, 157 N. C., 131; *Rushing v. R. R.*, 149 N. C., 158; *Orr v. Telephone Co.*, 132 N. C., 691; *Lloyd v. Hones*, 126 N. C., 359.

The objections to the ruling of the court on questions of evidence are without merit. On careful examination of the record, we find no reversible error to defendant's prejudice, and the judgment in plaintiff's favor must therefore be affirmed.

No error.

Cited: Ammons v. Mfg. Co., 165 N. C., 452; *Deligny v. Furniture Co.*, 170 N. C., 203.

A. R. HERRING v. THE CUMBERLAND LUMBER COMPANY.

(Filed 28 May, 1912.)

1. Lumber Roads — Timber — Consideration — Contract to Build Railroad — Measure of Damages.

A lumber company having purchased timber at a price less than its value, in consideration of the benefits to be derived by the vendors from a standard-gauge railroad it contracted to build, is liable in damages to the vendors for the difference between the price paid and the actual value of the timber, upon its failure to build the road it had contracted to build.

2. Same—Illegal Promise—In Pari Delicto.

A lumber company cannot avail itself of the defense, in an action for damages, that it was prohibited by our statute, Revisal, sec. 2598, from building a standard-gauge railroad, in consideration of which it had obtained the plaintiff's timber at a less price than its actual value; for if the stipulation to construct the road is invalid, the plaintiffs, though they should be *particeps criminis*, are not *in pari delicto*.

3. Same—Implied Promise to Repay.

The vendors of timber at a price less than its value, in consideration of the benefits to be derived from the construction of a standard-gauge rail-

road by a lumber company, which the latter had contracted to build, but were unauthorized by law to do, may recover damages on the promise created by law to repay money of the plaintiff's improperly obtained. *Edwards v. Goldsboro*, 141 N. C., 60, cited and distinguished.

4. Lumber Roads—Timber—Illegal Consideration—Contract to Build Railroad—Evidence.

In this case it was alleged that the defendant lumber company obtained deeds to plaintiff's timber for a less price than its value in consideration of an agreement that it would build a standard-gauge railroad, which would be beneficial to the plaintiff: *Held*, evidence of the agreement of defendant to build the railroad was erroneously excluded.

5. Pleadings—Prayers for Judgment—Relief Granted.

The facts alleged in the pleadings determine the nature of the relief to be granted, and the form of the prayer for judgment is not material.

6. Pleadings—Joinder of Actions—Alternate Relief.

A plaintiff may unite two causes of action relating to the same transaction and have alternate relief, that is, a judgment upon either one or the other of the causes alleged.

HOKE, J., concurs in result.

(383) APPEAL by defendants from *Ward, J.*, at October Term, 1911, of SAMPSON.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

George E. Butler for plaintiff.
Stevens, Beasley & Weeks for defendant.

(384) WALKER, J. This action was brought to recover the amount of a penalty, imposed by a contract between the plaintiff and the Wallace Manufacturing Company, for failure to comply with one of its stipulations. The question involved arose upon the following facts:

Plaintiff and certain other neighboring landowners agreed to sell the timber on their lands to the said company for a stated price, and defendant agreed to pay the price and also to construct a standard-gauge railroad from Delway to Wallace, and to complete the same for use and transportation on or before 15 March, 1908, and, upon failure to do so, it is provided by the contract that the Wallace Manufacturing Company shall forfeit and pay to the said landowners, as a penalty, an amount equal to 10 per cent of the price paid for the timber, and 2½ per cent on said price for each additional year of its default during the next five years, making 22½ per cent in all if the default should continue as long as five years after 15 March, 1908. The parties conveyed the timber

by deeds to the Wallace Company, coupled with the right to cut timber of a certain fixed dimension, and to build on the land roads, tramroads, and railroads, for the purpose of cutting and removing the timber. There is a provision in the deed that the trees sold to the company shall not be removed except by the standard-gauge railroad. The Wallace Company conveyed to the defendant Cumberland Lumber Company "the timber and tree rights, property rights and easements" acquired under the deed of the plaintiff to it. The standard-gauge railroad has never been constructed, and plaintiff sues to recover the penalty alleged to be due to him by the terms of his deed to the Wallace Company.

The defendants' counsel contend that the building of a standard-gauge road is not within the chartered powers and privileges of the defendants, and that it is also expressly forbidden by Revisal, sec. 2598. We need not decide whether or not this is a correct position, as we are of the opinion with the plaintiff upon another view of the matter. It appears in the case that the plaintiff and his neighbors, who joined with him in the agreement to sell their timber to the Wallace Manufacturing Company, one of the defendants, were influenced in fixing the price of the same by the stipulation of the said company to construct (385) this road, and that they sold the timber at much less than its reasonable worth because of this agreement, believing that if the road was built and put into operation, the benefit or advantage they would derive therefrom would compensate them for the loss of the difference between the price charged by them for the timber and the real value thereof. This being so, it would seem to be very unjust and inequitable that the defendants should repudiate their agreement and rely on its invalidity for the purpose of evading the payment of a reasonable price for the timber; in other words, that they should be allowed to keep the amount of the difference between the price paid for the timber and its true value, and, at the same time, refuse to execute their part of the contract to build the road, even upon the ground that it is *malum prohibitum*. If the stipulation to construct the road is invalid, the plaintiff, if *particeps criminis*, is not *in pari delicto*. He can recover the amount of his loss without declaring upon the alleged illegal stipulation and relief can be given without enforcing this part of the contract. In such a case the action, it may be said, is not based on the agreement alleged to be illegal or invalid, but on the promise created by law to repay money of the plaintiff improperly obtained. 9 Cyc., p. 547.

The principle governing such cases is well stated in *Lester v. Bank*, 33 Md., 558, 3 Am. Rep. (Anno. Ed., 1912) 211: "The rule of law is well settled that no action will lie to enforce a contract *malum in se*,

nor, if executed, to recover money paid under it. In all such cases the maxims, *'Ex turpi causa non oritur actio'* and *'In pari delicto potior est conditio defendentis et possidentis'* apply. In regard to contracts not immoral or criminal in themselves, but prohibited by statutory law, the same general rule may be said to apply, not, however, universal in its application, but subject to certain exceptions as binding in authority as the rule itself. Public policy, it must be borne in mind, lies at the basis of the law in regard to illegal contracts, and the rule is adopted, not for the benefit of parties, but of the public. It is evident, therefore, that cases may arise even under contracts of this character, in which the public interest will be better promoted by granting than denying relief, and in such the general rule must lead to this (386) policy. Hence, Judge Story admits that, even between parties *'in pari delicto'* relief will sometimes be granted if public policy demands it. 1 Story's Eq. Jur., secs. 298-300. Other cases are to be found arising under contracts made in violation of a statute, in the application to which of the general rule courts have been governed by the plain and obvious purposes of the law; and in such it has been repeatedly held that an action would lie against a party receiving money under such a contract upon a promise implied by law to refund it. Thus in *Smith v. Bromley,* Doug., 697, note, *Lord Mansfield* said: 'If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have his action. . . . But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover.' "

Lord Mansfield said, in *Browning v. Morris,* 2 Cowp., 790: "It is very material that the statute itself, by the distinction it makes, has *marked* the *criminal,* for the penalties are all on *one* side—upon the office-keeper."

This view of the case is not in conflict with what was decided in *Edwards v. Goldsboro,* 141 N. C., 60, as in that case there was an illegal agreement which was contrary to public policy, if not *contra bonos mores,* and the action was for the recovery of money actually paid to carry out the illegal transaction, which was not only forbidden by law, but injurious to the public, and the parties were *in pari delicto.*

In this case the defendants have acquired the plaintiff's timber at an undervalue, upon a promise which they refuse to perform, and seek to shelter themselves behind its alleged illegality. There is nothing contravening public policy in permitting plaintiff to recover at least what he had lost by not receiving a fair and full price for his property, not

exceeding the amount named in the contract. *Bond v. Montgomery,* 56 Ark., 563; *White v. Bank,* 39 Mass., 181; 1 Pom. Eq. Jur., sec. 403; *Sykes v. Beadon,* L. R., 11 Ch. Div., 170; 9 Cyc., 546; Bishop on Contracts, sec. 628, *et seq.; Prescott v. Norris,* 32 N. H., 101; *Parkersburg v. Brown,* 106 U. S., 487. (387)

Morville v. Am. Trust Society, 123 Mass., 129, is much like the one at bar, and the Court there said: "The money of the plaintiff was taken and is still held by the defendant under an agreement which it is contended it had no power to make, and which, if it had power to make, it has wholly failed on its part to perform. It was money of the plaintiff, now in the possession of the defendant, which in equity and good conscience it ought now to pay over, and which may be recovered in an action for money had and received. The illegality is not that which arises when the contract is in violation of public policy or of sound morals, and under which the law will give no aid to either party. The plaintiff himself is chargeable with no illegal act, and the corporation is the only one at fault in exceeding its corporate powers by making the express contract. The plaintiff is not seeking to enforce that contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. He is doing nothing which must be regarded as a necessary affirmance of an illegal act."

Jacques v. Golightly (2 W. Bl., 1973) was an action to recover back money paid for insuring lottery tickets. The defendant kept an office for insurance, contrary to the stat. 14 Geo. III., ch. 76. It was urged that the plaintiff, being *particeps criminis,* and having knowingly transgressed a public law, was not entitled to relief, but the action was sustained by the unanimous opinion of the Court. *Blackston, J.,* said: "These lottery acts differ from the stock-jobbing acts of Geo. II., ch. 8, because there both parties are made criminal and subject to penalties." See, also, *Tracy v. Talmage,* 14 N. Y., 162.

The plaintiff offered to show that the defendants purchased the timber at a greatly reduced price because of the promise to construct the railroad, which evidence the court excluded, and afterwards intimated that the plaintiff could not recover, and compelled him to submit to a nonsuit. We think there was error in both rulings, and a new trial is ordered. There are facts stated in the complaint sufficient, if established, to authorize a judgment, in favor of the plaintiff, for the difference between what he received for the timber and its true (388) value. The form of prayer for judgment is not material. It is the facts alleged that determine the nature of the relief to be granted. *Voorhees v. Porter,* 134 N. C., 597. The plaintiff can unite two causes

of action relating to the same transaction and have alternative relief, that is, a judgment upon either one or the other of the causes.

New trial.

HOKE, J., concurs in result.

Cited: *S. c.*, 163 N. C., 482; *Robinson v. Life Ins. Co.*, 163 N. C., 422.

CITY OF CHARLOTTE v. AMERICAN TRUST COMPANY.

(Filed 28 May, 1912.)

1. Cities and Towns—Bond Issues—Street Improvements—Assessments—Direct Obligation.

A municipal bond providing that it shall constitute a general and direct obligation of the city, and, in addition thereto, is made chargeable to the property abutting upon certain streets laid out by ordinances passed by the board of aldermen as permanent improvement districts or sections, is, upon its face, the direct obligation of the city, and the assessment specified an additional security to the bonds.

2. Same—Enabling Statute.

A statute which gives to an incorporated town or city, which has authority to pave its streets as a necessary expense payable out of its general funds, the further authority to tax the cost of the paving against abutting property-owners, must be construed as enabling legislation, giving an additional source of revenue and additional security to the bonds.

3. Cities and Towns—Bond Issues—"Bonds"—Words and Phrases—Direct Obligation.

When the word "bonds" is used in connection with municipal obligations, designating what is commonly called "municipal bonds," it denotes a negotiable bond, and *ex vi termini* it implies that the city is bound for their payment.

4. Cities and Towns—Bond Issues—Direct Obligation—Assessments—Additional Security—Diversion of Funds.

When an act empowers a town to issue "street improvement bonds" in ten equal series, each consisting of a like number of bonds, bearing a fixed rate of interest, required to be attested by the mayor and the city clerk, payable to bearer, redeemable by the town at a specified time, and executed with all the formalities of a regular issue of bonds, a requirement that the bonds shall contain such recitals as may be necessary to make them chargeable to the property of the abutting owners of the streets improved will be construed to mean that the assessments of this

property are to be devoted by the town to the payment of these particular bonds, and may not be diverted; but this does not affect the general obligation of the city to pay them.

5. Cities and Towns—Bond Issues—Necessaries—Direct Vote—Constitutional Law—Interpretation of Statutes.

The Private Laws 1911, chap. 251, authorizing the city of Charlotte to issue certain particular bonds, does not provide that the issuance of the bonds be first submitted to the vote of its citizens, and *Ellison v. Williamston*, 152 N. C., 149, cited and distinguished.

6. Same.

Chapter 251, Private Laws 1911, specifically authorizes the city of Charlotte to issue bonds for street improvements, and the bonds being for a necessary expense, are not inhibited by the provisions of Revisal, sec. 2977.

APPEAL from *Lyon, J.*, at Spring Term, 1912, om MECKLEN- (389) BURG.

Controversy without action submitted to determine whether certain bonds contracted to be sold by plaintiff to the defendant are the obligations or bonds of the city of Charlotte and binding upon the municipality. His Honor adjudged the bonds to be the "general, personal, and direct obligation of the city of Charlotte," and rendered judgment against the purchaser, the defendant. A copy of the bond is set out in full in the record and is marked "Exhibit B." The defendant excepted and appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE BROWN.

Chase Brenizer, Tillett & Guthrie for plaintiff.
P. C. Whitlock for defendant.

BROWN, J. The bond in question is one of a series issued pur- (390) suant to an act of the General Assembly ratified 3 March, 1911, and are denominated "street improvement bonds." Each bond contains this clause: "This bond shall constitute a general, personal, and direct obligation of the city, and, in addition thereto, the payment thereof is chargeable to the property abutting upon certain streets which have been laid out by ordinance passed by the board of aldermen as permanent improvement districts or sections, and are as follows:" [Here follows a list of assessments.]

It is too plain for discusion that upon their face the bonds are the direct obligation of the city of Charlotte, and that the assessments specified on the face of the bond are but additional security for their payment.

But it is contended that they are issued as such in violation of the terms of the statute, and are therefore *ultra vires.* It is agreed that they are issued pursuant to the terms of an act entitled "An act to amend the charter of the city of Charlotte," ratified on 3 March, 1911, being chapter 251, Private Laws 1911.

The plaintiff, prior to this act, had the right to pave its streets as a necessary expense, and to pay for the same out of its general funds. *Tucker v. Raleigh,* 75 N. C., 267; *Hightower v. Raleigh,* 150 N. C., 569.

We think the act of 3 March, 1911, did not intend to curtail the power and means of the city to pave its streets, but to increase them.

Inasmuch as prior to these special acts the plaintiff had the right to contract debts for paving its streets and to make the obligations issued for such purpose a part of its general and direct indebtedness, these special acts giving it power to tax the cost of paving against abutting property-owners must be construed as enabling legislation intended to enlarge the ability of the city to pave its streets by giving an additional source of revenue, and, furthermore, to render the bonds more salable by giving the bondholder a specific charge and lien against the abutting property-owners in addition to the general obligation of the city. The Legislature could not have intended to authorize an unsalable security.

The bonds are required to be sold at not less than par, and such
(391) an obligation could not be sold at par unless it constitutes the direct debt of a solvent obligor. As *Mr. Justice Harlan* very forcibly says, in a case on all-fours with this, *U. S. v. Fort Scott,* 99 U. S., 152: "Experience informs us that the city would have met with serious, if not insuperable, obstacles in its negotiations had the bonds upon their face, in unmistakable terms, declared that the purchaser had no security beyond the assessments upon the particular property improved."

The act directs the board of aldermen to issue bonds of the city and sell them. The use of the word bond *ex vi termini* implies that the city is bound. As said by the United States Supreme Court in *Davenport v. County of Dodge,* 105 U. S., 237, a *"a bond implies an obligor bound to do what is agreed shall be done."*

Also, in *Morrison v. Township of Bernards,* 25 N. J. Law, 219, *Chief Justice Beasley,* speaking of the force and effect of a direction in the statute that the township issue "bonds," says: "A similar implication, but one of greater force, arises from the direction that bonds are to be given under the hands and seals of the commissioners, for an instrument of that kind cannot be created without the presence of an obligor; and, indeed, it seems like a solecism to say that the statute calls for the making of a bond, but that nobody is to be bound by it.."

Not only that, but it is also held by the authorities that when the word "bond" is used in connection with municipal obligations, designating what is commonly called "municipal bonds," then this means negotiable bonds. This is expressly held in *Nallie v. Austin,* 85 Tex., 520. See, also, *McCless v. Meekins,* 117 N. C., 34; *Charlotte v. Shepard,* 122 N. C., 602.

These bonds, called "street improvement bonds" in section 12 of the act authorizing their issue, are specifically named such in that act; they are to be issued in ten equal series and each series shall consist of a like number of bonds; they bear interest at 6 per cent, fixed by the statute, and they are required to be signed by the mayor and attested by the city clerk. Thus it is seen that they possess all of the characteristics of a municipal bond, being payable to bearer, redeemable by the city at a stipulated time, and executed with all the formality of regu- (392) lar bonds by its officers.

It is true that the statute requires that the bonds shall contain such recitals as may be ne essary to show that they are chargeable to particular property. We construe this to mean that these assessments are to be devoted by the city to the payment of these particular bonds, and it would be a violation of law to divert the proceeds arising from such assessments to any other purpose. The fact that these assessments are dedicated to the specific purpose of paying these bonds does not render the bonds any the less the general obligation of the city.

It is also said that these bonds were not submitted to a vote of the people. In our opinion that was not necessary. There are classes of bonds other than those mentioned in this act of 1911 which are required to be submitted to a vote of the qualified voters, but there is no such provision or requirement in regard to these street improvement bonds secured by the assessment. On the contrary, the board is invested with power to issue these bonds without any vote of the people.

We are advertent to the previous decisions of this Court that where the General Assembly specifically requires a proposition to incur an indebtedness, or issue bonds for a given purpose, to be submitted to the qualified voters for their approval, this, as said by *Mr. Justice Hoke,* "will amount to a statutory restriction, and such indebtedness shall not be incurred unless the measure has been sanctioned and approved by the voters according to the provisions of the statute; and this though such indebtedness is properly classed as necessary expense." *Ellison v. Williamston,* 152 N. C., 149. Inasmuch as the statute does not require this particular issue of bonds to be submitted to the qualified voters, the principle announced in that decision has no application here.

Neither do we think the issue of bonds comes within the inhibition contained in Revisal, sec. 2977, as they are issued for a necessary expense, and specifically authorized by special legislation. *Wharton v. Greensboro,* 146 N. C., 357.

The judgment of the Superior Court is

Affirmed.

Cited: Caravan v. Comrs., 161 N. C., 103.

ROANOKE RAPIDS POWER COMPANY v. ROANOKE NAVIGATION AND WATER POWER COMPANY.

(Filed 28 May, 1912.)

1. Arbitration and Award—Matters Concluded—Subsequent Action.

An arbitration and award will not conclude matters not submitted or passed upon therein, and in this case the action is not therefore barred upon the question of whether the plaintiff was authorized under the statute to build a wing dam in the Roanoke River to the damage of the defendant, a lower riparian owner.

2. Contracts—Actions—Temporary Adjustments—Pleas in Bar.

The argeement entered into between the parties in this case, affecting a temporary adjustment, held not to affect the defendant's rights as a lower riparian owner to the use of the water interfered with by a wing dam built by the plaintiff in the Roanoke River. The decision in this case, *Power Co. v. Navigation Co.,* 152 N. C., 472, affirmed.

3. Water and Watercourses—Riparian Rights—Interpretation of Statutes.

The defendant was a purchaser, under a decree entered in a suit authorized by the Acts of 1874-75, chap. 198, which was ratified by Private Acts of 1885, chap. 57, and which vested in the purchaser, as a corporation, "the franchises, rights, privileges, works, and property of the Roanoke Navigation Company, as acquired by the sale," etc. The Private Laws of 1891, chap. 2, conferred certain other rights upon the plaintiff corporation, including, among other things, "the right to erect mills and factories on the lands situated on Roanoke River," with the right to the use of the water of the river for manufacturing purposes; *Held,* the defendant acquired the property with the restriction or qualification, expressed in the statutes, that in the use of the water for the purposes specified it should not interfere with other riparian owners.

4. Words and Phrases—Persons—Corporations—Interpretation of Statutes.

The use of the word "person" in the plaintiff's charter, that in the exercise of the rights and privileges conferred it shall not "prevent any person owning lands on Roanoke River from operating or erecting any mill," etc., is held to include corporations.

5. Water and Watercourses—Riparian Owners—Vested Rights—Due Process—Constitutional Law.

When riparian rights in a river have become vested, the owner of the lands holds them subject to the rights of the public, as, for instance, the right of navigation, and can only be deprived of them by due process of law and upon compensation being paid him.

PETITION to rehear. The facts are sufficiently stated in the (394) opinion of the Court by MR. JUSTICE WALKER.

W. E. Daniel and Claude Kitchin for plaintiff.

E. L. Travis, George Green, J. H. Pou, Rutledge & Hagood, Mordecai & Gadsden, and J. C. Spooner for defendant.

WALKER, J. This is a petition to rehear the above-entitled case, which was decided at Spring Term, 1910, and is reported in 152 N. C., 473.

A careful consideration of the briefs and arguments of counsel upon the rehearing have not disclosed any matter or authority that was overlooked by us at the former hearing. The case was then presented ably and learnedly by counsel, with a full citation of the authorities, and while it has been again argued with still more elaboration, nothing has been brought forward which induces us to change the opinion of the case we then held or the conclusion we reached.

As to the arbitration of the controversy between George P. Phillips and the Roanoke Navigation and Water Power Company, and the award of Judge Armfield and Mr. Lanier, who were the arbitrators, we are still of the opinion that the submission to arbitration did not embrace the matters involved in this suit. The various controversies pending between Phillips and the Navigation Company, and recited in the preamble of the submission, are not set forth with sufficient particularity to enable us to determine their exact nature and extent, but it sufficiently appears that the question to be decided by the arbitrators was whether the Navigation Company could enlarge the canal on its own land, and enjoy the use of the water of the Roanoke River, as it was accustomed to do at and before that time, without the consent of Phillips, and the arbitrators answered both questions affirmatively. A careful reading of the submission and award will show conclusively that the question now raised as to the right of the defendant, as successor to the Navigation Company, to dam up Little River by extending the present obstruction from bank to bank, so as to deprive lower proprietors (395) altogether of the use of its waters, was not involved in that submission and award. The Navigation Company was making no such claim as against Phillips, and it is clear that the arbitrators, both among the most eminent lawyers of the State, did not understand that they had

been asked to decide any such question. But if they did so think, it is sufficient to say that the award does not disclose any attempt by them to render any such decision. So far as the use of the waters of Roanoke River was involved in the arbitration, the only question was whether the Navigation Company could exercise the rights and privileges with respect to the waters of the river which were conferred by its charter, without the consent of Phillips, and the arbitrators, in making their award upon this part of the submission, use the language of the charter (Acts of 1885, chap. 57) in defining the rights of the Navigation Company in the river, without any reference to a larger and more comprehensive use thereafter, without any suggestion in regard to it. It may be added to what we formerly said upon this subject, and to what we have already stated herein, that even if the arbitrators had made any such ruling, it could bind and conclude the plaintiff only to the extent of its ownership of the land it acquired by purchase from Phillips, and not the other land below the Phillips tract, which will be injuriously affected by damming the river. *Foster v. Parham,* 74 N. C., 92; *Kissam v. Gaylord,* 46 N. C., 294; 16 Cyc., 695.

The agreement of 5 May, 1897, which may, not inappropriately, be called a *modus vivendi,* cannot be allowed to prejudice the rights of the plaintiff, so far as the matters now in controversy are concerned. It was manifestly not intended to have any such effect. The parties carefully guarded their rights against any such inference from their arrangement, which was made to provide temporary relief for the parties, pending a final adjustment or settlement of their controversies. This will appear from the language of the agreement. Defendant expressly stipulated that the license or permission therein granted by plaintiff should not be construed as a waiver or a concession to the Roanoke Navigation and Water Power Company "of any of its rights, franchises, and
(396) privileges to have the waters of Roanoke River flow by and through and upon its property to the extent it is entitled to use and enjoy said waters for any purposes for which it has the right to apply the same." And the plaintiff agreed that the license or permission therein granted the defendant should not be construed "as a waiver of or concession to the Roanoke Rapids Power Company of any of its rights, franchises, and privileges to draw the waters of Roanoke River into its canal to the extent and for the purpose it was entitled so to do." It would not be right, and of course not just, to permit defendant to construe or use that agreement in a way contrary to its own express stipulation. The correspondence of the parties shows that plaintiff was all the time denying the right of defendant to use more of the water of the river than was necessary for the purpose of navigation, and warning defendant that it would assert its right to damages for any greater

diversion of water from the river into the canal. In that correspondence, at or about the time the said agreement was made, the following letters passed between the parties. Defendant wrote to plaintiff: "It is only necessary to refer to two statements contained in your communication: first, the claim that your company, 'under and by virtue of its charter owns the right to the exclusive use of so much of the waters of the Roanoke River as it may need for navigation, manufacturing, or other purposes, now or at any future time,' and, secondly, that 'it objects to any use on your part (meaning the undersigned company) of the waters of the said river, or the construction of any dam or other works that will in any manner injure, impair, or interfere with its property, rights, franchises, or privileges.'" Plaintiff replied: "We do not propose, in the construction and maintenance of our works, to interfere with or encroach upon your company's property, rights, franchises, and privileges 'in any unreasonable manner, to the substantial injury' of your corporation. We deny that you have any right, exclusive or otherwise, now or at any future time, to use the waters of Roanoke River for purposes other than navigation. The sole purpose of the incorporation of the Roanoke Navigation Company was to remove the obstruction in Roanoke River, from Halifax westward, so as to afford a safe and uninterrupted passage for boats carrying freight and adapted (397) to the limited capacity of the stream. The quantity of water appropriated and drawn through the canals of that company at the time when the river was the only channel of commerce and in public demand and favor did not perceptibly affect the flow down the natural channels of the stream. The surplus water which continued to flow down these natural channels belongs to the owners of the water rights on the margin of the stream below." It then notifies the defendant that it will defend its rights as a lower riparian proprietor against any encroachment of the defendant by a greater diversion of the waters of Roanoke River than it is authorized, under the law, to create by obstructions in the river. Then followed the agreement which we have before mentioned, by which active controversy was suspended and all rights of the parties reserved. It is useless to pursue this subject any further.

This brings us to a construction of the judgment in *Bass v. Navigation Co.*, 111 N. C., 439, which, the defendant contends, brings into play the rule of *stare decisis* as to the issues involved in the present suit, so far as the same questions were decided in that case as are raised in this one. We have reëxamined that case with the greatest care, and are unable to see that the issues in the two cases are at all identical. The fifth headnote states with sufficient accuracy the points decided in the *Bass case*. It is as follows:

"The Roanoke Navigation Company, having acquired the right of way through the plainitff's land, permitted her, by parol license, to erect, in 1852, a private bridge over the canal, which she has continuously used ever since, until it was removed by the defendant, the purchaser and successor of the said company, in 1890, when engaged in improving the property: *Held,* (1) that such possession did not raise a presumption of a grant of the easement to maintain the bridge; (2) that the right to the fee in the condemned land did not revert to the original owner, or those claiming under him, upon the dissolution of the original corporation; (3) that the license could be revoked, and, being revoked, the defendant had a right to remove it without paying compensation to the owner."

Justice Avery in that case says distinctly that the only reason-
(398) able interpretation of the charter of the defendant (Acts of 1885, chap. 57, sec. 5) is "consistent with the general purpose to permit the use of the water of the canal for mills, in subordination to the main object of using it as an artery of commerce." The company was required, if convenient and possible to do so, to make the "canal answer both the purposes of navigation and waterworks." He does not state that "the new company is now contending for the privilege of using the water itself and farming it out for the purpose of manufacturing," but he does not pass upon that contention, as it was not one of the questions in the case, and, besides, it will be noted that what he says in respect to this claim does not extend so far as to embrace the right to the exclusive use of the entire flow of the Roanoke River. He refers only to the assertion of a right to use the canal in its then state or condition, with the wing dam extending only partly across the river for the said purposes.

The leading question in the case is whether the defendant, as successor of the Roanoke Navigation Company, can appropriate all of the waters of Little River to its own use by extending its dam to the other bank and thereby depriving the plaintiff, a lower riparian proprietor, of all use of the stream, which, as it alleges, will result in the destruction of its property. We held before that it could not be done, and we are still of the same opinion. In order to show that the defendant has no such right, we may well confine ourselves to a consideration of the Laws of 1885, chap. 57, and the Private Acts of 1891, chap. 2, being the amended charters of the two companies, without entering upon a discussion of the plaintiff's rights as a lower riparian owner, in order to demonstrate that it has no such rights which the general law recognizes and will protect against invasion or impairment by the defendant.

In our former opinion we stated that the right of the defendant to use the waters of the canal under the Acts of 1817 and 1885 was incidental to the public navigation of the river. In other words, that the defend-

ant and its predecessor are authorized by those acts to use for the said purpose only the surplus water of the canal that would otherwise run to waste. We think now that this view is sustained by an important decision upon the subject which was rendered in *Kankanna Co.* (399) *v. Canal Co.,* 142 U. S., 254. As the case bears so directly upon the question now under discussion, we may be permitted to extract copiously from it:

"It is probably true that it is beyond the competency of the State to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain. But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement."

Again, at page 274, the Court says: "In *Little Miami Elevator Co. v. Cincinnati,* 30 Ohio St., 629, 643, the right to lease surplus water for private use was recognized as an incident to the public use of a canal for the purpose of navigation, but it was held that such use was a subordinate one, and that the right to the same might be terminated whenever the State, in the exercise of its discretion, abandoned or relinquished the public use. It was doubted whether the State could, after abandoning the canal as a public improvement, still reserve to itself the right to keep up a water power solely for private use and as a source of revenue. By so doing, says the Court, 'the water power would cease to be an incident to the public use, and the State would be engaged in the private enterprise of keeping up and renting water power after it ceased to act as a government in keeping up the public use.' The same ruling was made by this Court in *Fox v. Cincinnati,* 104 U. S., 783. See, also, *Hubbard v. Toledo,* 21 Ohio St., 379." The Court also relies on *Spaulding v. Lowell,* 23 Pick., 71; *French v. Inhabitants of Quincy,* 3 Allen, 9; *Attorney-General v. EauClaire,* 37 Wis., 400 (*S. c.,* 40 Wis., 533), and then proceeds to say:

"The true distinction seems to be between cases where the (400) dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where in building a dam for a public improvement a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement and a reasonable provision for securing an adequate supply of water at all times for such improvement. No claim is made in

this case that the water power was created for the purpose of selling or leasing it, or that the dam was erected to a greater height than was reasonably necessary to create a depth of water sufficient for the purposes of navigation at all seasons of the year. So long as the dam was erected for the *bona fide* purpose of furnishing an adequate supply of water for the canal, and was not a colorable device for creating a water power, the agents of the State are entitled to great latitude of discretion in regard to the height of the dam and the head of water to be created; and while the surplus in this case may be unnecessarily large, there does not seem to have been any bad faith or abuse of discretion on the part of those charged with the construction of the improvement. The courts should not scan too jealously their conduct in this connection if there be no reason to doubt that they were animated solely by a desire to promote the public interests, nor can they undertake to measure with nicety the exact amount of water required for the purpose of the public improvement. Under the circumstances of this case we think it within the power of the State to retain within its immediate control such surplus as might incidentally be created by the erection of the dam. So far, however, as land was actually taken for the purpose of this improvement, either for the dam itself or the embankments, or the overflow, or so far as water was diverted from its natural course, or from the uses to which the riparian owner would otherwise have been entitled to devote it, such owner is undoubtedly entitled to compensation."

Many authorities could be cited to sustain the views thus expressed, but we need not dwell longer upon this feature of the case.

(401) The defendant purchased the property rights and franchise of the Roanoke Navigation Company at a judicial sale under a decree in a suit authorized by Laws 1875, and by Private Laws 1885, ch. 57, the Legislature ratified what had been done, and vested in the purchaser as a corporation "the franchise, rights, privileges, works, and property of the Roanoke Navigation Company, as acquired by the sale, including the right to use the water of the Roanoke River to be drawn through the canal for navigation, manufacturing, and other purposes, and the right to own, use, and enjoy the water power of the Roanoke River Navigation Company," with this restriction, set forth in the sixth section of the act:

"That this act shall not materially interfere with the legal or vested rights of any person owning or operating mills in Northampton County, or prevent any person owning land on Roanoke River from operating or erecting any mill or other structure to be operated by water power, and using the water of said river for operating said mill or other structure: *Provided,* in so doing he shall not interfere with the legal or vested rights of any other person or corporation in any unreasonable manner."

By chapter 2, Private Laws 1891, the incorporation of the plaintiff was validated, and certain rights, franchises, and privileges conferred upon it, and, among others, the right to erect mills and factories on the lands which are situated on the Roanoke River, below those of the defendant, and to use the water of the river for the purpose of operating the same, with this proviso: "That in the construction and maintenance of said dams, canals, and waste-ways and in the development and use of said water power, neither the rights or property of persons owning lands on the Roanoke River, nor the rights, franchises, privileges, or property of any other corporation, shall be interefered with or encroached upon in any unreasonable manner to the substantial injury of any other person or corporation." We think it is evident from these provisions that this right to use the water of the river for manufacturing purposes was conferred upon both corporations, with the restriction or qualification that in the use and enjoyment of those rights they should not unreasonably interfere with each other. (402) Why should the Legislature give to the plaintiff the right to build mills and factories on its lands and to operate the same with power drawn from the river if it had already conferred upon the defendant rights and franchises in conflict with this grant and utterly destructive of it? It was clearly intended that both companies should use and enjoy this right to use the water of the river without unreasonable interference with each other. The very words of the proviso to the defendant's charter are that it shall not, in the exercise of its rights and privileges, "prevent any person owning land on Roanoke River from operating or erecting any mill or other structure to be operated by water power and using the water of said river for operating said mill or other structure." It further provided that any such lower proprietor in the use of this river and its water power should not interfere unreasonably with any other person or corporation. We do not think that the word "person" as used in the two charters should have the restricted meaning which defendant's counsel insist upon. The context shows that it was intended to embrace corporations, and the law requires us to give it that meaning unless the statute clearly forbids it. Revisal, sec. 2831 (6). The legislative policy was a wise and just one. It permitted the defendant to use the waters of the river for manufacturing purposes in a reasonable manner, that is, so as not to interfere with a like reasonable use by lower proprietors on the stream. The Legislature did not intend to confer a monopoly, in the use of the river, upon the defendant. The language of the two statutes forbids that any such construction should be placed upon this provision and any such exclusive and extraordinary right conceded to the defendant.

The plaintiff has exercised its rights and privileges with respect to the river in strict accordance with the terms of the statute by returning the water diverted therefrom to the original channel before it reaches the land of any lower proprietor, and no one has complained of such use. The defendant may, perhaps, pursue a similar course, and get the full benefit of all the water it needs for its purposes.

There is no question of condemnation before us.

(403) It is admitted that any extension of defendant's dam will materially impair the plaintiff's works by withdrawing water from the river which is necessary to the successful operation thereof.

The following admission also appears in the case:

"All the water drawn into defendant's canal is to develop power for manufacturing purposes, and is used solely for those purposes; that said canal, by reason of the works of the defendant, is so disconnected from the river that boats cannot pass from one to the other, and that defendant has no purpose of opening up or using said canal for navigation purposes, unless there should arise some public requirement therefor."

Upon the facts thus admitted there has been a clear violation of the plaintiff's rights which were acquired by the Acts of 1885 and 1891. No one can safely venture to say that such a use of the river as is contemplated by the defendant is a reasonable one within the manifest meaning of those statutes. We need not consider what the plaintiff's rights are apart from the legislative grant.

We have assumed, for the sake of discussion, that the Legislature had the power to confer upon the parties the rights, franchises, and privileges, with respect to the waters of Roanoke River, which are named in the acts of 1885 and 1891, and if so, each party must accept and enjoy them subject to the conditions and restrictions annexed thereto.

Having passed upon their respective rights under those statutes, it is unnecessary to decide whether the plaintiff has certain riparian rights, as the owner of land bounded by the river, which are property and valuable as such, and which cannot be arbitrarily or capriciously destroyed or impaired. Such rights, when once vested, though they must be enjoyed in proper subjection to the rights of the public, as, for instance, the right of navigation, it is said that the owner can only be deprived of them in accordance with established law, and if necessary that they be taken for the public good, upon due compensation. *Yates v. Milwaukee,* 77 U. S., 497. Nor is it material to inquire whether the river is navigable, or unnavigable, as any right the defend-

(404) ant has as an upper riparian proprietor and any acquired by the statutes to which we have referred must be exercised with due regard to the rights of the plaintiff in the stream and subject to a reasonable use by it of the waters thereof for the purpose of generating

power to operate its mills or factories. The plaintiff is not interfering with any lawful right to the water of this defendant or with the rights of any lower proprietor. It concedes the right of the defendant to use so much of the water as was required by its predecessor and as it was appropriating at the time it extended its dam, but it denies that it can divert more than that quantity into its canal and unreasonably interfere with the plaintiff in the use and enjoyment of its property, and it is argued that if defendant can thus encroach upon the plaintiff's water rights and privileges, it can stretch its dam across the entire river and deprive the plaintiff of all use of the water.

It having been admitted that the extension of defendant's dam beyond what is known in the case as the "wing dam" has and will seriously injure the plaintiff's work lower down the stream, by preventing the natural flow of the water thereto, we held before, and now decide, that an injunction should issue as indicated in our former opinion.

We see no reason, after a protracted and careful consideration of the case, for reversing or modifying the original judgment.

Petition dismissed.

A. I. ANDERSON v. EMLUS MEADOWS AND ED. BYRD.

(Filed 28 May, 1912.)

1. Instructions, Confusing—Appeal and Error.

When the instructions of the court to the jury are erroneous in part, and so blended with those that are proper that the Court cannot tell how the jury was influenced by them in rendering their verdict against the appellant, a new trial will be awarded.

2. State's Lands—Cherokee Indian Treaties—Entry—Vacant Lands—Interpretation of Statutes.

The lands acquired by the State by the treaties with the Cherokee Indians in 1817 and 1819 were made subject to entry by the act of 1852 only when vacant, or not previously sold under the Cherokee land statutes; and hence an entry made of lands required by the act of 1819, chap. 997, to be sold is invalid, and a subsequent purchaser of the same lands under the provisions of the act acquires the title.

3. Same—Instructions.

The lands in dispute in this action were a part of the Cherokee Indian lands acquired by the State under the treaties of 1817 and 1819. The defendant deraigned his title through one who purchased them in 1820, under the act of 1819, and obtained his grant in 1864. The plaintiff claimed under a grant made in 1862 on an entry made in 1859: *Held*, an

instruction which made the controversy to rest upon the question of the seniority of the grants was erroneous, the land not being vacant and subject to entry at the time of the entry made by the plaintiff.

4. State's Lands—Cherokee Indian Treaties—Vendor and Vendee—Interpretation of Statutes.

One who acquired a part of the Cherokee Indian lands under the act of 1819 did so by purchase, establishing the relationship of vendor and vendee between the State and himself.

5. State's Lands—Void Entry—Collateral Attack.

An entry upon the State's lands which are not vacant at the time is void, and may be attacked collaterally.

6. State's Lands—Entry—Limitation of Actions.

It appearing in this case that a part of the Cherokee Indian lands, the subject of the controversy, had been sold under the act of 1819, prior to the time of entry and grant under which the plaintiff claimed, it is *Held*, that the plaintiff's right is not barred by the statute of limitation pleaded.

(405) APPEAL by defendants from *Webb, J.*, at the Fall Term, 1911, of MACON.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

Robertson & Benbow for plaintiff..
Johnston & Horn for defendants.

WALKER, J. This is an action for the recovery of land. Plaintiff claimed title under a grant (No. 2596) issued to Jacob Shope in 1862, upon an entry made by him in 1859, and the will of Jacob Shope
(406) devising the land to her. Defendants claimed under a purchase made by Clark Byrd from the State, under the act of 1819, providing for the sale of the lands acquired by treaties with the Cherokee Indians of 1817 and 1819. They connected themselves with Byrd by mesne conveyances. A grant was issued by the State to Clark Byrd, as purchaser, in 1864, and recites the fact that the tract is a part of the land acquired by treaty from the Cherokee Indians and sold under the provisions of the act of the General Assembly to Clark Byrd, who had paid the purchase money. The grant of Jacob Shope recites the fact that the tract therein described is a part of the land acquired by treaty from the Cherokee Indians and sold under the act of General Assembly aforesaid, but it does not state that it was bought by Jacob Shope, but that he entered it. Both grants were duty registered, and it was admitted that they covered the land in dispute. It was also admitted that the land described in the grant to Clark Byrd, No. 2934, was Section No.

11, District No. 17, in Macon County, acquired by treaty from the Cherokee Indians, surveyed by the State in 1820 and bought at a sale made by the commissioner for the State, by Clark Byrd, to whom the said grant issued in accordance with the statute concerning the sale of Cherokee lands. And the grant which was issued to Jacob Shope in 1859 upon his entry was for the same land as that described in the grant issued to Clark Byrd.

The court charged the jury that if they found as a fact that the plaintiff, Mrs. Anderson, is the same person to whom the land was devised by Jacob Shope, the plaintiff would be entitled to recover the *locus in quo*, as the grant to Jacob Shope was issued more than two years before the grant was issued to Clark Byrd, under whom the defendants claim. The court, therefore, made the plaintiff's right to recover depend solely upon the seniority of the grant to her father, who devised it to her. All of the charge is not set out, but whatever else the judge may have said to the jury, and however correct it may have been, if there was error in the instruction as to the grants, there must be a new trial, as the instructions were so blended that we cannot tell which one influenced the jury to give their verdict for the plaintiff. *Tillett v. R. R.*, 115 N. C., 663; *Edwards v. R. R.*, 129 N. C., 80. (407) The instruction as to the grants was erroneous. It appeared upon the face of both that the land which plaintiff's father had entered, and upon which his grant was issued, was not the subject of entry, as the act of 1852 only authorized entry of those Cherokee lands which were then vacant, and lands which had been sold by the State no longer belonged to it, and were not, therefore, vacant and subject to entry. By his purchase at the sale which was made pursuant to the statute, the grantee, Clark Byrd, acquired, not a mere option, such as an enterer under the general law would get by his entry, but the right or interest of a purchaser, the relation being that of vendor and vendee. The act of 1852, under which Jacob Shope made his entry, permitted an entry only of those lands when vacant or which had not been previously sold under the Cherokee land statutes. *Frasier v. Gibson*, 140 N. C., 275; Laws of 1852, chap. 119; Code, chap. 11. As it appears that the land in dispute had already been sold, it was not the subject of entry, and any grant issuing upon such an entry is void. The case cannot be distinguished from *Harshaw v. Taylor*, 48 N. C., 513. In that case the facts were that plaintiff made an entry of the *locus in quo* in 1852. The defendant purchased the same from the Indian land commissioners, under Laws 1836-7, it being Cherokee land.

Referring to the right to attack a grant collaterally, and stating that it depends upon whether the jurisdiction of the officer to issue it is

general or special, *Judge Pearson* said: "Upon these two distinctions our case is easily disposed of. The act of 1852 confers a *general* authority. It extends to all unsold land at a fixed price per acre. But it was properly admitted by the plaintiff's counsel that the grant to him could not be supported by the aid of that statute (act of 1852); (because) the statute only authorizes the entry and grant of vacant and *unsold* land, whereas the land in controversy had been previously surveyed and sold according to the provisions of the statutes in reference to land lying in the county of Cherokee." Speaking to a like question, *Justice Connor* said in *Janney v. Blackwell,* 138 N. C., 437: "The statutes in force in this State for more than a century have permitted 'all (408) vacant and unappropriated lands belonging to the State,' with certain well-defined exceptions, to be entered and grants taken therefor. Code, sec. 2751. 'To be subject to entry under the statute, lands must be such as belong to the State and such as are vacant and unappropriated.' *Hall v. Hollifield,* 76 N. C., 476; *S. v. Bevers,* 86 N. C., 588. By making the entry as prescribed by law, the enterer does not acquire any title to the land, but only a 'preëmption right,' or, as it is sometimes called, an 'inchoate equity' or right to call for a grant upon compliance with the statute. The grant, when issued, relates to the entry and vests the title in the grantee. The land when granted is no longer subject to entry as 'vacant and unappropriated lands.' *Featherstone v. Mills,* 15 N. C., 596; *Hoover v. Thomas,* 61 N. C., 184; *S. v. Bevers, supra; Newton v. Brown,* 134 N. C., 439. It follows, therefore, that if one lay an entry upon and procure a grant for land covered by a grant, he acquires no title thereto, for the reason that the State has by the senior grant parted with its title. *Stanmire v. Powell,* 35 N. C., 312. If the land be open to entry, and a grant be issued therefor, such grant may not be attacked collaterally for fraud, irregularity, or other cause. This can be done only by the State or by pursuing the provisions of section 2786 of The Code. But if the land be not subject to entry, the grant is void, and may be attacked collaterally."

We think, therefore, that the instruction of the court was erroneous.

There were questions discussed as to the statute of limitations, with special reference to the bearing of *Ritchie v. Fowler,* 132 N. C., 788; *Frasier v. Gibson, supra,* upon the case; but the facts of those cases and this one are not alike. In the two former cases there was a conflict between entries made under the act of 1852 and subsequent modifying statutes, while in this case the land had been sold under the act of 1819 and subsequent enabling statutes, and was, therefore, not the subject of entry under the other acts mentioned. Whether Clark Byrd complied with the statute is a question not presented. He paid the

purchase money, though it does not appear when it was paid, (409) if that be material. *Kimsey v. Munday,* 112 N. C., at p. 830, citing *Gilchrist v. Middleton,* 108 N. C., 705.

With the facts now before us, we are of the opinion that there was error in the instruction given to the jury.

New trial.

Cited: Smathers v. Hotel Co., Ib. 349; *s. c.,* 162 N. C., 402; *Tilghman v. R. R.,* 167 N. C., 173.

G. R. WESTFELT v. W. S. ADAMS.

(Filed 28 May, 1912.)

1. Interpretation of Statutes—Construed Together.

Statutes relating to the same subject-matter should be interpreted to harmonize with each other when it can reasonably be done.

2. Cherokee Indian Lands—Entry—Interpretation of Statutes.

Lands acquired by treaty with the Cherokee Indians in 1817 and 1819, and not already surveyed, were made subject to entry by Public Laws 1835, chap. 6; and the act of 1836-37, amending the act of 1835, refers to the Cherokee lands which had been reserved or allotted to "any Indian or Indians" under the treaties of 1817 and 1819 and afterwards bought by the State, and not to the lands then acquired under the treaties, providing, as to the lands reserved or allotted to "any Indian or Indians," that they be sold in the manner pointed out by the statute, and prohibiting entry as to them.

3. Same—Grants—Amendatory Acts—Repeal.

The acts of 1836-37, requiring that the Cherokee Indian reservations be surveyed and sold, were passed several days before the Revised Statutes which incorporated the acts of 1835-36, permitting entry upon the Cherokee Indian lands acquired by the State under treaty with the Indians, and by the express terms of the Revised Statutes the acts of 1835-36 did not take effect until after the ratification of the act of 1836-37: *Held,* the act of 1836-37 is not in conflict with the act of 1835-36; but, if otherwise, it was repealed by the Revised Statutes.

4. Cherokee Indian Lands—Treaties—Vacant Lands—Evidence—Location.

In order to ascertain whether there were any lands acquired by the State by treaty with the Cherokee Indians in 1817-1818 lying west of the Meigs and Freeman line and situated in Macon County, which were vacant and subject to entry, the Court will consider the act of 1852, chap. 70,

validating entries of a certain entry-taker in Macon County made after the expiration of his term of office; acts of 1852 authorizing entries of lands in said county, and others of like nature.

5. Same—Burden of Proof—Presumptions.

The defendant having introduced his grants for lands lying in Macon County west of the Meigs and Freeman line, which were issued 10 November, 1854, upon entries made 15 February, 1850; *Held*, in the absence of proof to the contrary, it will be assumed that the lands entered were a part of those acquired by the State from the Cherokee Indians in 1817 and 1819, which were open to entry at that time, if there were no other land in that county then subject to entry.

6. State's Lands—Grants—Presumptions—Vacant Lands—Evidence—Collateral Attack.

While it is true that a State's grant of land cannot be attacked collaterally for fraud or irregularity and there is a presumption that it is valid and that all requisite preliminary steps have been taken, the officer must have had power or jurisdiction to issue the grant, and it may be shown collaterally that the lands described in the entries and grants were not subject to entry.

7. State's Lands—Grants—Location—Evidence—Entries.

It is competent for the jury to consider the boundaries contained in an entry of land as evidence on a disputed location of the land claimed under the grant issued upon the entry, where the location of the land is not positively and clearly shown by the survey and the grant, though in a certain sense the entry is not a part of the documentary title, and the survey and description in the grant controls if sufficiently definite for location upon its face.

8. State's Lands—Grants — Entries — Location — Evidence — Instructions—Court Opinion on Evidence.

In this action, involving title to lands in dispute claimed by defendants under certain grants from the State, it was error for the trial judge to direct an affirmative answer to an issue when by so doing he withdraws from the consideration of the jury descriptions in the defendant's entries, and parol evidence tending to show that the lands claimed did not include the *locus in quo*.

9. Issues—Misleading—Pleadings.

Issues should be framed from the pleadings, and those in this case are not commended.

(411) APPEAL from *Justice, J.*, at September Term, 1910, of HAYWOOD.

This action was brought by the plaintiffs to recover the possession, and damages for the detention, of a tract of land in the county of Swain, on the waters of the Tennessee River, known as Section No. 2325, containing 640 acres, and described as follows: "Beginning at a chestnut

on the west side of the Jenkins Trail leading to the Smoky Mountains, and runs thence east four hundred and ninety (490) poles to a stake; thence south two hundred and five (205) poles to a stake; thence west four hundred and ninety (490) poles to a white oak; thence north two hundred and five (205) poles to the beginning." There are allegations in the complaint that the plaintiffs are the owners in fee of the land and entitled to the possession, and that the defendants are in possession of the same and unlawfully and wrongfully withhold the possession from the plaintiffs. These allegations are denied in the answer, and the defendants specially aver, as a defense and counterclaim, that they are seized in fee, as owners, of two tracts of land in the county of Macon, bounded and described as follows:

1. Beginning at a mountain oak on the Little Forked Ridge and runs south 45 west 100 poles to a stake; thence north 45 west 160 poles to a stake; thence north 45 east 100 poles to a stake; thence south 45 east 160 poles to the beginning, being State Grant No. 1545, issued 10 November, 1854.

2. Beginning at a birch, and runs north 160 poles to a stake; thence west 100 poles to a stake; thence south 160 poles to a stake; thence east 100 poles to the beginning, being State Grant No. 1546, issued 10 November, 1854.

That said two tracts of land are located on the ridge lying between Sugar Fork Creek and Haw Gap Creek, commonly known as the Little Fork Ridge, and so called, and are the lands whereon the defendants were conducting mining operations at the date of the commencement of this action.

It is further alleged in the answer: "That the plaintiffs unlawfully and wrongfully claim an interest in said land, and to be the owners of the same, pretending that they are embraced within the boundaries of the tract of land described in the complaint herein, which said pretended claim the defendants say has no foundation in fact." (412) Judgment is prayed that the plaintiffs take nothing by their suit, and that the defendants go without day, and, further, that defendants are the owners of the said two tracts of land, and that plaintiffs and their privies in estate be enjoined perpetually from hereafter making any claim or asserting any title thereto.

When the case was called for trial, plaintiffs tendered the following issues:

1. Are the plaintiffs the owners of the lands described in the complaint and indicated on the official plat by lines H, P, O, N, in black?

2. Are the defendants in wrongful possession of said lands?

3. What damage, if any, are plaintiffs entitled to recover?

The court refused to adopt these issues and, instead thereof, submitted issues to which the jury responded, as follows:

1. Are the plaintiffs the owners and entitled to the possession of the land described in the complaint, without regard to its location, provided the defendant's Grants Nos. 1545 and 1546 are not located on it? Answer: Yes.

2. Is the tract of land described in plaintiffs' complaint, Grant No. 2325, located as designated on the maps, beginning at the point marked H and to P, O, N, in black letters on the maps? Answer: No.

3. Is the plaintiffs' tract, Grant No. 2327, located as designated on the maps, beginning at the point marked H and to I, R, Q, in black letters on the maps? Answer: No.

4. Are the defendants the owners and entitled to the possession of the two tracts of land described in the answer, Grants Nos. 1545 and 1546, without regard to their location? Answer: Yes.

5. Is the tract, Grant No. 1545, located as designated on the maps, beginning at point marked Mountain Oak, W, and to X, Y, Z, in red letters on the maps? Answer: Yes.

6. Is the tract, Grant No. 1546, located as designated on the maps, beginning at point marked birch, S, and to T, U, V, in red letters on the maps? Answer: Yes.

Plaintiffs excepted to the ruling of the court upon the issues. (413) There was much evidnce taken in the case and many exceptions noted to the rulings of the court, which we will consider in the order of their statement in the record. Judgment was entered on the verdict for the defendants, and the plaintiffs appealed.

A. C. Avery, F. A. Sondley, T. F. Davidson, and J. C. Martin for plaintiffs.

J. H. Merrimon, Moore & Rollins, Aycock & Winston, and J. J. Hooker for defendant.

WALKER, J. It is conceded that the land in controversy is a part of the land acquired by the State under treaty with the Cherokee Indians. The fact is recited in the grant, under which the plaintiffs claim, that the land herein described is "a part of the land lately acquired by treaty from the Cherokee Indians," and the defendants, in their brief, thus refer to the grants under which they claim: "It seems clear, therefore, that the lands embraced in grants numbered 1545 and 1546 were of 'vacant and unsurveyed lands acquired by treaty of 1817 and 1819,' and made subject to entry from 1 May, 1836, by Public Laws 1835, chap. 6, page 7." The plaintiffs' grant was issued to E. H. Cunningham assignee, on 28 April, 1860, upon an entry made by Daniel L. McDowell, of 640 acres, which the grant recites was sold for $64, as Indian

land, under an act of the Legislature. The grants of the defendant, Nos. 1545 and 1546, and each for 100 acres, were issued on 10 November, 1854, upon entries made on 15 February, 1850. The grants so recite, and the entries, upon which they are based, were put in evidence by the plaintiffs. There was no attack made by the defendants upon the title of the plaintiffs to the lands claimed by them, so far as the validity of the grant issued to their predecessor, E. H. Cunningham, is concerned; but the defendants contended solely that the plaintiffs had failed to locate their grant and to show that it embraced any of the lands in dispute. There was a sharp and protracted controversy between the parties as to the true location of the several grants introduced by them, the defendant denying that the plaintiff's Grant No. 2325, which was alleged by them to include the *locus in quo*, or Grant No. 2327, upon which plaintiffs relied to show the location of Grant No. (414) 2325, had been correctly located, and the plaintiffs denying that Grants 1545 and 1546 had been correctly located by the defendants.

There was much testimony introduced by the parties to support their respective contentions, but we will not refer to any of it at present, as we deem it proper to consider, in the beginning, the validity of the defendants' Grants 1545 and 1546, which are assailed by the plaintiffs, for if they are invalid, the question of location as to them will become immaterial, except in so far as the evidence upon that question and the charge of the court with respect thereto may have been prejudicial to the plaintiffs in the location of their grants.

The validity of the defendants' grants must depend upon the proper construction of the Cherokee laws. As said in the defendants' brief: "The Indian title, or right of occupation, was extinguished by the following treaties made and concluded between the United States and the Cherokee Nation or tribe of Indians, to wit: The Treaty of Holstein of 2 July, 1791, 7 U. S. Stat., 39; The Treaty of Tellico of 2 October, 1798, 7 U. S. Stat., 62; The Treaty of 8 July, 1817, 7 U. S. Stat., 156; The Treaty of 27 February, 1819, 7 U. S. Stat., 195; The Treaty of New Echota of 29 December, 1835, 7 U. S. Stat., 478."

At a very early period, the entry of lands within the Indian hunting grounds, or of any lands either ceded by the Indians or conquered from them, was forbidden by statute, and the bounds of such Indian lands were carefully delineated. Laws 1778, chap. 132; Laws 1783, chap. 185, which will be found in Potter's Revisal, pp. 354 and 484. By the Laws 1809, chap. 774 (Potter, 1161), it was provided as follows: "The land lying west of the line run by Meigs and Freeman, within the bounds of this State, shall not be subject to be entered under the entry laws of this State; but the same, when the Indian title shall be extinct, shall remain and inure to the sole use and benefit of the State; any law

to the contrary notwithstanding. All entries made, or grants obtained, or which may hereafter be made or obtained, shall be null and void."

The last act, as its preamble, and even the language we have (415) quoted, evidently show, was intended to apply to Indian lands only, and there may not have been any other land west of the Meigs and Freeman line. By the treaties of 1817 and 1819 the State acquired a large area of land from the Cherokee Indians, which by the act of 1819, chap. 10, was directed to be disposed of by sale, after being surveyed, except such as would not command a certain price, and those lands, which were called the "residue," were "reserved" for future disposal by the Legislature, and the act prohibited the entry of lands so acquired. In 1823 the State acquired by purchase from certain individuals of the Cherokee tribe of Indians the lands which, under the treaties of 1817 and 1819, had been allotted to them, and did not, of course, pass to the State by the treaties.

The policy of the State from the beginning, in regard to the Indian lands acquired by treaty, had been, and continued to be until the year 1835, that none of said lands should be subject to entry, but should be disposed of by sale only, as provided in the several acts of the Legislature relating thereto, which, however, differed in some particulars or details from each other, though substantially alike and enforcing the general purpose to withhold them from entry. But by the act of 1835, chap. 6, it was provided that the lands acquired by the treaties of 1817 and 1819, and which were "'vacant and unsurveyed," should be subject to entry as other lands in the State, and by act of 1836, chap. 7, the lands purchased from the Indians in 1823 were excepted from the operation of the act of 1835, or, to be more accurate, the latter act was declared not applicable to them, and the Legislature had made no provision for their disposal by sale or otherwise. They were simply owned by the State, but not subject to entry.

So far the legislation of the State relating to the Cherokee lands is comparatively easy of construction, and we may say that the legislative meaning is plain and unmistakable.

In 1835, by treaty with the Cherokees, the State acquired additional lands, and Laws 1836, chap. 9, provided for the survey and sale of such part of the lands, lately acquired by treaty with the Cherokee Indians, as would bring a certain price, and reserved the residue (416) for the future disposal of the Legislature, and prohibited entry of the same. This act provides further, in sections 20 and 21, as follows: "It shall be the duty of the commissioner to be appointed by virtue of this chapter to cause to be surveyed and offered for sale all the reservations remaining undisposed of in the county of Macon, under the same rules and regulations that are provided for the surveying and sell-

ing the lands lately acquired by treaty from the Cherokee Indians. And it shall be the duty of the said commissioners of sale to expose again to sale all the lands already surveyed and now remaining unsold in the county of Macon aforesaid."

The act of 1835 was inserted in the Revised Statutes of 1837, as a part of section 1, chapter 42, on Entries and Grants, which reads as follows: "All vacant and unappropriated lands belonging to this State shall be subject to entry in the manner herein provided, except in the cases hereinafter mentioned. It shall not be lawful for any entry-taker to receive an entry for any lands lying to the westward of the line run by Meigs and Freeman in 1802, as the then boundary line between this State and the Cherokee Nation, except the vacant and unsurveyed lands that have been acquired by treaty from the Cherokee Indians in 1817 and 1819."

The act of 1835 was amended by Laws 1836-7, chap. 7, which provided that it should not apply to the land reserved or allotted to the Indians in the treaties of 1817 and 1819, which, therefore, were not subject to entry, and the amending act of 1836-7 was inserted in the Revised Statutes as section 36 of chapter 42, which is as follows: "Nothing in this act contained shall be so construed as to authorize or allow the entry of any portion of the Cherokee lands which were reserved or allotted to any Indian or Indians under the Cherokee treaties, which the State has since acquired by purchase; and the Secretary of State is hereby directed to issue no grant for any portion of the lands of the latter description until the General Assembly shall otherwise order and direct."

The "Act concerning the Revised Statutes" provided that certain enumerated acts therein contained, including the chap- (417) ter or act on Entries and Grants, but not including the act of 1836-7, relating to the survey and sale of Indian lands, should take effect on 1 January, 1838. It also provided that the acts of a public nature passed by the Legislature in 1836-7, with one exception, should be published in the first volume of the Revised Statutes with the acts enumerated therein, and to which we have referred, and other acts were required to be published in the second volume. The chapter concerning Entries and Grants was published in the first volume of the Revised Statutes, and the act of 1836-7, relating to the survey and sale of Indian lands, in the second volume, under the title, "Cherokee Lands," with other laws upon that subject. The act of 1836-7, amending the act of 1835, so as to exclude the lands purchased from the Indians from its operation and prohibiting the entry of them, was ratified 10 January, 1837; the other act of 1836-7 on 20 January, 1837, and the Revised Statutes on 23 January, 1837. This gives, as briefly as we can state it, the legislative history of these several statutes.

The plaintiffs contend that the act of 1835, authorizing the entry of the vacant and unsurveyed Indian lands, was repealed by the act of 1837, passed 20 January, because by the twentieth section of the latter act the commissioners are required to survey and sell all the Indian reservations in Macon County undisposed of at that time, while the defendants contend that the act of 20 January, 1837, sec. 20, refers to the land known as the Indian reservation, which had been acquired by contract or purchase in 1823 (Laws 1823, chap. 9), which contract was ratified by Laws 1824, chap. 11, sec. 2 (Revised Statutes, pages 196 and 198), and they rely upon subsequent statutes recognizing the fact that there were lands in the county of Macon which were subject to entry under the general law, viz.: Laws 1852, chap. 70, recites that William Tatham, former entry-taker of Macon County, had received entries, in 1850 and 1851, after the expiration of his term of office, and the Legislature provided that entries made in the entry-taker's office of said county, and all warrants, surveys, and grants based thereon, in the past or the future, should be valid, as if William Tatham had rightfully held
(418) said office. Laws 1852, chap. 169, authorized entries of lands in Macon and Hawood counties under the provisions fo that act, at the present rates, and declared that all lands theretofore entered in said counties and not paid for, could be paid for as therein provided for lands lying in Cherokee, the money received by the entry-takers of said county to be paid "to the contractors for making the Western Turnpike Road, on the certificate of the proper agent." It is also contended that Laws 1850-51, chap. 25, secs. 5 and 6, clearly show that there was land in Macon County which was subject to entry immediately prior to the passage of that statute. The lands in dispuate lie in the county of Swain, the territory of which was taken from the county of Macon in 1871. It is argued that as there were no lands in Macon County which were not acquired from the Cherokee Indians, whether by treaty or purchase, and none west of the Meigs and Freeman line, the lands thus subject to entry must, of necessity, have been Indian lands; and if this be true, it follows that they were the lands opened for entry by the act of 1835.

We are satisfied, from a careful examination of this question in every conceivable aspect, that the contention of the defendants is justified by the facts. We are convinced that there were no lands west of the Meigs and Freeman line which were the subject of entry prior to 1851, other than the lands mentioned in the act of 1835, which were acquired by the treaties of 1817 and 1819 from the Cherokees. Section 20 of the act of 1836 evidently referred to the lands reserved to certain individuals of the Cherokee tribe, otherwise the statutes upon this subject cannot well be harmonized, and it is our duty to reconcile them, if it can reasonably be done.

The chapter on entries and grants in the Revised Statutes will appear, by reference to the Legislative Journals of 1836-7, to have been what was called one of the "revised acts," and was passed one or two days after the act of 1836-7, requiring the Indian reservations to be surveyed and sold. It also appears that the chapter on entries and grants of the Revised Statutes (which includes the act of 1835) did not take effect, by the terms of the first chapter of that revisal, until 1 January, 1838, whereas the act of 1836-7 was ratified 20 January, 1837, (419) and took effect thirty days after the rise of the General Assembly of that year, which adjourned on 23 January, 1837, as will appear by the journals. If, therefore, the act of 1836-7 is in conflict with the act of 1835, it was repealed by the Revised Statutes, the first section of the chapter on entries and grants, authorizing the entry of vacant and unsurveyed Indian lands acquired by the treaties of 1817 and 1819, having taken effect with the other revised statutes on 1 January, 1838, much later in date than the time when the act of 1836-7 was ratified and in force.

It further appears, as we have already shown, that by several subsequent acts of the Legislature, the fact is established that lands were being entered in Macon County in 1850 and 1851, if not prior to those years. The warrants of survey, under the entries upon which Grants 1545 and 1546 issued, were signed by William Tatham on 15 February, 1850, and these entries and warrants were put in evidence by the plaintiffs. The act passed in 1836-7, providing for the sale of the Indian lands, refers to those acquired by the last treaty in 1835.

We conclude, therefore, that the vacant and unsurveyed lands, acquired by the treaties of 1817 and 1819, were the subject of entry in February, 1850, when defendants' entries were made; and we must assume, in the absence of any proof to the contrary, that the lands entered by Jonathan Hill in February, 1850, were a part of those lands. *Harshaw v. Taylor,* 48 N. C., 513; *Dosh v. Lumber Co.,* 128 N. C., 84. Laws 1852, chap. 169, opened land in the Cherokee boundary to entry in a restricted way, and it was not until 1883, 2 Code, secs. 2478, 2479) that all of the Cherokee lands were made the subject of entry and grant under the general law of the State relating to the subject.

Plaintiffs' counsel contend that this Court, in *Stanmire v. Powell,* 35 N. C., 312; *Lovingood v. Burgess,* 44 N. C., 407, and *Frasier v. Gibson,* 140 N. C., 272, has decided that no entry of any of the Cherokee lands could be made prior to 1852; but we do not so construe those cases. The first two related to land in Cherokee County, which was not affected by the act of 1835, as it was not acquired by the (420) treaties of 1817 and 1819, but by the treaty of 1835; and the act of 1836-7 provided for the survey and sale of the lands in that county.

What was said in *Frasier v. Gibson* had reference to the lands acquired by treaty of 1835 and to the act of 1836-7, authorizing a survey and sale of them. The immediate context clearly shows that this is what was meant by the learned justice who wrote the opinion of the Court, and it is now fully conceded, and it must be admitted, that the act of 1835 did authorize the entry of a part of the lands acquired by the treaties of 1817 and 1819. It would be strange indeed that an office was open in Macon County in 1850 for the purpose of receiving entries of land, if there were no lands in the county which were subject to entry, and plaintiffs introduced in evidence several entries made during that year. No satisfactory reason has been given for this strange anomaly. Besides, we cannot think that the Legislature would validate entries filed with William Tatham because his term of office had expired, as it did by Laws 1852, chap. 70, if it was not lawful to make entries of land in Macon County at that time and the entries thus made and the warrants of survey issued thereon were void. That act purports to validate all entries made in Macon County prior to 1852, though the reason assigned is that the official term of Tatham had expired.

It is true that a grant cannot be attacked collaterally for fraud or irregularity. There is a presumption that a grant is valid and that all preliminary steps have been taken which are required by law. *Chief Justice Marshall* stated the rule clearly in *Polk v. Wendal,* 9 Cranche (U. S.), 87, as follows: "The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the State from imposition. Officers are appointed to superintend the business, and rules are framed prescribing their duty. These rules are, in general, directory and when all the proceedings are completed by a patent issued by the authority of the State, a compliance with these rules is presupposed. That every prerequisite has been performed is an inference properly deduci-
(421) ble, and which every man has a right to draw from the existence of the grant itself." *Lovinggood v. Burgess,* 44 N. C., 407; *Strother v. Cathey,* 5 N. C., 102; *Stanmire v. Powell,* 35 N. C., 312. But all this presupposes that the officer had power or jurisdiction to issue the grant. "If they (the lands) never were public property or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the deparment would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide." *Smelting Co. v. Kemp,* 104 U. S., 636. "When the lands are not, in fact, vacant and

unappropriated, or when the law forbids entry of vacant land in a particular tract or country, a grant for a part of such land is absolutely void; and that may be shown on the trial in an action of ejectment." *Board of Education v. Makely,* 139 N. C., 37.

These being Cherokee lands, therefore, we do not see why the plaintiffs may not show, if they can, that the lands described in the defendants' entries and grants were not a part of the vacant and unsurveyed lands acquired by treaties with the Indians in 1817 and 1819, and therefore were not subject to entry. *Janney v. Blackwell,* 138 N. C., 439. This course was taken and approved in *Harshaw v. Taylor,* 48 N. C., 513.

Justice Connor said in *Janney v. Blackwell, supra:* "It follows, therefore, that if one lay an entry upon and procure a grant for land covered by a grant, he acquires no title thereto, for the reason that the State has by the senior grant parted with its title. *Stanmire v. Powell,* 35 N. C., 312. If the land be open to entry and grant be issued therefor, such grant may not be attacked collaterally for fraud, irregularity, or other cause. This can be done only by the State or by pursuing the provisions of section 2786 of The Code. But if the land be not subject to entry, the grant is void, and may be attacked collaterally."

And *Judge Pearson* said in *Harshaw v. Taylor, supra:* "But it was properly admitted by the plaintiff's counsel, that the (422) grant to him could not be supported by the aid of that statute (act of 1852), because the statute only authorizes the entry and grant of vacant and unsold land, whereas the land in controversy had been previously surveyed and sold according to the provision of the statutes in reference to land lying in the county of Cherokee."

The defendants' counsel admit that there were no lands in Macon County other than those acquired from the Indians in 1817 and 1819, which could be entered in the year 1840.

The statutes which have any material bearing upon the questions herein discussed are collected, in the order of their enactment, in The Code of 1883, chap. 11, except the act of 1835, the act of 1836-7 exempting land purchased in 1823 from the operation of that act, and the act of 1852 relating to entries filed in the office of William Tatham, to which full reference has been made.

But while the court correctly held the defendants' grants to be valid, upon the evidence as it now appears, there was error in other respects. Upon a careful examination of the charge, we think the court substantially told the jury that, in locating the several grants, they need not consider the entries. It is true that, in a certain sense, the entry is not a part of the documentary title, and that the survey and description in the grant must control; but that is no reason why the entry should be

disregarded altogether, and especially in a case like this one, where the location of the land is not positively and clearly shown by the survey and grant. All of the grants call for trees—chestnut, mountain oak, and birch—as the beginning corners of the several tracts, and the remaining description is equally as indefinite.

The plaintiffs contended that the defendants' land, as described in grants 1545 and 1546, were on the waters of Eagle Creek, as described in the entries, and not on or near the waters of Haw Gap Creek and Sugar Fork Creek, and that the Little Fork Ridge, mentioned in Grant 1545, was far north of the place at which defendants located their two grants,
(423) and near the waters of Eagle Creek. The plaintiffs further contend that their grant, No. 2325, should be located on the west or northwest side of Hazel Creek, and not where the defendants say it should be located, that is, considerably north of Hazel Creek and at a place which would not be designated as lying west or northwest of Hazel Creek, in describing its true location. For these reasons, the plaintiffs have argued before us that the court should not have excluded the entries from the consideration of the jury, and in this position we concur.

It is true that the description in the grant is paramount in locating the land, and must override that in the entry if the latter is in conflict with it, but the entry may be considered in determining the location of the land described in the grant, at least in cases of doubt as to the true location. The language of the court must have produced the impression upon the jury that they could only consider the description in the grant and what the surveyor did in locating the land, as they were told, among other things equally objectionable, that "the description in the grant constitutes the real location of the land, without regard to the entry." This was correct in one respect, but in order to ascertain what the grant really described and what the surveyor really did, it was competent to consider the entry, in this case at least, as the description in the grant would fit a tract of land on Eagle Creek as well as one on or near Haw Gap Creek at the place where defendants contend their entries were surveyed.

The court directed the jury to answer the fourth entry in the affirmative, without permitting them to pass upon the oral testimony introduced by the defendants to show that the title, which had been vested in Stephen Munday by the grants of 1545 and 1546, and mesne conveyances, had passed out of him and had been acquired by them. This was an error, if we are to follow numerous decisions of this Court to the effect that the court cannot find any fact, but must leave even the credibility of the witnesses to the jury, however, plain direct, and conclusive the proof may appear to be, as the following cases will show:

"It is the province of the jury to find the facts involved in the issue or issues presented in the pleadings, and in all the cases the credibility of witnesses is exclusively for the jury to consider." (424) *Burrus v. Insurance Co.*, 121 N. C., 62.

"The present case is not like either of these, for the State had not made out a case, unless the State's witness was believed, and the credibility of a witness must be passed on exclusively by the jury. It is true, from the case as made out, there could be but little room to doubt that both defendants were guilty, and the wonder is why the jury should have hesitated about convicting both. Still, that was a matter for the jury, and its being a plain case, although it accounts for, does not legalize, this novel mode in entering a verdict." *Justice Clark* in *S. v. Riley*, 113 N. C., 648.

"Both the issue and the credibility of the evidence offered tending to establish the position of either party in reference to it were for the jury and not for the court." *Justice Hoke* in *Bank v. Fountain*, 148 N.C., 590.

"The jury are the constitutional judges, not only of the truth of testimony, but of the conclusions of fact resulting therefrom. The evidence may, in the opinion of the court, have been ever so strong against the defendant, yet it was for the jury to find the ultimate fact of guilt, without any suggestion from the court, direct or indirect, as to what the finding should be." *S. v. R. R.*, 149 N. C., 470; *S. v. Simmons*, 143 N. C., 618; *Bank v. Pugh*, 8 N. C., 206; *S. v. Lilly*, 116 N. C., 1049.

Such an instruction also is expressly forbidden by statute. "No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." Revisal, sec. 535.

Where the facts are undisputed the judge may direct a verdict in a civil case, but not in a criminal case, and he cannot do so in either where the facts are not admitted and the credibility of the witness is involved.

There was no admission of facts in this case. The statement is that there was oral evidence, in addition to the documentary, tending to prove certain facts. The evidence is not set out, and this, perhaps, is not material, as it would still remain for the jury to decide as to the credibility of the witnesses, even if the evidence strongly (425) tended to prove the facts in issue. The plaintiff had denied the defendants' title, and the burden, therefore, was upon the latter to establish it in every particular. The same error was committed in charging the jury as to plaintiffs' title, but the defendant did not except and appeal, and we cannot review the judge in this respect.

There are other errors assigned by the defendant, but it is not necessary to discuss them. The error as to the entries permeated the entire case and was not confined to the defendants' title. It was just as competent for the plaintiffs to use their entry in locating the land described in Grant 2325, as it was for them to use defendants' entries in order to show that they had not properly located their land. But an error on either side would induce us to award a general new trial, as the two locations are so closely related.

The issues do not strongly commend themselves to us. They are unusual, somewhat involved, and may have misled the jury. It is better to follow the beaten path and submit the ordinary issues in such cases. Issues are raised by the pleadings, and should be framed accordingly, unless the parties agree upon special issues, but that is not so in this case. The plaintiffs objected to each of the issues, and they are not those made by the pleadings.

New trial.

IDA E. GARRISON ET AL. V. R. WILLIAMS ET AL.

(Filed 22 May, 1912.)

1. Issues Sufficient.

The issues in this case held sufficient.

2. State's Lands—Grants—Vacant and Unappropriated—Previous Grants.

When upon competent evidence, and under proper instructions, the jury have found, in their answers to the issues, that the defendant's grants to lands, claimed by plaintiff also under grants from the State, covered the *locus in quo* at the time of plaintiff's entry, the lands at that time were not vacant and unappropriated, and plaintiff cannot recover them. Instructions in this case held correct, under *Bowen v. Lumber Co.*, 153 N. C., 368.

3. State's Lands—Grants—Boundaries—Instructions—Harmless Error.

As the lands described in the grant in dispute were found by the jury to have previously been granted by the State to the defendant: *Held*, an instruction, if erroneous, was harmless, as to the running of one of plaintiff's lines with the county line.

(426) APPEAL from *Webb, J.*, at December Term, 1911, of BURKE.

The court submitted to the jury the following issues, fifteen in number:

1. Did Ida E. Garrison enter the lands in controversy on 14 January and 10 March, 1902? Answer: Yes.

2. Did the defendant Williams enter the same lands on 6 January and 10 March, 1902? Answer: Yes?

3. Was the notice of the entries made by Ida E. Garrison posted as the law directs at the same time said entries were made, or within a short time thereafter? Answer: Yes.

4. Was the protest entered by Williams filed within ten days after the aforesaid notice of the Garrison entries were posted? Answer: No.

5. Are the lands in dispute covered by the grants of the plaintiff? Answer: Yes.

6. Were the lands claimed by the plaintiff and covered by her grant, No. 16532, vacant and unappropriated lands of the State of North Carolina at the time plaintiff made her entry of the same? Answer: No.

7. Were the lands claimed by the plaintiff and covered by her grant, No. 16533, vacant and unappropriated lands of the State of North Carolina at the time plaintiff made her entry of the same? Answer: No.

8. Were the lands claimed by the plaintiff and covered by her grant, No. 16534, vacant and unappropriated lands of the State of North Carolina at the time plaintiff made her entry of the same? Answer: No.

9. Did the defendant Williams, with notice of the said entries of Ida E. Garrison, obtain his grant for said land and thereafter convey said lands to the defendant R. F. Whitmer? Answer: Yes.

10. Did the defendant Whitmer take title to the lands described in the complaint with notice of the alleged equity of the (427) plaintiff? Answer: No.

11. Did the defendant Table Rock Lumber Company take title to the land conveyed to it by Whitmer on 24 February, 1906, with notice of the alleged equity of the plaintiff? Answer: No.

12. Did the Table Rock Lumber Company convey said land to the Empire Trust Company by deed of 1 March, 1906, after this suit was begun, in order to secure a proposed issue of bonds, and was said land afterwards by deed reconveyed by the Empire Trust Company to the Table Lumber Company or the Table Rock Lumber Company on the ..... day of ....., 1906? Answer: Yes.

13. If any bonds were issued under and pursuant to the said deed of trust to the Empire Trust Company, were they paid by the Table Rock Lumber Company prior to or at the time of said reconveyance? Answer: At time of reconveyance.

14. Did the plaintiff request, in good faith, the entry-taker to issue to her her warrants of survey on her entries a day or two after the protest was filed by Williams? Answer: No.

15. Did the entry-taker refuse to issue the warrants of survey to the plaintiff for the reason that the protest had been filed by Williams? Answer: Yes.

The court rendered judgment that the defendants go without day and recover their costs. The plaintiffs appealed.

John M. Mull and S. J. Ervin for the plaintiffs.
J. F. Spainhour and Avery & Ervin for the defendant.

PER CURIAM. This action was brought by the plaintiff for the purpose of having the defendants declared trustees for the plaintiff of certain tracts of land described in the amended complaint, the plaintiff claiming that in August, 1900, she duly entered the said land in the county of Burke, and that in 1902 the defendant Richard Williams entered the same land, and that his rights, if he had any, have passed to his codefendants with notice of the plaintiff's entries.

At a former trial the case was appealed to this Court and heard upon a demurrer to the complaint. The cause was remanded for a new trial.

(428) There are fifteen assignments of error set out in the record, which in the view we take of the case need not all be considered. The plaintiff tendered two issues which were refused by the court, and, as we think, properly so. The issues submitted covered every phase of the case, and presented every point of contention between the parties.

The claim of the plaintiff is founded upon three grants, which are made the subjects of the 6th, 7th, and 8th issues, as follows:

6. Were the lands claimed by plaintiff and covered by her grant, No. 16532, vacant and unappropriated lands of the State of North Carolina at the time plaintiff made her entry of the same? Answer: No.

7. Were the lands claimed by plaintiff and covered by her grant, No. 16533, vacant and unappropriated lands of the State of North Carolina at the time plaintiff made her entry of the same? Answer: No.

8. Were the lands claimed by plaintiff and covered by her grant, No. 16534, vacant and unappropriated lands of the State of North Carolina at the time plaintiff made her entry of the same? Answer: No.

One of the essentials to a valid entry under the statute is that the lands should have been vacant and unappropriated at the time of the entry. As the jury have found that the lands were not vacant at the time of the plaintiff's entry, but were covered by the Avery and Tate grants, that of necessity terminates the plaintiff's case, unless there was some error made in the trial of these particular issues.

We find that there is abundant evidence in the record to sustain the findings of the jury. In instructing the jury as to the manner in which

grants and deeds should be located, his Honor followed precisely the rules laid down by *Mr. Justice Hoke* in *Bowen v. Lumber Co.*, 153 N. C., 368. The charge of the court is clear and pertinent to these issues, and we find no error in it.

It is not clear to us that the plaintiff was prejudiced by instructions of the court to the jury as to running one of the lines of Grant 6556 to J. C. Tate with the county line, inasmuch as the jury have found that all of the land covered by the plaintiff's grant had been previously granted to Tate and Avery. (429)

We think it unnecessary to discuss any further assignments of error in this case. The law of the case was settled and well stated in the opinion of *Mr. Justice Walker,* and seems to have been followed carefully by his Honor on this trial.

Upon a review of the record, we find no substantial error which we think would warrant us in ordering another trial.

No error.

Cited: Barefoot v. Lee, 168 N. C., 90.

LAURA J. FEATHERSTONE v. LOWELL COTTON MILLS.

(Filed 15 May, 1912.)

1. Liability Insurance—Evidence of Indemnity—Prejudicial Questions—Correction—Presumptions—Courts—Discretion.

It is not a relevant circumstance, in an action for damages for personal injuries negligently inflicted, whether or not the defendant's liability is protected under an insurance policy; and if plaintiff has asked a question of this character in bad faith, before the jury has been impaneled, and which likely operated to defendant's prejudice, a recovery against him should not be allowed to stand. The presumption, however, is that the court below properly corrected any prejudice which may have been produced and that intelligent jurors rejected it; and therefore the matter is largely left in his discretion.

2. Jurors—Interest—Corporations—Officers and Employees.

Stockholders, officers, or employees of an indemnifying company are incompetent to serve on the jury in an action against the indemnified for damages covered by the policy.

APPEAL from *Long, J.*, at January Special Term, 1912, of GASTON.

Action to recover damages for personal injuries. Verdict for plaintiff and judgment, and defendant excepted and appealed, assigning for error:

1. That plaintiff's counsel, for the purpose of ascertaining their competency to serve as jurors, was allowed to ask, over defendant's
(430) objection, if they were interested as stockholders, officers, or employees, etc., of the Maryland Casualty Company.

2. That while court was examining an authority on the subject, plaintiff's counsel stated in the hearing of the jurors and before they were selected, "I desire to ask the attorney for defendant if the Lowell Cotton Mills pays one cent of any recovery in the action up to $5,000?" Defendant objected on the ground "That the statement was calculated to prejudice the jury, and because irrelevant and impertinent." The court sustained the objection, and added that defendant's counsel was not required to answer the question. The jurors, already in the box, were then sent out, and it was shown that defendant company held an insurance policy in the Maryland Casualty Company to $5,000 and was denying its liability thereunder because not notified as required," etc. The jurors having returned, plaintiff's counsel inquired of them if there was any members of the jury interested in the said casualty company, if so, he desired to excuse them. Defendant objected to the question; court overruled objection, stating it had allowed the question for the purpose of enabling counsel to ascertain if any juror was interested as agent or otherwise in the Maryland Casualty Company, but only for the purpose of allowing plaintiff's counsel to peremptorily challenge such juror. Defendant excepted.

The case on appeal here proceeds as follows: "No juror excused himself on this ground, but there were some jurors, probably as many as three, who were objected to by plaintiff's counsel for some other reason, and stood aside, and other jurors, either from the regular panel or from bystanders, were called into the box, and the jury was thus supplied with twelve jurors. After such new jurors were called into the box, the plaintiff propounded, among other things,, the same question as set out above. The defendant objected. The court allowed the question to be asked for the purpose above set out, and the defendant excepted."

The jury having been obtained, were impaneled and verdict and judgment for plaintiff. Defendant, as heretofore stated, excepted and appealed.

(431) *Thomas F. McDow, William H. Lewis, and A. G. Mangum for plaintiff.*

O. F. Mason for defendant.

PER CURIAM. Under our decisions, the stockholders, officers, or employees of the casualty company would not be impartial or competent

jurors to determine the issue, and under all ordinary conditions the questions asked by counsel on the *voir dire* were not improper. *Norris v. Cotton Mills,* 154 N. C., 474; *Blevins v. Cotton Mills,* 150 N. C., 493.

It has also been held with us, however, that the fact that a principal defendant is protected from liability by an insurance policy is not a relevant circumstance on the trial of the issue (*Lytton v. Manufacturing Co.,* 157 N. C., 331); and before jury impaneled, if it should be made to appear that questions of this character have been asked in bad faith and have likely operated to defendant's prejudice a recovery should not be allowed to stand. In this case, on the facts as presented, both the questions asked of the jurors, the same being as a rule competent, and that addressed to defendant's counsel, are matters which must be left largely to the discretion of the court below, and it must be presumed that the character and good sense of the jurors selected have protected them from improper bias or that any such tendency has been effectually checked and corrected by the learned and impartial judge who presided at the trial.

We find no error in the record to justify the Court in disturbing the results of the trial.

Cited: *Starr v. Oil Co.,* 165 N. C., 591; *Deligny v. Furniture Co.,* 170 N. C., 204; *Oliphant v. R. R.,* 171 N. C., 304.

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(432)

ELLEN HOLTON v. TOWN OF MORGANTON.

(Filed 15 May, 1912.)

Cities and Towns—Streets and Sidewalks—Contributory Negligence—Burden of Proof—Ordinary Care—Specific Instructions—Appeal and Error.

The plaintiff sued the defendant town for damages for an injury received in attempting to cross a ditch alleged to have negligently been left across the sidewalk. The court charged the jury correctly that the burden upon the issue of contributory negligence was upon the defendant to show that the plaintiff had not exercised ordinary care. An exception to the charge, that the court failed to declare and explain the law of contributory negligence, should have been taken by offering a special prayer containing the instructions desired.

APPEAL from *Long, J.,* at Fall Term, 1911, of BURKE.

This action is to recover damages against the town of Morganton for personal injuries sustained, as the plaintiff alleges, by the negligence of the defendant in permitting a ditch or gully to remain open across one of its sidewalks.

The negligence is alleged in the complaint as follows:

"That on or about 1 August, 1909, while plaintiff was walking along on said sidewalk, hereinbefore set out and described, going from the depot to the home of her son, E. W. Holton, near the intersection of said sidewalk with King or Church Street, which was the nearest and most direct route, street, or sidewalk to the home of her son, as aforesaid, and when she reached a point about half the distance of said sidewalk, to wit, about 200 yards, going in the direction of the residence of her son, and in attempting to avoid the gullies and ditches on said sidewalk, as hereinbefore alleged, and trying to get from one side of said sidewalk, across a large ditch in the middle of said sidewalk, which was about 20 inches deep, to the other side of the sidewalk, on account of the dangerous, defective, and unsafe condition of said sidewalk, and without any negligence or fault on her part, her foot slipped into said ditch or gully, throwing her violently to the ground and into the aforesaid ditch or gully, and breaking her left arm, so that she was rendered unable to use said arm for a long time, and was con-
(433) fined to her room for a month or two; that she incurred heavy expense in employing a physician and buying medicine, and that she suffered and still suffers much pain, all to her great damage."

The defendant denied negligence, and pleaded contributory negligence as a defense.

Evidence was introduced on behalf of the plaintiff and defendant on the issues of negligence and contributory negligence.

The jury returned the following verdict:

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

2. Did the plaintiff by her own negligence contribute to her own injury? Answer: Yes.

3. What damage, if any, is plaintiff entitled to recover? Answer: Not answered.

There is no contention on the part of the plaintiff that there was no evidence of contributory negligence.

Judgment was rendered in favor of the defendant, and the plaintiff excepted and appealed.

R. L. Huffman and Spainhour & Mull for plaintiff.
S. J. Ervin and Avery & Avery for defendant.

PER CURIAM. There are ten exceptions in the record, seven of which are to rulings upon the first issue, which we need not consider, as this issue was answered in favor of the plaintiff.

The eighth exception is to a part of his Honor's charge on the second issue, which, when considered alone, might be the subject of criticism;

but if read in connection with other parts of the charge, it will be seen that the plaintiff's contention was fairly submitted to the jury.

His Honor told the jury more than once that the burden of the second issue was on the defendant, and that the plaintiff would not be guilty of contributory negligence if she exercised ordinary care.

The ninth exception is that his Honor failed to declare and explain the law as to contributory negligence.

We think he did so, but if he did not, it was the duty of the plaintiff to request more specific instructions. *Craft v. Albe-* (434) *marle Timber Co.*, 132 N. C., 151.

It appears, however, from the record, that all prayers for instructions tendered by the plaintiff, six in number, were given, two of which relate to the second issue, and are as follows:

"5. The court instructs you that if you find the plaintiff saw the ditch in front of her across the sidewalk, if she exercised reasonable care in stepping down into the ditch, and you find this was done for the purpose of being careful, and, in doing so, you find that she used reasonable care, and in her effort to get out of the ditch in a reasonably careful manner she slipped and fell and an injury was thereby caused, then she would not be guilty of contributory negligence, and you should answer the second issue 'No..'

"6. The court instructs you that though the plaintiff saw the condition of the sidewalk, it would not bar her of a recovery or make her guilty of contributory negligence unless the obstruction or defect in the sidewalk was of such a character that a prudent person in her condition would not have attempted to cross the same, and if you find that she used reasonable or ordinary care for her own safety, then you would answer the second issue 'No.' "

The tenth exception is formal, to the refusal to set aside the verdict.

We see no reason for reversing the judgment.

No error.

B. B. BRADY v. CITY OF RANDLEMAN AND RANDOLPH POWER COMPANY.

(Filed 1 May, 1912.)

Cities and Towns—Streets and Sidewalks—Lighting—Negligence—Discretion—Contracts.

In an action against an incorporated town and a lighting company for damages to one who was injured by a third person running into him with a horse and buggy, it appeared that he was pushing a hand-cart along the

street at the time of the injury, as required by the ordinance; that the street was in good condition; and the only negligence alleged was that an additional electric light should have been placed there: *Held*, (1) the number of lights and their placing was within the discretion of the proper town authorities, for which the town would not be liable, and no liability attached to the lighting company acting under the direction of the town authorities in placing the lights (*Johnson v. Raleigh*, 156 N. C., 269, cited and applied); (2) there was no breach of contract by the lighting company with the city to give the plaintiff a cause of action against the former (*Gorrell v. Water Co.*, 124 N. C., 328, cited and distinguished).

(435) APPEAL from *Daniels, J.*, at December Term, 1911, of RANDOLPH.

Action to recover damages for personal injuries, caused by alleged negligence on the part of defendants. At the close of the entire testimony, on motion of defendants and properly entered, there was judgment as of nonsuit, and plaintiff excepted and appealed.

E. Moffitt and J. T. Brittain for plaintiff.
H. M. Robins for defendant.

PER CURIAM. There was evidence tending to show that on 5 July, 1909, about 9 o'clock p. m., plaintiff, pursuing his regular occupation, was taking the United States mail in a handcart from the post-office to the railroad station in the town of Randleman, and at the time was on Depot Street in said town, when he was run into by a horse and buggy driven by a third person, and seriously injured. The ordinance prohibited carts of the kind from being on the sidewalk, and plaintiff, with his cart, was at the time of the injury in the street proper, or driveway.

It appears that the defendant the Power Company was under contract to supply lights for the town at a specified rate, the poles and lights to be erected and placed under the direction and supervision of the board of aldermen and the street committee. The lights to be turned on not later than half an hour after sundown and to be kept in action "until 12 o'clock, except on nights when the moonlight would render the electric lights useless." That the arrangement was just being entered upon, and all the lights required had not been placed. That Main Street was lighted to the depot or station, and one of the lights on that street was as near as 75 feet, but the effect was very much destroyed by the intervening buildings. That a light was put on the street in question on the night following the injury.

Plaintiff testified himself that the street where the injury occurred was in good condition. "Macadamized and all right," in the language of the witness, and the only negligence imputed was the absence of proper

lights. Without considering the allegations of contributory negligence alleged against the plaintiff, we think that his Honor made correct decision in directing a nonsuit. Our cases hold that the absence of lights in a town, even when power has been conferred upon the authorities to light the streets, is not negligence *per se,* but is only a relevant circumstances as to whether the streets at a given place are in a reasonably safe condition. *Johnson v. Raleigh,* 156 N. C., 269; *White v. New Bern,* 146 N. C., 447. And a perusal of these cases and the authorities cited will further show that even when the lighting of the streets has been undertaken and entered on, the number of lights required and their placing are left largely to the discretion of the city authorities.

Applying the principle, and on the facts in evidence showing there was a firm, broad, smooth way, in good condition, we concur in the view that no breach of duty was shown against the city; and the Power Company, which could only place the lights as required by the city, are necessarily without fault. Nor is there evidence in the record that justifies or permits a finding that there was a breach of contract on the part of the Power Company, giving plaintiff a right of action against said company on the principle upheld and applied in *Gorrell v. Water Co.,* 124 N. C., 328.

There is no error, and the judgment dismissing the action is

Affirmed.

Cited: *Morton v. Water Co.,* 168 N. C., 585, 591.

LEE S. OVERMAN v. MATTIE LANIER ET ALS.

(Filed 17 April, 1912.)

Executors and Administrators—Interest Chargeable.

In this case it was decided that the account of the plaintiff, administrator, should "be reformed to charge him with interest from the date of filing the report on so much of the amount which is now adjudged to be due by him at that date, on which interest is not calculated in the judgment below": *Held,* the interest should be calculated from the time the administrator filed his report, on the amount finally adjudged to be due, and not from the time the referee in the case filed his report.

APPEAL by defendant from *Lyon, J.,* at May Term, 1911, of (437) ROWAN.

T. J. Jerome, E. J. Justice, E. C. Gregory, L. H. Clement, C. W. Tillett and T. F. Kluttz for plaintiff.

Manly, Hendren & Womble, Walser & Walser, Burwell & Cansler, and Geo. W. Garland for defendants.

PER CURIAM. This case was decided at last term, 157 N. C., 544. The present appeal is upon the construction placed by the court below on the following language in our opinion: "The account should also be reformed to charge the administrator with interest from the date of filing the report on *so much of the amount which is now adjudged to be due by him at that date, on which interest is not calculated in the judgment below.*"

Administration was taken out in December, 1894. In August, 1904, the plaintiff, administrator, filed his final report, showing a balance of $685.34 due by him at that date to the distributees. This proceeding was instituted by him in September, 1904, to have his final report approved and judgment of final discharge entered (Revisal, 150). The next of kin answered, alleging that said amount admitted to be due by the final report of the administrator was incorrect, and that sundry large sums were due them. The matter was submitted to a referee, and his report, which was filed in January, 1911, adjudged that the balance due by the administrator was $5,346.33, with interest thereon. This Court adjudged that a further amount was due by the administrator, *i. e.*, $1,000.

It did not appear from the record whether interest was calculated by the referee from the date of the filing of the final report of the
(438) administrator in August, 1904, down to the judgment in May, 1911, or not, or, if it was, upon what sums. It seems clear that no interest was allowed upon the balance due by the administrator from filing the referee's report in January, 1911, to the judgment in May, 1911, and certainly none was allowed upon the additional amount of $1,000 added by the judgment of this Court.

This Court being of opinion that the true amount adjudged to be due by the administrator at the time of filing his report in August, 1904, should bear interest from that date, decreed that the account should be reformed as above stated, *i. e.*, "that the account should be reformed to charge the administrator with interest from the date of filing the report" (by which we meant from filing his report in August, 1904) "on so much of the amount which is now adjudged to have been due by him at *that date,* on which interest is not calculated in the judgment below." The context of the opinion indicated this, as we thought, plainly. It would have been better, it seems, as there were two reports—one by the administrator in August, 1904, and the other by the referee

in January, 1911—that we should have specifically stated which was meant, but we were discussing then the balance due by the administrator and not any alleged errors of the referee, all of which had been passed on.

The report of the referee will be reformed so as to ascertain, under the opinion of this Court, the true amount due by the administrator in August, 1904, instead of the $685.34 which his final report then admitted to be due, and interest will be calculated upon such balance from that date. *Bushee v. Surles,* 79 N. C., 53. The administrator should have filed a final report showing the true amount due by him to that date, and should have paid over the same to the defendants, or, if declined, he should have paid it into the clerk's office to stop the running of interest (Revisal, 145). On the contrary, he claimed and used as his own all above $685.34, and did not even pay that into the office.

The case will be remanded, so that the court below may proceed in accordance with this opinion.

Reversed.

FANNIE H. THOMPSON v. MARCELLUS SMITH ET AL.

(Filed 17 April, 1912.)

Appeal and Error—Executors and Administrators—Bad Faith—Costs—Interpretation of Statutes.

The motion of plaintiff to tax the defendant administrator with costs of appeal is denied, as he was appellee therein, and nothing appears to the Court to show that he has acted in bad faith, etc. Revisal, sec. 1277.

APPEAL by plaintiffs from *Peebles, J.,* at the October Term, (439) 1911, of WAKE.

J. H. Fleming for plaintiff.
B. M. Gatling for defendant.

PER CURIAM. This is a motion by plaintiff to tax the defendant Marcellus Smith personally with the costs of this Court. Defendants were successful in the court below in the case, and plaintiff appealed. The judgment was reversed here, and the cause remanded to be further proceeded with in accordance with law. We do not see any reason, at present, for giving a personal judgment against Smith. He was brought here by the plaintiff's appeal, and his conduct has not been frivolous, and he has done nothing to make himself personally liable. The de-

fendants should pay the costs of this Court, as administrators, and they will be allowed a credit for the same in their administration account, unless the plaintiff can show sufficient reason to the lower court why it should not be allowed. Provision as to the recovery of costs against executors and administrators is made in Revisal, sec. 1277, where such costs are declared to be "chargeable only upon or collected out of the estate, fund, or party represented, unless for mismanagement or bad faith in prosecuting or defending the action, the Court shall direct the same to be paid personally by the representative," but no such case is presented here. The motion is denied, with costs to be taxed.

Motion denied.

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(440)

NELLE CLAIRE FLEMING v. PERCY B. FLEMING.

(Filed 10 April, 1912.)

Habeas Corpus—Motions — Pendente Lite — Practice — Appeal and Error— Costs.

The order, in this case, of the lower court upon motion made *pendente lite* for the custody of the minor children of the parties, etc., is set aside without discussion of the findings of fact, as such might prejudice the case in its further stages, leaving the moving party to renew her motion for alimony and counsel fees, *pendente lite* at any time at chambers, or at a regular term of court, should the trial be delayed. The costs are equally taxed between the parties.

APPEAL from WAKE from order rendered by *Peebles, J.*, at chambers, 13 September, 1911.

This was a motion in the cause for alimony *pendente lite* and for the custody of two children, George Mortimer Fleming and Nelle Bryan Fleming, ages respectively four and three years, and for counsel fees.

His Honor rendered a judgment and made certain findings of fact and law, to which the defendant excepted, and appealed to the Supreme Court.

John W. Hinsdale, Herbert E. Norris, and W. M. Person for plaintiff.

Douglass, Lyon & Douglass for defendant.

PER CURIAM. Upon a review of the entire record in this case, we are of opinion that some of the assignments of error are well taken and must be sustained. Inasmuch as this application is for alimony *pendente lite* and the custody of children, we do not deem it advisable to review the case at length immediately preceding its trial upon the issues

raised by the pleadings, which is soon to take place before a jury in the Superior Court. It is possible that a discussion of it by us might be prejudicial to one party or the other upon such trial.

We will content ourselves by setting aside the order and remanding the cause to the Superior Court of Wake County to be heard by the judge upon the motion of the plaintiff when the issues of (441) fact raised by the pleadings have been determined by the jury.

If there is any delay in the trial of the cause, the plaintiff shall have a right to renew her motion for alimony *pendente lite* and counsel fees at any time at chambers, or at a regular term of the court. In the meantime, we affirm so much of the order as awards the custody of the two children to the plaintiff pending the trial of the cause before a jury upon the issues raised by the pleadings.

The cost of the appeal will be paid by the appellant and the appellee in equal parts.

Remanded.

NELLE CLAIRE FLEMING v. PERCY B. FLEMING.

(Filed 10 April, 1912.)

MOTION before *Peebles, J.*, WAKE, October, 1911.

The defendant appealed.

PER CURIAM. This cause is brought to restrain the defendant from disposing of certain property in aid of the proceeding between the same parties, No. 229, at this term, for alimony.

This last named case has been remanded to the Superior Court of Wake County for another hearing, and this case is so intimately connected with it that it will take the same course.

Remanded.

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(442)

W. M. JOHNSON, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 April, 1912.)

Appeal and Error—Evidence—Nonsuit.

In this action for the wrongful killing of plaintiff's intestate, a judgment of nonsuit on the evidence was properly denied, the negligence of the defendant's conductor in giving the signal to start being sufficient, under the circumstances, to take the case to the jury.

APPEAL from *Cooke, J.*, at November Term, 1911, of CHATHAM.

This was a civil action. These issues were submitted to the jury:

1. Was the plaintiff's intestate killed by the negligence of the defendant?

2. Did plaintiff's intestate, by his own negligence, contribute to his injury?

3. What amount, if any, is plaintiff entitled to recover from the defendant?

The jury answered the first issue "Yes," the second issue "No," and the third issue "$5,000."

N. Y. Gulley & Son, R. H. Dixon and Hayes & Bynum for the plaintiff.

Rose & Rose and H. A. London & Son for the defendant.

PER CURIAM. We have examined carefully the several assignments of error set out in the record, and we are of opinion that his Honor properly denied the motion for nonsuit.

We think that there was sufficient evidence to be submitted to the jury that the intestate fell from the car by reason of negligence in giving the signal by the conductor at the moment he did. We do not deem it necessary to discuss the facts, as these cases differ so materially from each other that a discussion of the evidence is of no material value.

We have examined the charge of his Honor, and think that he presented the case to the jury fairly and fully, and in accordance with the well-settled precedent of this Court.

No error.

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(443)

STATE EX REL. S. E. MIDGETT v. W. R. GRAY.

(Filed 28 May, 1912.)

1. Appeal and Error—Record—Quo Warranto—Admissions—Corrections—Consent of Attorney-General—Interpretation of Statutes—Practice.

It appearing that, by inadvertence, the record in this action of *quo warranto* to try the title of office did not show that permission of the Attorney-General was given according to the requirements of Revisal, sec. 826, it is held that proof of such permission given anterior to the commencement of the action may be offered upon the new trial awarded, and upon failure thereof the action may be dismissed.

2. Two Offices—Acceptance—Vacancy—Constitutional Law.

The acceptance and qualification for one office vacates *eo instanti* an office already filled by the same incumbent.

3. Same—Acceptance—Qualification—Oath—Estoppel.

A clerk of the Superior Court, while holding this office, was elected a school committeeman, qualified as such, and after having met with the other committeemen, resigned in writing his position as such to the board of education: *Held*, he was estopped by his resignation to deny that he had accepted the office, or his qualification therein, and the fact that he was not sworn on the Bible will not avail him.

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

Quo warranto to try title of defendant to the office of Clerk of the Superior Court of Dare.

This issue was submitted to the jury: "Did defendant accept and qualify and enter upon the duties of School Committeeman of District No. 15, white race, as alleged in the complaint? Answer: "No."

The court rendered judgment for the defendant. Plaintiff appealed.

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

PER CURIAM. 1. It does not appear in the record that the relator has ever obtained the permission of the Attorney-General to institute this proceeding, which is a condition precedent to the right of plaintiff, who personally does not claim the office, to maintain the ac- (444) tion. Revisal 1905, sec. 826.

Since the former opinion in this case was published, but not certified down, we are informed that such permission was given in writing as required by law, but that the record of it was inadvertently omitted in the transcript of appeal. As the case is to be tried again, proof of such permission given anterior to the commencement of the action may then be offered, and for failure to do so the action may be dismissed. No such objection is taken by defendant, and therefore we presume the permission of the Attorney-General was regularly obtained.

2. The plaintiff in apt time asked the court to charge the jury: "If you believe all the evidence in this cause, it will be your duty to answer the issue 'Yes.'" This was refused. Plaintiff excepted.

We think the court should have given the instruction.

The defendant offered no evidence. The evidence offered for the plaintiff is uncontroverted, and, if believed, proves these facts:

The defendant was duly elected and qualified as Clerk of the Superior Court of Dare County.

Afterward, on 5 July, 1911, while holding said office, he was duly elected School Committeeman of Dare County for School District No. 15.

On 22 July, 1911, defendant qualified as school committeeman and took the oath of office. On 15 August, 1911, he resigned the office of school committeeman in these words:

To the Honorable Board of Education, Dare County, N. C.

GENTLEMEN:—I hereby respectfully tender my resignation as School Committeeman for the Fifteenth District, to take effect from date hereof. This 15 August, 1911. W. R. GRAY,

School Committeeman.

In the meantime he had talked with A. W. Price, County Superintendent of Public Instruction, about the schools.

He had had a meeting in his office with the other two committeemen and with Professor Eason present, who was present upon invitation of W. R. Gray.

(445) It is well settled that the acceptance and qualification for one office vacates *eo instanti* an office already filled by the same incumbent. *Barnhill v. Thompson,* 122 N. C., 493.

That the defendant was not sworn on the Bible when he qualified as school nommitteeman will not avail him. He is estopped to deny his qualification. *S. v. Long,* 76 N. C., 254; *S. v. Cansler,* 75 N. C., 442.

The defendant, if the evidence is to be believed, held himself out and acted as school committeeman. He signed his name as such and in writing resigned the office of school committeeman. Having resigned such office, the defendant cannot be heard to say that he did not accept it. He could not resign an office which he had never accepted or qualified to discharge its duties.

The former opinion in this case is canceled.

New trial.

Cited: Whitehead v. Pittman, 165 N. C., 90; *S. v. Knight,* 169 N. C., 341.

WILSON LUMBER AND MILLING COMPANY v. HUTTON & BOURBONNAIS COMPANY ET AL.

(Filed 28 May, 1912.)

1. Deeds and Conveyances—Calls—Adjoining Lines—Evidence.

When the line of another tract of land is definitely called for as one of the termini in a grant or deed, and this line is fixed and established, it will control a call by course and distance, whether such line is marked or unmarked.

2. Same—Questions for Jury.

Additional evidence being offered by the defendant since the last appeal of this case, tending to show that the line of another tract called for as one of the termini and boundary in his grant was a well-recognized and established line or lines closing the survey and boundary as contended for and claimed by him, it is held that the question of location was properly submitted to the jury.

CLARK, C. J., dissenting; BROWN, J., concurring in the dissenting opinion.

APPEAL from *Long, J.*, at May Term, 1911, of CALDWELL.

Trespass to realty. There was verdict for defendant. Judgment on the verdict, and plaintiff excepted and appealed.

The facts are sufficiently stated in *per curiam* opinion. (446)

Edmund Jones and Finley & Hendren for plaintiff.

W. C. Newland, J. T. Perkins, Mark Squires, and Council & Yount for defendant.

PER CURIAM. On a former appeal in this cause, reported in 152 N. C., 544, the facts will sufficiently appear to indicate the purport of the present decision. It was chiefly urged for error in the present trial that the court below had made unwarranted departure from the rulings made in the former opinion, by which the cause should be tried, and more especially in submitting the case on the position that if the "Daniel Moore" line and "Jesse Gragg's line" and the line of John Crisp's own land, called for in defendant's grant and made two of the termini of the lines therein and the boundary of a third, "were known and established lines," they would control the calls by course and distance, also appearing in the grant.

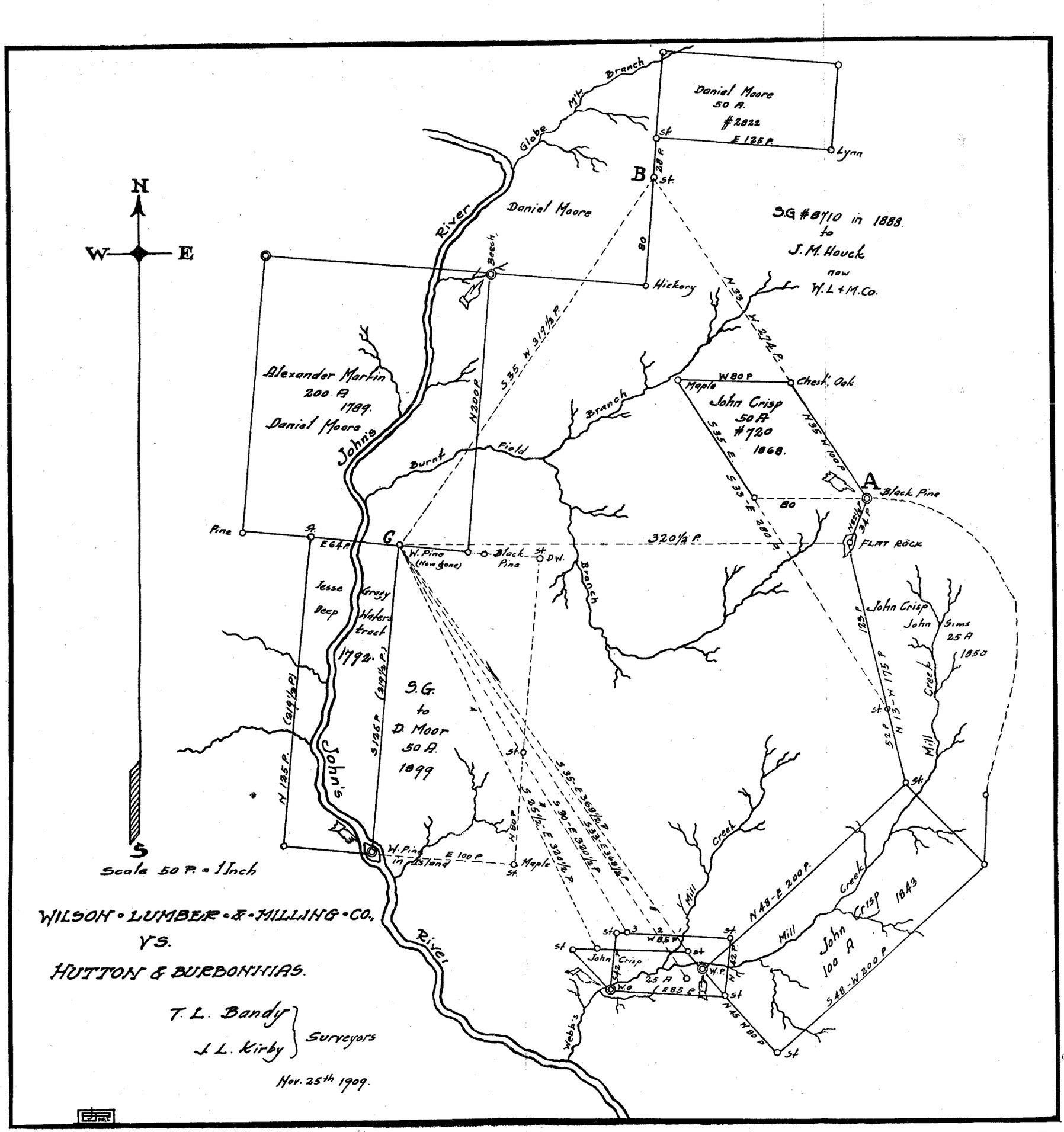
We are of opinion, however, that the objection rests on an erroneous concept of the former decision. It is a settled principle with us in the law of boundary, that, when the line of another tract is definitely called for as one of the termini of a call in a grant or deed and this line is fixed and established, it will control a call by course and distance.

Whitaker v. Cover, 140 N. C., 280, and authorities cited. And where the line of another tract is the one called for and is sufficiently "proved and established," the principle applies, whether such line is marked or unmarked. *Campbell v. Branch,* 49 N. C., 313; *Corn v. McCrary,* 48 N. C., 496. This position was fully recognized on the former appeal, and was well stated by the *Chief Justice* as follows: "It is true that the general rule is that course and distance must give way to a call for a natural boundary, and that the line of an adjacent tract, if well known and established, is a natural boundary. But this is because such natural boundary is usually considered more certain, being at a fixed and definite place, if 'established and known,' and therefore unchangeable and more likely to be the true call in the deed than course and distance which may, by inadvertance, be incorrectly written down. The reason of the law is the life thereof. *Ratione cessante, cessat ipsa*
(447) *lex.* The rule of construction which ordinarily prefers the call for the boundary of another tract to course and distance is based upon the reason that the former is usually more certain than the latter, and only applies when the boundary of the other tract is established and well known."

On that appeal, however, a majority of the Court were of opinion that the lines of adjacent tracts, called for and made the termini of two of the lines of defendant's grant and the boundary of a third, to wit, the Daniel Moore line and the Jesse Gragg line, and John Crisp's own line, were not sufficiently established to require or permit the application of the principle, and the calls by course and distance afforded the safer guide to a proper location. On the present trial, additional evidence was offered by defendant tending to show that the Daniel Moore line was a well-known and established line, and there were also additional deeds and testimony offered tending to show that the John Crisp line, referred to and made the last call of defendant's grant, was a well-organized and established line or lines closing the survey and boundary as contended for and claimed by defendant. This additional testimony, tending as it did to show that these lines of adjoining tracts, called for as termini and boundaries of defendant's grant, were sufficiently proved and established, was such as to permit and require that the question of location should be considered by the jury, on the principles referred to, and we find nothing in the charge of the court or in the other features of the trial which gives plaintiff any just ground of complaint. There is no error, and the judgment for defendant is affirmed.

No error.

CLARK, C. J., dissenting: This case was before us, 152 N. C., 537, where the map was set out which shows the remarkable nature of the



WILSON • LUMBER • & • MILLING • CO.,

VS.

HUTTON & BURBONNAIS.

T. L. Bandy
J. L. Kirby
} Surveyors

Nov. 25th 1909.

defendant's contention in this case. In accordance with that decision and its subsequent approval in the opinion by *Hoke, J.,* in *Bowen v. Lumber Co.,* 153 N. C., 369, there is error on the present appeal, for which there should be a new trial.

"The reason of the law is the life thereof," and "when the (448) reason ceases, the law ceases." These two rules are well recognized by sound common sense and must be observed to save the law from degenerating into mere technicality.

At common law it was held that when a natural boundary is called for it will control course and distance. In *Cherry v. State,* 7 N. C., 82, this principle was extended owing to "the peculiar situation and circumstances of the country at that time," to hold that the line of an adjacent tract when called for should be treated as a natural boundary. The proposition is not true as a matter of fact. The line of another tract is not a natural boundary. It lacks much of being so, for it is artificial, not natural and unchangeable and unmistakable. Hence it should only be treated as such when in the nature of things it is more certain than the course and distance. It ought not to apply when, as in the present case, there is much else in the description which will make the true boundaries beyond question and when to apply to the principle will negative the better evidence and be a practical denial of the proper result.

In the present case the patent was issued by the State to Crisp, under whom the defendant claims, for 50 acres, with a plat laid down as a parallelogram on the grant which describes the boundaries as running from the beginning (which is not disputed) "N. 35 W. 100 poles to a stake in Daniel Moore's line; then W. 80 poles to a stake in Jesse Gragg's line; then S. 35 E. 100 poles to a stake in his own line; thence E. with said line to the beginning." The defendant contends that the first line should be extended to Daniel Moore's line, though this would make it 274 poles instead of "100 poles," as stated in the grant; that instead of the second call in the grant "80 poles W. to a stake in Jesse Gragg's line," the second line should run S. 35 W. 319½ poles to a *corner* of Jesse Gragg's line," though in so doing both course and distance are wide of the mark and the line would cross through two older surveys. The third line in the grant is "S. 35 E. 100 poles to a stake in Crisp's own line," and the fourth line was "and thence E. with said line to the beginnng," which of course would be 80 poles. But if this third line is run according to the defendant's contention, it would cut in half another tract and would run 388 poles instead of 100 poles, as called for in the grant, and the (449) fourth line, instead of being "east with said line to the beginning" 80 poles, would run five different courses, aggregating 400 poles, to get back to the beginning.

Instead of the 50 acres granted Crisp, the defendant will get 700 acres, 650 of which the plaintiff has paid the State for and for only 50 of which the grantor of the defendant paid the State. It is in evidence that the defendant has always listed this land for taxation under oath as 50 acres. To run the first line as the defendant contends, "to a stake in Daniel Moore's line," not only disregards the limitation of 100 poles which is a part of the description of that line, but it totally disregards the second, third, and fourth lines; it disregards the patent and gives the defendant fourteen times as much land as the State granted. It also disregards the plat laid down on the grant as required by the statute, and the fact that the description in the grant and the plat alike call for a parallelogram, and that the defendant's contention will give us a most irregular tract with eight sides instead of four, and whose boundaries will aggregate 1,313½ poles instead of 360, as called for by the grant and plat. Such a *reductio ad absurdum* is its own refutation.

It would be more certain—indeed, it would be absolutely certain—to start at the beginning and reverse the course and distance, which our decisions permit when greater certainty can be ascertained thereby (*Norwood v. Crawford,* 114 N. C., 513), though the Court does not favor reversing unless it is necessary to avoid a palpable mistake, as here, in running the course and distance in regular order. But, as was said in this case, 152 N. C., 541, "When the plat, the courses and distances, and the acreage all correspond, as they do in this case, they are more certain than the wild result which would be obtained by departing from them in attempting to give the preference to the call for "a stake in Daniel Moore's line" when there was no actual survey, and the surveyor and grantee did not know where it was," as was palpably the case.

(450) On that same page, 152 N. C., 541, this Court said: "While acreage is usually postponed to other descriptions, there are cases in which the Court has held that it was a potent, if not a conclusive factor. It was so held in *Cox v. Cox,* 91 N. C., 256. In *Baxter v. Wilson,* 95 N. C., 137, it was held that the number of acres in some cases may have a *controlling effect.* In *Peebles v. Graham,* 128 N. C., 227, the Court says: 'The general rule is that the quantity of land stated to be conveyed will not be considered in determining locations or boundaries. But there is a well-known exception to this: 'Where the location or boundary is doubtful, quantity becomes important. *Brown v. House,* 116 N. C., 866; *Cox v. Cox,* 91 N. C., 356.'" The Court further said, quoting from *Mayo v. Blount,* 23 N. C., 283: 'A perfect description which fully ascertains the *corpus* is not to be defeated by the addition of further and false descriptions.' Certainly, no stronger

appropriate cases, to the facts of this case with the most remarkable results which would follow, is to discredit the rule itself and will call for its abrogation altogether. It is merely a judicial opinion as to the weight of evidence. If held and understood, in this case, as an iron-bound rule of such devastating importance as to take precedence of and overthrow all other description that may be far more material and conducive to a correct result and admitting of no exception, this will not make for the ascertainment, but for the denial of the true boundary in all cases where there is more evidence. This is to make a judicial opinion as to the weight a jury should give to evidence an irrebuttable rule admitting of no exceptions.

(452) Upon the state of facts in this case the true rule is, as was laid down by us, 152 N. C., 537, and which has been reaffirmed by *Hoke, J.*, speaking for a unanimous Court, in *Bowen v. Lumber Co.*, 153 N. C., 369, where he says that this rule "is never departed from unless accompanying data and relevant facts make it perfectly clear that its application would lead to an erroneous conclusion, as in the recent case of *Lumber Co. v. Hutton*, 152 N. C., 537." After the facts of this case have thus been twice pronounced as not requiring the application of this rule, it ought not now to be held that they do require the application of the rule, notwithstanding the results above summed up.

It is to be doubted if in all the books of the law there can be found a single case where an arbitrary rule as to the weight to be given one description in a deed, which was expressed by judicial decision and not by statute, as a matter of convenience and for the better ascertainment of the truth, is upheld as irrebuttable and admitting of no exception whatever, even when its application will be to contradict all the other boundaries set out, and will increase the acreage fourteen-fold, and will reject entirely the plat which by statute is laid down on the grant. In its proper place and in proper cases, the rule is useful. To apply it here will be mischievous. Even in "the laws of the Medes and Persians" an exception was found, as there is to all rules. But the defendant contends that none shall be permitted to this, however palpably, even painfully, erroneous and wrong the result it shall bring about. If so, then this of itself is an exception to the general rule, that "All rules have their exceptions," for *exceptio probat regulam.*

It was of such as this that Tennyson spoke:

> *"The old order changeth, yielding place to new,*
> *Lest one good custom should corrupt the world."*

As the old Latin maxim has it: *"Quis haeret in litera, haeret in cortice."*

case for the application of this principle can be found than in this, where the courses and distances given in the grant of the tract, which was not actually surveyed, are found to agree exactly with the quantity of 50 acres described and conveyed, and with the plat attached to the grant, and where to discard them would increase the quantity of land to fourteen times that for which the State was paid."

In *Brown v. House,* 116 N. C., 866, the Court refused to extend a line to a stake in the boundaries of another tract when it would have increased the acreage only twice; whereas, in this case, to do so would make the acreage fourteen times as much. On the rehearing in that case, 118 N. C., 870, the Court reaffirmed its ruling and cited *Harry v. Graham,* 18 N. C., 76. "Where the distance called for gave out 30 poles short of the line of the other tract, the Court refused to extend the line 30 poles and held that it must terminate at the end of the distance called for." It also cited *Carson v. Burnett,* 18 N. C., 546, which held that "The course and distance called for must control unless there is another call more definite and certain than course and distance," and cited *Kissam v. Gaylord,* 44 N. C., 116; *Spruill v. Davenport, ib.,* 134; *Cansler v. Fite,* 50 N. C., 424, and *Mizell v. Simmons,* 79 N. C., 182, all to the same effect.

In *Mizell v. Simmons,* 79 N. C., 190, where the call was "east," (451) which was palpably erroneous, the Court followed the rest of the description and read "west." So, in this case, the Court should omit the palpable misdescription of a part of the first line, "to a stake in Daniel Moore's line," and take the rest of the description of that first line, "100 poles" plus the description in the second line, "80 poles W. to a stake in Jesse Gragg's line," plus the description of the third line, "then S. 35 E. 100 poles to a stake in Crisp's line," and plus the description of the fourth, "then east with Crisp's line" to the beginning, and the acreage of 50 acres and the plat as laid down in the grant, and from these establish the land which was actually granted, for all of these are certain, and the erroneous part of the description in the first line, "to a stake in Daniel Moore's line," is as palpably erroneous as writing "east" when it should have been "west."

There is a maxim in war, "Not to leave an armed fort in the rear without masking it or taking it." At the battle of Germantown, "Chew's House," a stone building, was taken possession of by a small body of the enemy's infantry, perhaps half a company, when their army was in full retreat. One of the American generals insisted on applying the above maxim of war and halted our advancing line to take the "fort." The enemy rallied and the American cause lost a splendid victory and our independence was delayed several years thereby. To apply the above maxim of the land law, which is useful in

After the twice repeated opinion of the Court, that upon these facts the line could not be extended beyond the boundaries and acreage of the grant and plat, the court below should have so instructed the jury.

BROWN, J., concurs in the dissenting opinion of CLARK, C. J.

Cited: *Lumber Co. v. Bernhardt,* 162 N. C., 465, 469; *Lumber Co. v. Lumber Co.,* 169 N. C., 100; *Power Co. v. Savage,* 170 N. C., 628.

(453)

NANCY J. GAINEY, ADMINISTRATRIX, v. ATLANTIC COAST LINE RAILWAY COMPANY.

(Filed 10 April, 1912.)

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

Upon the admission of the parties in this action for damages for the negligent killing of plaintiff's intestate: *Held,* the plaintiff is barred of recovery owing to the intestate's contributory negligence in stepping upon the track of the defendant, under the circumstances, without looking or listening, and without introducing evidence tending to show that the defendant's passing train, which caused the death of the intestate, was not giving the customary signals or warning of its approach.

APPEAL from *Ferguson, J.,* at November Term, 1911, of NASH.

Action to recover damages for the death of plaintiff's intestate.

His Honor rendered judgment that upon the pleadings and admissions in open court, the plaintiff's intestate was guilty of contributory negligence, which bars any recovery herein, and ordered a nonsuit. The plaintiff excepted and appealed.

The following judgment was rendered:

This cause coming on for hearing before his Honor, G. S. Ferguson, and being heard upon the pleadings and the admissions of the parties, and the further admission that the two tracks of the defendant company run parallel at a distance of 13 feet apart from center to center, and the court being of opinion, upon said pleadings and admissions, that plaintiff's intestate was guilty of contributory negligence, which bars any recovery herein, it is therefore adjudged that plaintiff take nothing by her writ; that the defendant go hence without day and recover its costs of plaintiff and the surety on her prosecution bond, to be taxed by the clerk.

G. S. FERGUSON,
Judge Presiding.

The following is a return made to a writ of *certiorari* issuing from the Supreme Court:

To the Honorable, the Supreme Court of North Carolina:

In obedience to the order of the court made in the case of Nancy J. Gainey, administratrix of Robert Gainey, v. Atlantic Coast Line
(454) Railroad Company, I beg to report that when the case was called for trial and the pleading read, it was admitted that the decedent, who was standing at the side of the northbound track waiting for a long freight train which was going north to clear the crossing, walked around the end of the caboose and stepped upon the track of the southbound train and was immediately struck and killed. It was further admitted that the distance between the center of the tracks was 13½ feet.

The plaintiff admitted that she had no evidence to prove that the passenger train was not equipped with a proper headlight, and that it was not burning, or to prove that the bell was not ringing or that the whistle for the station and crossing had not been blown.

It was further admitted that there was an arc light at the crossing, which was burning.

I was of the opinion that there was sufficient room and opportunity for the decedent, after he got within the zone of danger, to have observed the approach of the passenger train before he went upon the track, and that is was negligence for him not to have done so, and to get on the track without looking and listening for the train; and under the ruling of the Court in *Coleman's case,* I stated that upon the pleadings and admissions, if that should be the evidence on the trial, I would direct a nonsuit; and in deference to this intimation the plaintiff agreed that I might order a nonsuit and she take exception thereto and appeal to the Supreme Court, which was accordingly done.

Respectfully submitted,

G. S. FERGUSON.

Henry Grady, T. T. Thorne for plaintiff.
F. S. Spruill for defendant.

PER CURIAM. When this cause was argued in this Court a writ of *certiorari* was issued, directing the judge of the Superior Court
(455) to certify up as a part of the record the admissions of the parties made in open court, and which were fully set out in the record.

His Honor having certified the said admissions in due form, they have been considered by us. We are of opinion, upon the said admissions so certified to us, and upon the pleadings, that the plaintiff's intestate was guilty of contributory negligence upon the plaintiff's own showing, and that the judgment of nonsuit was properly entered.

Affirmed.

D. J. RICHARDS v. RITTER LUMBER COMPANY.

(Filed 28 May, 1912.)

Modified upon petition to rehear.

PER CURIAM. Upon consideration of the opinion and judgment at last term, the Court is of opinion, as alleged in the petition to rehear, that the conclusion and judgment at last term should be reformed by striking out the judgment, "Defendant's appeal dismissed," and substituting in lieu thereof, after the word "record," the words "In both appeals, New Trial," as prayed in the petition to rehear.

Judgment reformed accordingly.

STATE v. WILLIAM DAVIS AND WILEY STATON.

(Filed 15 May, 1912.)

1. Roads and Highways—County Commissioners—Order Establishing Road—Appeal—Superior Court—Trial de Novo—Order Vacated.

An appeal properly taken to the Superior Court from an order of the county commissioners directing the laying out of a highway, has the force and effect of vacating the order appealed from; and pending such appeal the case does not come within the provision of the law looking to the proper maintenance and working of the roads. Revisal, sec. 2690.

2. Same—Working Roads—Indictment.

Defendants are not guilty of a violation of the statute in refusing to work on a public road, after being summoned to do so by the overseer, after they have appealed to the Superior Court from an order of the county commissioners to lay out the road in question, and have given the bond and in all respects have complied with the statute; for under the express words of the statute "the whole matter is to be heard anew"; all issues of fact raised are to be determined in the Superior Court, and the appeal vacates the order. Revisal, sec. 2690.

3. Same—Case Agreed—Special Verdict—Practice.

Defendants, being indicted for refusing to work the road, agreed with the solicitor as to the facts constituting the offense, and consented that these facts should be regarded by the court as a special verdict. Therein it appeared that the order establishing the road in question had been appealed from to the Superior Court and the appeal perfected as required by the statute. It is held that the appeal would have vacated the order establishing the road if it had been in fact from a special verdict of an impaneled jury, and when so found, the defendants should be acquitted.

STATE *v.* DAVIS.

APPEAL from *Foushee, J.*, at March Term, 1912, of HENDER-
(456) SON.

Indictment for failure to work road after notice, heard on appeal from a justice of peace and determined as on special verdict. The facts presented in form as a special verdict and agreed upon by solicitor and counsel for defendant, are as follows: "That a petition for a public road in Crab Creek Township was filed with the Board of Commissioners of Henderson County. That there was also a counter-petition filed. That an order was made by the board of commissioners that the road should be opened. That no further action was taken in the matter and the road was never opened. That four years thereafter a petition was filed before the board of commissioners, asking that the road be opened according to the order previously made. To this a counter-petition was filed. The board of commissioners having ordered that the road be opened, the counter-petitioners prayed an appeal to the Superior Court and gave bond for the costs in accordance with the statute. Pending this appeal, the overseer of the road summoned the
defendants to work on the road. The defendants refused to do
(457) so, being advised by counsel that pending the appeal the overseer had no right to work the road." Upon these facts, the court being of opinion that defendants were guilty, it was so adjudged, and defendants excepted and appealed.

Attorney-General Bickett and T. H. Calvert, Assistant Attorney-General, for the State.

Mc. D. Ray and H. G. Ewart for defendants.

HOKE, J. The first order for the laying out of the road was not pursued, and the second application was recognized and dealt with as an original petition both by the parties and the board of commissioners, and, considering the proceedings in that aspect, the case, as correctly stated by the Attorney-General, presents the single question whether defendants can be convicted of the offense of failing to work a public road after being duly notified, while an appeal was pending in the Superior Court to review the action of the county commissioners establishing the road.

The statute applicable to appeals and the effect of them in cases of this kind (Revisal, sec. 2690), is as follows: "Any person may appeal to the Superior Court at term-time from the determination of the board of county commissioners, and if any person shall appeal from the board on a petition, he shall give bond to the opposing party as provided in other cases of appeal, and the Superior Court at term shall hear the whole matter anew; and where any proceeding is instituted to lay out,

establish, alter, or discontinue public roads or to appoint and settle ferries, and the said proceeding is carried to the Superior Court in term-time by appeal or otherwise, the parties to said proceeding shall be entitled to have every issue of fact joined in said proceeding tried in the Superior Court in term-time by jury, and from the judgment of the Superior Court either party may appeal to the Supreme Court as is provided by law for other appeals."

From the broad import of the language and authoritative interpretations of this and similar statutes, as well as from the "reason of the thing," we conclude that an appeal properly taken from an order directing the laying out of a highway has the force and effect (458) of vacating the judgment or order, and that pending such appeal the case does not come within the provision of the law looking to the proper maintenance and working of the roads. *Keaton v. Godfrey,* 152 N. C., 17; *McDowell v. Insane Asylum,* 101 N. C., pp. 656-659; *Finley v. Oldham,* 68 Indiana, 114; *Taft v. Pettsford,* 28 Vt., 286; *Pool v. Breese,* 114 Ill., 594. Speaking to the question in *McDowell v. Asylum, supra, Merrimon, J.,* delivering the opinion of the Court, said: "Moreover, the statutory provision allowing the appeal from the order of the county commissioners, establishing or refusing to establish or discontinuing or refusing to discontinue a road or ferry already established, contemplates that an appeal shall lie at once from such order. The province of the Superior Court upon such appeal is not simply to correct errors of law of the county commissioners. In such case the whole matter of the application is heard *de novo,* and the parties will be entitled to have all the issues of fact raised by the petition, and the objections thereto, tried by a jury. Then, wherefore execute the principal order before an appeal would lie from it? What end could be subserved by delaying the appeal until it could be executed? It is not probable that the dissatisfied party would be content after its execution, because his objection was to establishing the road at all, and his appeal would present questions in that respect that he would be entitled to have settled and decided by the Superior Court, not exercising jurisdiction and authority simply to correct errors of law, but to hear and determine the whole matter anew upon the merits as to the facts and the law applicable. It would be idle and nugatory to execute such order before the appeal." It is otherwise with us in regard to appeals in ordinary civil litigation, but this is so by express provision of the statute in such cases. Revisal, sec. 604, and other sections looking to a stay of execution in ordinary civil judgments, as in section 1490, referring to appeals from cases tried by justice of the peace. There is no such provision, however, on appeals of the kind we are considering,

(459) and where, as in this case, "the whole matter is to be heard anew," and a party is entitled to have every issue of fact raised determined in the appellate court.

We are of opinion, as stated, that the appeal should be held to vacate the judgment. 2 Ency. Pl. and Pr., p. 323. *Lucas v. Dennington,* 86 Ill., 88; *Paine v. Cowden,* 34 Mass., 142.

It is true, we have said in *Blair v. Coakley,* 136 N. C., 405, that in the absence of specific statutory provision, appeals from the board of county commissioners should be in accord with the rules obtaining in cases of appeals from a justice's court, but this was said in reference to the more formal regulations concerning the prosecution of such appeals, and was not intended to change or alter the express provision of the statute, without restriction or limitation, that on appeals of this kind "the whole matter should be heard anew."

We have considered the appeal as if the questions raised had been formally and properly presented by a special verdict; it was so dealt with in the court below; but we must not be understood as approving the submission of facts in these cases by agreement of counsel. They should be formally stated and embodied in a special verdict by an impaneled jury. *S. v. Wells,* 142 N. C., pp. 590-596.

There is error, and on the facts presented when properly established, defendants are entitled to an acquittal.

Error.

STATE v. ANDREW MOSTELLA.

(Filed 10 April, 1912.)

1. Spirituous Liquor—Possession—Evidence—Prima Facie Case—Rebuttal—Questions for Jury.

Chapter 21, Laws of 1908, making it unlawful for persons other than licensed druggists to keep on hand spirituous, etc., liquors, in Richmond County, also provides that, with the exception of druggists, the possession of more than a quart thereof is *prima facie* evidence of guilt. Evidence is sufficient for conviction, under this statute, which tends to show that four half-pint bottles of whiskey were found concealed in the defendant's poolroom, and that 58 ounces thereof were found under his pool table in a bucket; and it was competent to show by a witness that he had found this whiskey in the bucket, which he poured into a bottle and produced at the trial, in rebuttal of defendant's evidence that the contents of the bucket was not whiskey.

STATE *v.* MOSTELLA.

2. Spirituous Liquor—Possession—Prima Facie Case—Unlawful Sales—Time Not of the Essence—Instructions—"Reasonable Doubt."

Upon the trial for an unlawful sale of whiskey in Richmond county under a special legislative enactment, making the possession of more than a quart *prima facie* evidence of guilt, the time of the possession is not of the essence, and the date laid in the bill is ordinarily not considered as restrictive or controlling on the question of proof; and the charge of the court is not held for reversible error in this case in that respect, or on the question as to reasonable doubt.

APPEAL from *Whedbee, J.*, at January Term, 1912, of RICH- (460) MOND.

Indictment for keeping liquor on hand for sale contrary to law. There was verdict of guilty. Judgment, and defendant excepted and appealed.

Attorney-General T. W. Bickett and Assistant Attorney-General T. H. Calvert for the State.

John P. Cameron and Lorenzo Medlin for defendant.

HOKE, J. The statute applicable, chapter 21, Laws Extra Session 1908, makes it unlawful for persons other than duly licensed druggists to have or keep for sale, barter, or exchange spirituous, vinous, malt, or other intoxicating liquors in the county of Richmond. By section 2, the having on hand more than one quart of the liquors in question by persons other than duly licensed druggists is made *prima facie* evidence of guilt.

There was ample evidence to sustain the verdict, and we find no reversible error which entitles defendant to a new trial of the issue.

There was evidence on the part of the State tending to show that defendant was proprietor of a poolroom, and among other things found on defendant's premises tending to establish the charge, including four half-pint bottles of whiskey in a bed under the cover, castor (461) shucks used to cover bottles, empty bottles, etc., the officer, a short time prior to indictment found a bucket containing 58 ounces of corn whiskey under the pool-room table. This the officer poured out into a large bottle, and it was produced at the trial, defendant contending there was error because it had been poured out of the bucket and on that account was no longer admissible as evidence. The officer gave the very natural explanation that he did this because he was afraid it might be overturned. The article was produced because of a claim made by defendant that the contents of the bucket was not whiskey. The objection urged goes to the force of the circumstance, but in no way affects the relevancy. Defendant objected further to a portion of his Honor's charge, as follows: • "The law presumes the defendant

is innocent, and requires the State to satisfy you beyond a reasonable doubt that he had intoxicating bitters in his possession for the purpose of sale within the county of Richmond within two years from the date of this bill of indictment. It does not make any difference what whiskey, whether this particular whiskey or any whiskey, if this evidence satisfies you beyond a reasonable doubt that he kept whiskey in his possession for the purpose of sale in violation of this act, it would be your duty to return a verdict of guilty," the objection being that the inquiry should have been confined to the precise time laid in the bill. But it is well understood that when time is not of the essence, the date laid in the bill is ordinarily not considered as restrictive or controlling on the question of proof. *S. v. Williams,* 117 N. C., 753. We find nothing in the charge as to reasonable doubt that is calculated to affect defendant's rights adversely or that was likely in any way to have misled the jury. *S. v. Whitson,* 111 N. C., 695.

No error.

Cited: *S. v. Wilkerson,* 164 N. C., 442.

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(462)

STATE v. H. N. PACE.

(Filed 28 May, 1912.)

1. Motion to Quash—Plea in Abatement—Court's Discretion—Appeal and Error—Practice.

A plea in abatement or a motion to quash a bill of indictment, made after the plea of not guilty is entered, is only allowed in the discretion of the trial court, which will not be reviewed on appeal.

2. Motion to Quash—Plea in Abatement—Waiver.

One who fails, with full knowledge of the facts, to file his plea in abatement in apt time will be deemed to have waived his rights thereto.

3. Seduction—Breach of Promise—Evidence—Testimony of Wife—Corroboration—Interpretation of Statutes.

While the statute provides that "the unsupported testimony of the woman shall not be sufficient to convict," for seduction under promise of marriage (Revisal, sec. 3354), it does not limit or define the character of the corroborating testimony required.

4. Same—Statements Made to Others.

In an action for seduction under a breach of promise of marriage (Revisal, sec. 3354), evidence of statements made to others that the prosecutrix and the defendant were to be married is competent to corroborate the

testimony of the prosecutrix that the defendant had offered and promised to marry her, and with other evidence in this case of his registering with her as man and wife at a hotel, his misstatements as to the marriage license and as to his not being a married man, etc., told by her to others before and after the act of seduction, and corroborated by them, is held sufficient for a conviction.

APPEAL from *Carter, J.*, at October Term, 1911, of CRAVEN.

The defendant was indicted under section 3354 for seduction under promise of marriage. There was a verdict of guilty, followed by judgment sentencing the defendant to the State Prison, from which judgment the 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.

Moore & Dunn for defendant.

BROWN, J. 1. At the conclusion of the testimony of Henriette Dougherty, the prosecutrix, who testified for the State, the (463) defendant filed a plea in abatement, averring that the said indictment could not be maintained in the county of Craven, but should be tried in the county of New Hanover, where the alleged act of seduction, according to testimony of the said witness, occurred. His Honor overruled the plea. The defendant excepted.

The findings of the judge show that at the preliminary hearing of this case when the defendant was bound over, all of the facts set out in the plea of abatement appeared in evidence, and the defendant was present and represented by counsel. He knew at the time when the indictment was tried and before the jury was impaneled what the testimony of the prosecuting witness would be. He had ample opportunity to file his plea in abatement in apt time.

It is well settled that a plea in abatement or a motion to quash a bill of indictment made after the plea of not guilty is entered is only allowed in the discretion of the court. His Honor declined, in his discretion to permit the plea to be filed. The exercise of his discretion is not reviewable by us. *S. v. Jones,* 88 N. C., 672.

Assuming that the county of New Hanover was the proper venue, the defendant, having full knowledge of the facts which the State relied upon, is deemed to have waived the point by not filing his plea in abatement in apt time. *S. v. Holder,* 133 N. C., 709; *S. v. Woodard,* 123 N. C., 710.

2. It is contended by the defendant that there is not sufficient corroborating evidence to the testimony of the prosecutrix. The statute

provides that "the unsupported testimony of the woman shall not be sufficient to convict," but it in no sense limits or defines the character of the corroborating testimony required. That is to be determined by the ordinary rules of evidence.

There are three essentials to a conviction under this statute: First, the criminal act; second, that it was the seduction of an innocent and virtuous woman; and, third, that it was done under promise of marriage. The first is admitted by the defendant; the second is
(464) proven practically by all the evidence in the case, and is really not disputed so far as the character of the woman is concerned; the promise of marriage is testified to by the prosecutrix and corroborated fully by her declarations made before the seduction as well as afterwards.

It is settled that statements to others that the prosecutrix and the defendant were going to be married are competent for the purpose of corroborating the testimony of the prosecutrix that the defendant had offered and promised to marry her. *S. v. Kincaid,* 142 N. C., 657; *S. v. Whitley,* 141 N. C., 823.

The evidence tends to prove that the defendant was a married man working in the railroad shops at New Bern, and that his wife and children were living with his father at Richmond; that the prosecutrix was employed as a waitress at a hotel, and that she first became acquainted with the defendant in February of that year; that she testified positively that she did not know that he was a married man, and that he represented himself as a single man, and repeatedly offered to marry her; that they went on excursions together to Morehead City and other places; that they were engaged to be married in January; that he told her that he could not wait until January, and desired her to marry him in August; he called regularly to see her on Sunday and Wednesday nights; they frequently went out together in public; they went to Wilmington on Sunday to get married, the defendant stating that he had prepared to have the marriage license ready and the marriage take place.

At Wilmington they went to a hotel. The defendant registered as "H. M. Pace and wife"; they were assigned to a room, when the alleged seduction was accomplished. Immediately afterwards the defendant said that there was some miscarriage about the marriage license and they would have to go somewhere else to be married. He constantly made excuses, deferring the marriage.

All of these details were communicated by the prosecutrix to others and corroborated by them after she found the defendant could not marry her. The promise of marriage and the attention of defendant to her were made known to her friends before the trip to Wilmington.

We think that the evidence corroborates the testimony of the prosecutrix in every particular, and that upon all the evidence (465) the verdict of the jury was well warranted.

It is well settled in this State that when a witness is impeached upon cross-examination or otherwise, and it is necessary to sustain the testimony by corroborative evidence, proof of declarations made to others similar to the testimony given in evidence on the trial may be proved by the witness who made them and the persons to whom they were made. *S. v. George,* 30 N. C., 324; *Marsh v. Harrell,* 46 N. C., 329; *S. v. Whitfield,* 92 N. C., 831.

In addition to this character of corroborative evidence, we think there is evidence of admissions by the defendant, and of his conduct towards the prosecutrix while he was in jail, which tend to corroborate the charge of the State that the seduction took place under promise of marriage, and the prosecutrix being ignorant of the fact that the defendant was married.

Upon a review of the whole record, we find no error which we think is of sufficient importance to justify us in ordering another trial. We have carefully examined the remaining assignments of error, and find them without merit.

No error.

Cited: *S. v. Hand,* 170 N. C., 706; *S. v. Cline, ib.,* 752; *S. v. Moody,* 172 N. C., 968.

STATE v. CHARLES F. TAYLOR.

(Filed 15 May, 1912.)

1. Barn Burning—Bad Blood—Intent—Evidence Sufficient.

Evidence in this case held sufficient to sustain a verdict against the defendant for burning the prosecutor's barn in violation of the statute, which tended to show that there was bad blood between the prosecutor and the defendant; that a few nights after the defendant had tried to induce a witness to burn the barn, the barn was destroyed by fire; that on the night of the fire the prisoner induced the witness to stay with him, and the next morning tracks were found showing the size and certain peculiarities of the witness's shoes, leading by a devious route from the defendant's house to the prosecutor's barn; that the witness did not make them, and the shoes themselves indicating that some one had worn them during the night.

2. Same—Foot Tracks — Identity — Illustrations — Instructions — Harmless Error.

When there is circumstantial evidence that the prisoner, indicted for burning the prosecutor's barn, had committed the deed, and which, among other things, tended to show that during the night he had used the shoes of a witness for the purpose of going there, the State contending that the shoes were too small for the prisoner and that he could have worn them by mashing down the vamps, it is not held for error that the solicitor exhibited the shoes to the jury, which were not put in evidence, by way of illustration, the court instructing the solicitor to proceed no further, and the jury to confine their consideration of the shoes to that of illustration only.

(466) APPEAL by defendant from *Justice, J.*, at March Term, 1912, of BURKE.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Spainhour & Mull for defendant.

CLARK, C. J. This was an indictment for burning a barn. The first exception is to the refusal of the court to charge the jury that the evidence was not sufficient to warrant a conviction and to return a verdict of not guilty. Upon this prayer we can consider only the evidence most favorable to the State.

There was evidence that the defendant lived about one mile from the prosecutor; that there was bad blood between them; that the prosecutor, who was the owner of the burnt barn, had reported the defendant for running a blockade still; that the defendant had endeavored to get the witness Blue to hide on the roadside and shoot the prosecutor, and a few days before the barn was burnt had endeavored to get said Blue to burn the barn; that the barn was burned one night in November, and that on that night, when the witness Blue, who was visiting the defendant's house, started to leave, the defendant insisted on his staying all night, promising him fried chicken and liquor for breakfast; that Blue when he went to bed left his shoes in a corner of the next room; that the next morning he found his shoes in the middle of the room, wet, muddy, the vamps mashed down and the strings broken; that the (467) next morning tracks corresponding to Blue's shoes were found leading by a devious route to the barn from defendant's house and going back to defendant's house; that Blue's shoes had an iron on heel and the toe of the right foot pointed in; that these pecularities

showed in the tracks found; that Blue's shoes were too small for defendant, and that the next day the defendant was limping and said he had a sprained ankle.

We think that the above evidence was sufficient to submit the case to the jury. *S. v. Hunter,* 143 N. C., 610; *S. v. Daniels,* 134 N. C., 655.

The theory of the State was that the defendant had used Blue's shoes, which, being too small for him, he had used by mashing down the vamps. The solicitor, in his argument, contended that when shoes are too small for a man he can wear them by mashing down the vamps, and exhibited shoes with the vamps thus mashed down, stating that he did this for illustration and that the shoes were not in evidence. On objection by the defendant, the court told the solicitor not to proceed further along that line, and said to the jury that the solicitor was only illustrating his argument, and that the shoes were not in evidence. We cannot perceive how the defendant was prejudiced thereby.

No error.

STATE v. ANNIE BROWN.

(Filed 10 April, 1912.)

Cities and Towns — Recorder's Court — Criminal Actions — Extraterritorial Jurisdiction—Constitutional Law.

A legislative enactment creating a municipal court for an incorporated city or town, and conferring thereon jurisdiction in a territory extending one mile beyond its corporate limits, over criminal cases concurrently cognizable in a justice's court, is valid (State Constitution, Art. IV, sec. 12); and does not contravene Article IV, sec. 14, of the Constitution, providing for special courts for the trial of misdemeanors in cities and towns. *S. v. Doster,* 157, N. C., 634, cited and distinguished.

APPEAL by the State from *Cooke, J.,* at February Term, 1912, (468) of GUILFORD.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

Attorney-General Bickett, Assistant Attorney-General Calvert, and A. Wayland Cooke for the State.

Sapp & Williams for defendant.

WALKER, J. The defendant was charged in the Municipal Court of Greensboro with the common-law offense of keeping a disorderly house, and was convicted. She appealed, and was again convicted in the Supe-

rior Court, but the judgment was arrested upon the ground that the crime was not committed within the corporate limits of Greensboro, although it was committed within one mile of the same. Appeal by the State.

The contention is that the Legislature could not confer jurisdiction upon the Municipal Court of Greensboro to hear and determine criminal cases where the offenses are committed, not in the city, but within one mile thereof, and that she should have been indicted originally in the Superior Court.

The acts establishing the court expressly give the jurisdiction where the crime is committed in the city or within one mile of its corporate limits. Public Laws 1909 chap. 651, as amended by Private Laws 1911, chap. 430. Counsel for the defendant argued that this jurisdiction was not authorized by the Constitution, as it conflicted with the jurisdiction of justices of the peace under that instrument; but we think the question has been decided against this contention in several cases. It is only necessary to reproduce what was said in *S. v. Collins,* 151 N. C., 648, where reference is thus made to the constitutional provision (Article IV., sec. 12) for the establishment of courts inferior to the Superior Court: "These provisions so plainly worded and so comprehensive in their scope, would seem to admit of no doubt as to the rightful exercise by the Legislature of its constitutional power in enacting the law by virtue of which the Recorder's Court of Nash County was created and afterwards organized, and to be a full answer to the contention of the State in the court below. But the question has been heretofore fully considered by this Court, and we reached the conclusion that the Legislature had the power, under the Constitution, to establish a recorder's court, not (469) only for cities and towns, *S. v. Lytle,* 138 N. C., 738; *S. v. Baskerville,* 141 N. C., 811; *S. v. Jones,* 145 N. C., 460, but also for counties, *S. v. Shine,* 149 N. C., 480. In the case last cited the Legislature created the recorder's court of Monroe, in the county of Union, and further provided in the act by which the court was established as follows: 'Said court shall have exclusive and original jurisdiction to hear and determine all other criminal offenses committed within the county of Union below the grade of a felony, as now defined by law, and all other such offenses committed within the county of Union are hereby declared to be petty misdemeanors.' This language is at least substantially identical with that to be found in Laws 1909, chap, 633, by which a recorder's court for Nash County was created. If the former act was valid, and we so held, the latter must necessarily be." It will be observed that in *S. v. Collins* it appeared that the court was created for the entire county, including the town of Nashville, the capital of the county, and other towns therein. In *S. v. Shine* the court was created for the city of Monroe, but its

jurisdiction was extended beyond the city and to the county limits. The offense for which the defendant was convicted, in that case, was committed beyond the city limits. *S. v. Baskerville, supra.* The authorities seem to be decisive of the question now raised by the appellant.

It is not necessary to decide whether the provision as to the exclusiveness of the court's jurisdiction is valid, as, if it can only be concurrent with a court of a justice of the peace in certain cases, it has assumed and exercised, in this case, its rightful jurisdiction, and the question as to the extent of the jurisdiction is not presented, nor was it presented in *S. v. Collins.*

The only question here is, and so it was in that case as to the recorder's court, whether the statutory court or the Superior Court had the jurisdiction. *S. v. Doster,* 157 N. C., 634, cited by defendant's counsel, does not sustain the position that, because this is called a municipal court, and has jurisdiction of offenses committed in the city, it can have no jurisdiction beyond the (470) city limits, under Article IX, sec. 14, of the Constitution, which provides for special courts for the trial of misdemeanors in cities and towns; but the intimation is clear that such jurisdiction may be given, though in some cases it may be concurrent. The offense, in that case, was within the jurisdiction of a justice of the peace, and committed outside of the city of Monroe. The defendant had been tried before a justice and convicted. On appeal he moved to quash, and the question was whether the Recorder's Court of Monroe had exclusive jurisdiction. The court held that it did not, but it did not decide that the jurisdiction was not concurrent, or that the Legislature could not confer jurisdiction outside the city upon the recorder's court. In this case, the offense is not within the final jurisdiction of a justice of the peace. We do not see why the Legslature, under Article IV, sec. 12, of the Constitution, is not invested with ample power to establish this court and assign to it the jurisdiction conferred by the statute. The court is given jurisdiction over offenses commmitted within the city of Greensboro, but the power of the Legislature was not thereby exhausted. It follows, therefore, that there was error in the judgment of the court.

Error.

Cited: *S. v. Rice,* 158 N. C., 638.

STATE v. JOHN DUNN.

(Filed 28 May, 1912.)

1. **Habeas Corpus—Jurisdiction—Competent Court—Judgments—Second Appeal—Rehearing—Practice.**

The writ of *habeas corpus* cannot be used in the nature of a writ of error, and will not be considered on appeal when it appears that the petitioner is in custody by virtue of the judgment of a competent court appearing to be regularly entered (Revisal, sec. 1822, 2), which has been affirmed by the Supreme court on a former appeal.

2. **Habeas Corpus—Competent Court—Judgment—Illegal Evidence—Intoxicating Liquors—Sale—Courts—Jurisdiction.**

An indictment and judgment against the prisoner for an illegal sale of spirituous liquors alleged to have been based upon illegal evidence authorized by an unconstitutional statute, may not be passed upon in *habeas corpus* proceedings, for such would be to permit one Superior Court judge to examine into the proceedings before another judge, upon parol evidence, and review his action.

3. **Federal Questions—Objections and Exceptions — Practice — Intoxicating Liquors—Sales—Presumptions—Statutes.**

When a Federal question arises it must be presented by an exception taken at the trial upon the merits, and be reviewed on appeal in that case. *Semble*, that under Chapter 20, Laws of 1905, making the possession of more than two gallons of whiskey *prima facie* evidence of the illegal sale, no Federal question can arise.

(471) APPEAL by defendant from an order rendered by *Peebles, J.*, at chambers, 10 April, 1912; from CUMBERLAND.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

R. W. Winston and E. G. Davis for defendant.

CLARK, C. J. The defendant was convicted upon an indictment, in the usual form, for illegal sale of intoxicating liquors. On appeal to this Court, the judgment was affirmed. The defendant then sued out a writ of *habeas corpus* before a judge of the Superior Court, alleging that the conviction had been obtained upon illegal evidence. The judge refused to discharge the prisoner, whereupon he appealed to this Court. Afterwards, in deference to the decision *In re Holley*, 154 N. C., 164, he withdrew said appeal and applied to this Court for a writ of *certiorari*. This was granted, and the question now presented is whether there was error in refusing to discharge the petitioner upon *habeas corpus*.

It is true that when it appears upon the inspection of the record itself that the court imposing the sentence was without jurisdiction, the prisoner can be discharged upon *habeas corpus* upon the ground that the judgment is void, but the writ cannot be used in the nature of a writ of error. If the petitioner is in custody by virtue of the (472) judgment of a competent court, the statute forbids the writ to be issued. Revisal, 1822 (2); *S. v. Webb,* 155 N. C., 426; *Howie v. Spittle,* 156 N. C., 180; *Ledford v. Emerson,* 143 N. C., 536. The remedy is by appeal from the original judgment. In this case the indictment and judgment are in every respect regular upon their face. The court below could not go behind the record and find that the defendant was convicted upon evidence which was illegal because authorized by an alleged unconstitutional statute. This would be for one Superior Court Judge to examine into the proceedings before another judge, upon parol evidence, and review his action.

Besides, in this case, the defendant had appealed to this Court, which had adjudged no error, and this proceeding is in effect an attempt to procure a rehearing of the cause upon a *habeas corpus* before another judge of the Superior Court.

This point is not before us, for the reasons above given, but we may say that the statute thus irregularly attempted to be called in question was passed upon and construed in *S. v. McIntyre,* 139 N. C., 599, and as there construed, no Federal question can arise in regard to it. When a Federal question arises it must be presented by an exception taken at the trial upon the merits, and be reviewed on appeal in that case. It could not be presented in this irregular method. The judgment in refusing to discharge the prisoner is

Affirmed.

STATE v. BURRILL AND LEONA CASEY.

(Filed 17 April, 1912.)

Homicide—Evidence—Conviction of Less Offense—Instructions—Harmless Error.

A prisoner convicted of a less offense than the evidence discloses, if found by the jury to be the facts, cannot be heard to complain of an instruction which precludes from their consideration a finding for the greater offense.

APPEAL from *Carter, J.,* at October Term, 1911, of CRAVEN.

The prisoners were jointly indicted for the murder of Joseph (473)

Whitty, who died 22 May, 1910. The charge of the State is that the deceased came to his death by means of poison administered by the defendants with felonious intent. The prisoners were convicted of murder in the second degree, and were sentenced to the State Prison for a period of ten years each.

Attorney-General Bickett, Assistant Attorney-General Calvert, and D. L. Ward for the State.

Carl Daniels and W. D. McIver for defendants.

BROWN, J. The evidence in this case tends to prove that the *feme* prisoner was the wife of Joseph Whitty, the deceased, and that she was married to her coprisoner, Burrill Casey, about a month after the death of Whitty. There is most abundant evidence in the record that the deceased came to his death by means of poisoning.

It would serve no good purpose to review the evidence in this case, which tends strongly to prove, not only that the deceased came to his death by means of poison, but that the poison was administered by these unfortunate prisoners.

We have examined carefully the exceptions to the evidence, and the exceptions to the charge to the jury, and we find all of them without merit. The charge of the court was comprehensive and clear, and gave the prisoners the benefit of every instruction that they were entitled to.

1. It is contended that the solicitor had no right to place the prisoners upon trial for murder in the second degree only, and that it was their privilege to be tried for the capital felony, and the prisoners excepted to so much of his Honor's charge as instructed the jury that they could not convict the prisoners, or either of them, of any higher offense than murder in the second degree.

We fail to see that the prisoners have any reasonable ground for complaint because their lives were not put in jeopardy, and instead they were tried for an offense punishable only by imprisonment in the penitentiary. It is the settled law in this State that the prisoner
(474) cannot complain of an instruction which could not possibly be prejudicial to him, but was in his favor.

It is true, as contended by the prisoner, that the administration of poison with felonious intent, resulting in death, constitutes murder in the first degree, but the fact that the State saw fit to ask for a verdict of murder in the second degree is a degree of mercy extended to the prisoner, of which no reasonable person can complain. This question has been discussed and settled by this Court in *S. v. Matthews,* 142 N. C., 621; *S. v. Quick,* 150 N. C., 820; and *S. v. Freeman,* 122 N. C., 1012.

Upon a review of the entire record, we find

No error.

STATE v. BURRILL AND LEONA CASEY.

(Filed 17 April, 1912.)

Homicide — Evidence — Conviction of Less Offense — Solicitor's Request — Harmless Error.

The prisoner on trial for a capital felony cannot be heard to complain of error on the part of the State in asking for a conviction of a less offense than murder in the first degree, when from the evidence the verdict should be murder in the first degree, or an acquittal.

APPEAL from *Carter, J.*, at October Term, 1911, of CRAVEN.

Indictment for murder. There was a verdict of guilty of murder in the second degree. The defendants appealed.

The facts are sufficinetly statd in the opinion of the Court by MR. JUSTICE BROWN.

Attorney-General Bickett, Assistant Attorney-General Calvert, and D. L. Ward for the State.

Carl Daniels and W. D. McIver for defendants.

BROWN, J. The evidence against Leona Casey amply justified her conviction, as is shown by the following extract from the brief of her counsel:

"However, the crime she is charged with is the most heinous known to man. She is charged with poisoning one husband in (475) order that she might be free to marry another. If the evidence introduced in the case tends to prove anything against her, it must prove the charge."

This unfortunate prisoner does not ask for a new trial, but states through her counsel, "But would prefer to take her ten years sentence in the penitentiary than to put her young life in jeopardy again."

The only assignment of error discussed in the brief is stated as follows: "At the conclusion of the evidence the State declined to ask the jury to convict her of murder in the first degree, and there was no evidence of murder in any other degree," and upon this decision of the solicitor, she asked her discharge.

We have already held repeatedly that if the solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain. *S. v. Quick,* 150 N. C., 820; *S. v. Matthews,* 142 N. C., 621.

Upon a review of the entire record, we find

No error.

STATE v. ALEX. JERNIGAN.

(Filed 27 March, 1912.)

1. Appeal and Error—Right of Trial by Jury—Manner of Trial Judge—Record—Constitutional Law.

The Supreme Court is confined to what appears in the record, and cannot award a new trial upon the ground assigned, merely that the manner of the judge was such as to deprive the prisoner, convicted of murder, of his right to a trial by jury.

2. Appeal and Error—Verdict, Directing—Intimation—Acquiescence.

When upon intimation from the trial judge that he would charge the jury to return a verdict of murder in the second degree, if they believed the evidence beyond a reasonable doubt, counsel for the prisoner said he would not address the jury, the remark of the attorney implies that the truth of the evidence could not be contested, and the intimation will not be held as reversible error on appeal.

3. Appeal and Error—Intimation—Instructions—Variation.

In this case, before prisoner's attorney had begun his address to the jury, upon a trial for murder, he said he would not do so upon an intimation from his Honor that he would charge them to return a verdict of murder in the second degree if they believed the evidence beyond a reasonable doubt. The court subsequently charged the jury to find a verdict of murder in the second degree if they were satisfied beyond a reasonable doubt that the facts were as testified to by the State's witnesses. The prisoner's attorney called the court's attention to the difference between the intimation and the charge as given, and was offered and refused an opportunity to address the jury: *Held*, no error.

4. Appeal and Error—Remarks of Judge—Exceptions, Specific—Practice.

Exceptions to remarks of the trial judge in a colloquy with counsel, after the charge to the jury had been given, but in their presence, will not be considered on appeal when the objectionable matter relied on is not pointed out.

5. Appeal and Error—Objections and Exceptions—Incorrect Record—Practice.

This Court can only consider the exceptions properly presented in the record, and this rule will not be departed from because the appellant's attorney insists here that the case is not a correct statement of the case and that he was not given an opportunity to note his exceptions.

(476) APPEAL from *Peebles, J.*, at September Term, 1911, of JOHNSTON.

The defendant was convicted of murder in the second degree and sentenced to serve a term of twenty-five years at hard labor in the State's Prison.

The evidence of the principal witness for the State, George D. Langley, was as follows: "July 1st, lived in Wendell. I knew Albert Todd, G. N. Langley, Harrison Pittman, Lewis Jernigan. Todd and myself went to millpond two miles from Wendell; went just before night; went to set nets, but did not fish any. Bought cider, sardines, etc. Stayed there two hours. Drank pint of liquor on our way. Went in one-horse wagon, flat bottom, but no sides. I was sitting on right-hand side of wagon; Todd was on the other side, feet hanging down. Father, Lewis, and Pittman were in front of wagon. Defendant was lying down on his back, feet hanging out at rear end of wagon. Did not see anything in hand of defendant. One-half mile after (477) leaving mill, defendant said some one had stolen his money. Todd asked who he thought got it. He said some one on the wagon got it. Todd said: 'You don't believe I got it, do you?' Defendant said: 'Yes I think you got it,' or, 'I had as soon believe you got it as any one.' Todd got off the wagon and started around the wagon towards Jernigan. I got off and met Todd before he got to Jernigan, and got him back on the wagon, and I got on and we went about fifty yards, when defendant said: 'Albert, you have got my money, and I want you to give it to me.' Defendant had a knife open in his hand. Todd got off the second time, and I got him back second time; caught hold of him and told him to get back on wagon, and he did so. Fifty yards farther defendant said: 'No son of a bitch can take my money and get off easy.' Todd said: 'Don't let us have any more words about the money. I will not say anything more about it if you don't.' Defendant said: 'It was my money, and you taken it from me.' Todd got off the third time and went to him. When I got there he was standing behind the wagon, reaching over and hitting Jernigan with his fists. I saw him have nothing else. Two or three times; missed him a time or two and hit wagon beside him. I went behind Todd and put my arm around him and pulled him away, about three steps backwards. Defendant got off the wagon and went to Todd and cut him in the breast and left side with pocket-knife, and cut me on arm with same lick. Defendant then left road and went in woods. Todd ran back towards mill and called me. I told him I could not go, I was cut, but to come on and let us go home. Saw Jernigan next Sunday evening. It was a big, new knife. I saw the blade. [Blade of knife exhibited.] The one I saw. I and father told defendant to shut up his knife. Todd about twenty-five or thirty. He was logging for mill, and I was working at the mill, running edger. Todd was a small man, weighing about 150 pounds, about 5 feet 4 inches high. Everybody took a drink of whiskey. Todd and defendant seemed to be friendly. I drank three glasses of cider. I don't know how much others drank. Defendant loaned Todd some money at the mill. Starlight night; think moon

was not shining. Road through woods where cutting took place;
(478) woods on both sides. The licks that hit the bed of wagon seemed loud. Defendant never fell or got between wagon and wheels. Did not see Jernigan after he ran in woods. I stated on former trial that Jernigan got off wagon and went to Todd. I did not see him eating apples. I have been indicted for fighting."

At the conclusion of the evidence offered by the State, counsel for the defendant announced that the defendant would not introduce evidence.

As counsel for the defendant were about to address the jury, his Honor said: "You may speak three hours, if you wish, but I am going to charge, if the jury believe the evidence beyond a reasonable doubt, they will find the defendant guilty of murder in the second degree." Thereupon one of the counsel for the defendant announced to the court that, in view of his Honor's statement, he would not address the jury.

His Honor then proceeded to charge the jury, and defined the crimes of murder in the first degree, murder in the second degree, manslaughter, and justifiable homicide; and charged, in part: "If the jury are satisfied beyond a reasonable doubt that the facts are as testified by the witnesses for the State, you will find the defendant guilty of murder in the second degree."

After his Honor concluded his charge to the jury, one of the counsel for the defendant stated to his Honor that he had not charged as he said he would.

His Honor replied: "Of course, I did not use the exact language, because the Supreme Court has suggested a better formula, but the effect of my charge is the same; and now that you know what my charge is, if you wish to address the jury you can do so, and I will again charge the jury after you have made your speech."

The counsel then said that he would not address the jury, and asked the court to note an exception to the remarks made by the court; whereupon his Honor directed the jury to retire and make up their verdict.

Attorney-General Bickett and Assistant Attorney-General T. H. Calvert for the State.

Ray & Harris for defendant.

(479) ALLEN, J. We cannot consider the contention that the manner of the judge was such as to deprive the defendant of his right to a trial by jury, because we are confined to the record, and nothing appears therefrom except what was said. Upon consideration of the evidence, it is certain that the defendant could not have been acquitted on the ground of self-defense, in any aspect of it, and there was only a bare possibility of reducing the offense to manslaughter.

The defendant not only provoked the difficulty by calling the deceased a thief, but after the deceased indicated that he would resent the insult, he opened his knife and repeated the charge, and after the deceased was pulled away from him, and was being held, he advanced upon him and inflicted the mortal wound with his knife.

When his Honor told counsel that he would charge the jury to return a verdict of guilty of murder in the second degree, if they believed the evidence beyond a reasonable doubt, and counsel replied that in view of his Honor's statement he would not address the jury, this could only mean that the truth of the evidence could not be contested; otherwise, he would have discussed the credibility of the witness before the jury. It does not appear, however, that any exception was taken by the defendant to this statement of the judge, and so far as the case on appeal discloses, there was no exception to the charge to the jury.

It is true that after the charge was delivered and a colloquy ensued between the judge and one of the counsel, that the judge was requested to note an exception to his remarks, but the remarks excepted to are not pointed out, and those immediately preceding were that counsel could address the jury if they desired to do so.

It also appears that there is no assignment of error in the record.

It is possible, as suggested by counsel, that they had no opportunity to note their exceptions, and that the case is not a correct narrative of the trial, but however reluctant we may be to affirm a judgment for a long term of imprisonment when such complaints are made, we cannot base our judgment on them. We find

No error.

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(480)

STATE v. F. C. WATKINS.

(Filed 28 May, 1912.)

1. Evidence—Dying Declarations—Competency.

Evidence of dying declarations does not depend for its competency upon a declaration by the deceased, at the time, that he was dying; for it may be shown by the attending circumstances that he was in actual danger of death, which ensued, with full apprehension of his danger.

2. Same—Circumstances.

The defense being interposed, on a trial for murder, that the defendant shot the deceased and inflicted the wound from which he died, under an apprehension that he would be assaulted, and that he was in immediate danger, declarations of the deceased, "Why did he shoot me? I have done nothing to be shot for," are competent, when it is shown that they

were made when his physician informed him that he had to be operated on, that he had but one chance in a hundred to live, and that he then, acting on his physician's advice, sent messages for the attendance of his friends, having expressed the purpose not to do so unless he would die; and that immediately he was put on the operating table, and died that night.

3. Evidence—Dying Declarations—Weight—Question for Jury.

Dying declarations are not conclusive, but only to be given such weight by the jury as they think proper, and in like manner as other competent evidence.

4. Evidence—Dying Declarations—Proximity of Death.

When otherwise sufficient, the competency of dying declarations does not depend upon the immediate proximity of death.

5. Evidence—Dying Declarations—Opinion—Statements of Fact—Questions for Jury.

When there is doubt as to whether "dying declarations" were stated as a fact or the opinion of the deceased, the question should be submitted to the jury.

6. Evidence—Dying Declarations—Statement of Fact.

The prisoner having pleaded justification to the charge of murder, it is *Held*, in this case, that the dying declarations of the deceased, "Why did he shoot me? I have done nothing to be shot for," were statements of fact.

7. Murder—Instructions—Verdict—Harmless Error.

The prisoner having been acquitted of the charge of murder in the second degree, and found guilty of manslaughter: *Held*, an instruction upon the law of murder in the second degree, if erroneous, was harmless.

8. Instructions—Testimony of a Certain Witness—Phases of Evidence—Legal Principles.

Upon a trial for murder, the court instructed the jury that if they found that the prisoner's actions, etc., were such as testified to by a witness, C., and under circumstances as testified to by him, to find the prisoner guilty of murder in the second degree: *Held*, not error, in this case, as it directed the jury's attention, not to the credibility of the witness, but to a certain hypothesis or state of facts, which if established would constitute the offense, the reference to the witness being for the purpose of refreshing the jurors' memory as to the evidence.

9. Murder—Justification—Reasonable Apprehension—Surrounding Circumstances—Questions for Jury.

Upon a plea of justification upon a trial for murder, the reasonableness of the apprehension of the prisoner that he was about to lose his life or suffer great bodily harm must be passed upon by the jury in view of the evidence and attending circumstances, and not found conclusively from the prisoner's own statement concerning his apprehension thereunder. The charge in this case held correct.

10. Murder—Justification—Self-defense—Officer.

The same rules of law applicable to an individual pleading self-defense on a trial for murder govern when the same plea is interposed by an officer committing a homicide in making an arrest.

11. Jurors—Opinion Formed and Expressed—Motion for New Trial—Delay—Practice.

A motion to set aside a verdict on the ground that one of the jurors had formed or expressed his opinion, before he entered the box, that the prisoner was guilty, comes too late after verdict, when this was known to the prisoner before the argument of the case had been completed.

12. Jurors—Opinion Formed or Expressed—Verdict—Motions—Court's Discretion.

It is discretionary with the trial judge, in the absence of palpable abuse, to set aside a verdict on the ground of a juror having expressed his opinion of the prisoner's guilt before entering the jury box.

APPEAL by defendant from *Webb, J.*, at April Term, 1911, (481) of BUNCOMBE.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

J. D. Murphy, A. T. Morrison, and Craig, Martin & Thomason for defendant.

CLARK, C. J. The prisoner was indicted for the murder of (482) John Hill Bunting. There was a verdict for manslaughter. The deceased, Bunting, was shot in his room at the Black Mountain Hotel by the prisoner about an hour after midnight on 6 August, 1909, and died next day in the hospital at Asheville. The prisoner was an officer and went to the room in which were Bunting and Paul Collins, having been sent for, upon the information that they were noisy and disorderly and disturbed the inmates of the hotel thereby. According to the evidence of the State, when the prisoner reached the room Bunting and Collins were not aggresssive and offered no resistance, and the shooting under the circumstances was entirely unnecessary and could not be justified as an act of self-defense or otherwise. According to the evidence for the prisoner, who testified in his own behalf, he acted under apprehension that he would be assaulted and was in immediate danger and under reasonable apprehension thereof, though no weapons were found in the possession of either Bunting or Collins. The conflict of testimony upon this point was a matter for the jury.

The first exception is to the admission of the dying declarations of Bunting. He stated to the nurse that they "had killed him." He asked if he was in any danger of dying, and said that if he was not, he did not wish his people to know his condition. The doctor told him that he was suffering from a severe internal hemorrhage and that he did not have "more than one chance in a hundred of living"; that they would have to cut open his abdomen and were not willing to do so without his consent, and that he had better communicate with his people. Thereupon he asked Dr. Hilliard to send a telegram to them. The deceased, who had been quiet, then opened his eyes and said: "Who shot me?" Dr. Landress answered: "The officer at Black Mountain shot you"; to which the deceased replied: "Why did he shoot me? I have done nothing to be shot for." Dr. Fletcher also testified to the critical
(483) condition of the deceased at that moment, who knew his condition and who was about to be put upon the operating table, and who died that night. Surrounding circumstances are sufficient to show consciousness of approaching death and to lay the foundation for a dying declaration. *S. v. Bagley,* 158 N. C., 608, and *S. v. Laughter, post,* 488.

In Wigmore Ev., sec. 1442, it is said: "In ascertaining this consciousness of approaching death, recourse should naturally be had to all the attending circumstances. It has been contended that only the statements of the declarant could be considered for this purpose or, less broadly, that the nature of the injury alone could not be sufficient, *i. e.,* in effect, that the declarant must have shown in some way, by conduct or language, that he knew he was going to die. This, however, is without good reason. We may avail ourselves of any means of inferring the existence of such knowledge; and if in a given case the nature of the wound is such that the declarant must have realized his situation, our object is sufficiently attained. . . . No rule can here be laid down. The circumstances of each case will show whether the requisite consciousness existed; and it is poor policy to disturb the ruling of the trial judge upon the meaning of these circumstances."

The evidence in this case shows that the deceased said that he did not wish his friends to know his condition unless he was in danger of dying; the physicians told him that he must be operated on; that he had but one chance in a hundred to live; that he should communicate with his friends. He immediately sent off a message, showing his belief in what had been said to him; he was immediately lifted upon the operating table, and died that night; and, indeed, the above declaration seemed to have been the last remark he made. It is impossible to escape the conclusion upon this evidence that the declaration was made under a sense of impending death.

The deceased had already stated that they had killed him, and he must have known, even independently of the physician's statement, from the attendant circumstances, that his condition was desperate; and when the physician told him that he had but one chance in a hundred to live, and he should wire his family, he understood their meaning, and at once sent the dispatch. The dying declarations of (484) the deceased under these circumstances are taken, without the sanctity of an oath, because of necessity. Such declarations are, however, only admitted as evidence, and are not conclusive. The jury are to weigh them like any other evidence and give them such weight only as they think proper. Though it seems that these were the last words that the deceased spoke, the admissibility of such declarations does not depend upon the immediate proximity of death, for they are competent where there is the impending sense of dissolution, though death may be much longer off than in this case. In *S. v. Peace,* 46 N. C., 255, the declarations were admitted, though the deceased did not die for two days thereafter; and there have been cases where such declarations were admitted when the death occurred after a still longer lapse of time. *S. v. Mills,* 91 N. C., 581.

On the other hand, it is not necessary that the deceased should have expressly declared that he was about to die, when, as here, the attending circumstances, as for instance the remark of the physician of his desperate condition and his acting upon this suggestion to send off the dispatch, show that his critical condition was known to him.

In Greenleaf Ev., sec. 158 (16 Ed.), it is said that while it is essential that the deceased was under the sense of impending death, it is not necessary that he should so state at the time. "It is enough, if it satisfactorily appears, in any mode, that the declarations were made under that sanction; whether it be directly proved by the express language of the declarant or be inferred from his evident danger, or the opinion of the medical or other attendants, stated to him, or from his conduct or the circumstances in the case, all of which are resorted to in order to ascertain the state of the declarant's mind."

The rule for the admission of such testimony is also thus laid down in Taylor Ev., sec. 648, and approved, *S. v. Mills,* 91 N. C., 594: "(1) At the time the declarations were made, the declarant should have been in actual danger of death; (2) He should have a full apprehension of his danger, and (3) Death should have ensued."

Nor is the language used, "Why did he shoot me? I have done nothing to be shot for," incompetent as the expression of an (485) opinion. It was the statement of a fact. If it was doubtful, which it was, it should have been admitted, and the court should have been requested to instruct the jury to consider what the deceased meant

as a matter of affecting the weight to be given to the statement. In *S. v. Mills,* 91 N. C., 594, the dying man stated that Eaton Mills had shot him. The witness asked, "What for?" to which the deceased replied, "Nothing." That reply is almost identical with the declaration here in evidence.

In *Darby v. State,* 79 Ga., 63, the deceased said that "the prisoner had cut him, and that he had done nothing to cause it." The Court held that this was not a conclusion, but a fact, and that the declaration was competent. In *White v. State,* 100 Ga., 650, the dying declaration that the accused "shot me for nothing, without any cause," was held not the statement of a conclusion, but rather a fact, and was competent. These two cases were cited and approved on this point in *McMillan v. State,* 128 Ga., 25.

The court charged the jury that if they found that the prisoner "went into this room that night, and that his conduct and actions were such as testified to by Collins and under the circumstances as testified by him [the court recapitulating the evidence], then the court charges you that it is your duty to find the defendant guilty of murder in the second degree." The prisoner was acquitted of murder in the second degree, and therefore this language, even if erroneous, was not prejudicial; but in *S. v. Rollins,* 113 N. C., 734, it is held that such language was not erroneous. The Court said: "The court cannot single out a witness or witnesses, to find so and so. *S. v. Rogers,* 93 N. C., 523, and cases there cited. But there is no impropriety in saying to the jury that if they believe a certain state of facts, as deposed to by certain witnesses, then the law applicable is so and so, when the court, as in this case, calls to their attention the opposite state of facts as deposed to by other witnesses, and instructs as the law applicable thereto. This directs the jury's attention, not to the credibility of such witnesses, but to a certain hypothesis or state of facts, and the reference to the witnesses (486) is simply incidental, to refresh them as to the evidence tending to show a particular state of facts."

Exception 3 cannot be sustained, for the instruction asked was correctly given in the charge, as follows: "If the defendant reasonably believed that he was about to suffer death or serious bodily harm, and shot to protect himself, he would not be guilty, and the jury should return a verdict of not guilty; and the jury need not be satisfied of these facts beyond a reasonable doubt, or by the greater weight of the evidence, but simply satisfied. The prisoner's conduct must be judged by the facts and circumstances as they appeared to him at the time he shot, and the jury under the evidence should ascertain whether he had at the time a reasonable apprehension that he was about to lose his life or receive great bodily harm. The reasonableness of this apprehension is

for the jury to pass upon, but the jury must form their conclusion from the facts and circumstances as they appeared to the prisoner at the time he shot." The able counsel for the defendant insisted that the reasonableness of the apprehension was to be judged by the prisoner himself, and not by the jury. The charge as given is strictly in accordance with the precedents and the reason of the thing. If the reasonableness of the apprehension of the prisoner must be decided by him conclusively, and not by the jury, upon consideration of the attendant circumstances, then the result depends upon his nerves or rather upon his own statement as to them, and not upon the reasonableness of the apprehension under which the prisoner took the life of a fellow being. In short, a brave man under such circumstances would be guilty and a coward justifiable. Such cannot be the law.

Exceptions 6, 7, and 8 cannot be sustained, for the court gave the instructions asked even more strongly than requested. The court repeatedly charged that if the officer acted in self-defense as testified to by himself and witnesses, he could not be convicted. The same is true as to exception 10.

Nor can exception 16 be sustained. If the prisoner fired, not in the attempt to effect an arrest, but in defense of his own person, then his conduct must be measured by the rules applicable to any individual so assaulted, and the fact that he was an officer would not justify him in needlessly killing the deceased. (487)

The other exceptions are without merit and were properly abandoned by not being brought forward in prisoner's brief. Rule 34 of this Court, 140 N. C.

The prisoner further assigned for error the action of the court in overruling a motion to set aside the verdict on the ground that one of the jurors had formed or expressed his opinion that prisoner was guilty before he entered the box, and did not let this be known when challenged. The court found as a fact that such knowledge as the prisoner had in regard to this matter was acquired before the argument of the case was completed and before verdict, but it was not communicated to the court till after the verdict. In *Pharr v. R. R.*, 132 N. C., 418, the Court said: "Motions of this sort must be made in apt time. The knowledge of the alleged facts, upon which the defendant bases its motion, was acquired during the trial and before the verdict was rendered, and the matter should at the earliest opportunity have been brought to the attention of the court. It has been said by this Court that after a defendant has taken chances for a favorable verdict, the purposes of justice are not subserved by listening too readily to objections not taken in apt time." To a similar purport, *Baxter v. Wilson*, 95 N. C., 137; *Spicer v. Fulghum*, 67 N. C., 18; *S. v. Perkins*, 66 N. C., 128. Such matters rest

in the discretion of the trial court, certainly in the absence of a palpable abuse of discretion. This was not the case here, for the testimony of the juror himself is that he not only was not prejudiced against the prisoner, but that in considering the verdict several of the jurors were in favor of a verdict for murder in the second degree, and that he on the first vote stood out for manslaughter and aided to reduce the verdict accordingly, and that none of the jurors were for acquittal at any time.

Upon careful consideration of all the exceptions we find

No error.

Cited: *S. v. Blackwell,* 162 N. C., 684; *S. v. Williams,* 168 N. C., 195; *S. v. Hand,* 170 N. C., 706.

STATE v. ANDY LAUGHTER.

(Filed 15 May, 1912.)

Homicide—Dying Declarations—Res Gestæ—Evidence.

Upon the trial of the husband for the homicide of his wife, there was evidence tending to show that the deceased was in a delicate condition, and had bruises upon her arm, back, and abdomen, and a wound or rupture of the inside lining of her womb, and that her death resulted from a small clot of blood in the right ventricle of her heart which the wounds and bruises, alleged to have been inflicted by her husband, would have produced. Deceased had said that she would die: *Held,* it was competent as a dying declaration, to prove that the deceased said, immediately preceding her death, that she expected to die, and at the same time stated that her husband had beaten her to death.

(488) APPEAL by defendant from *Long, J.,* at Fall Term, 1911, of POLK.

This is an indictment of the defendant for the murder of his wife, and the only question in the case relates to the competency of the dying declarations of the wife as to the cause of death. There was evidence tending to show that her husband had beaten her severely with a hickory stick at their home on 28 May, 1911, and that she left that day and went to her sister's, and from there she went to the home of defendant's sister, and then to the home of her own sister, Mrs. Hendrix, where she arrived on Sunday, 11 June, 1911.

W. A. Hendrix testified that when she came to his house she looked very badly, and very soon after she came she lay on the bed, and that there were bruises on her body, several on her back and one on her side

"which was black and blue and half as big as a man's hand." She told Hendrix and his wife on Monday night, 12 May, 1911, that she could not live and that she expected to die, that she was going to die, and she could not live in her condition. This was repeated several times on Tuesday morning about 6 o'clock, and she died about 11 o'clock the same morning.

The mother of the deceased testified that she had hemorrhages from her womb several days before she died, and had pains in her abdomen.

Dr. Brockman stated that he made an examination of the deceased and found bruises or lashes on her arms and back and (489) evidences of a wound or bruise on the abdomen and a wound or rupture of the inside lining of the womb. He also found a dead fetus in the womb which was decomposed and a small clot of blood in the right ventricle of the heart. He testified that death evidently followed the formation of this clot in the heart in a very few minutes, and that the condition of the womb and the fetus would account for the clot of blood in the heart.

There was evidence tending to show that deceased fell in the arms of her sister and died very suddenly after stating again that "she was going to die."

The State then offered to show by what W. A. Hendrix and his wife what she had said as the cause of her condition and subsequent death. The defendant objected, but the evidence was admitted, and defendant excepted. The witnesses testified that deceased had said that her husband had beaten her to death. She remonstrated with him about drinking so much, and he went out and got a stick and "fixed her up; that he killed her." The court restricted the proof of the State to the declaration of the deceased at the time she said that she expected to die. The prisoner was convicted of murder in the second degree and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Smith, Shipman & Justice for defendant, appellant.

WALKER, J., after stating the case: While the sense of impending death is considered by the law as sufficient a guaranty of truth as the solemnity of an oath, a dying declaration cannot be subjected to the other test, there being no opportunity for cross-examination and nothing to meet the objection to it, as hearsay, which will answer as an equivalent for such an examination; hence the exception to the hearsay rule in favor of dying declarations rests solely upon the ground of necessity and public policy; for if they were not admitted as evidence it would be impossible to convict in a case of homicide, the knowledge of the facts, in many cases, being confined to the party slain and the perpetrator of

the crime; but as the exception can only be sustained upon the
(490) ground of necessity, the declaration is admissible only in indictments for homicide and is restricted to the act of killing and the circumstances immediately attending the act and forming a part of the *res gestæ*. *S. v. Shelton,* 47 N. C., 360; *S. v. Jefferson,* 125 N. C., 712. The rule for the admission of such testimony is thus stated in *S. v. Mills,* 91 N. C., 581, quoting from Taylor on Evidence, sec. 648: "(1) At the time the declaration was made, the declarant should have been in actual danger of death; (2) He should have a full apprehension of his danger; (3) Death should have ensued."

The evidence in this case showing the declarant was *in extremis,* and was conscious or apprehensive of approaching death and had abandoned all hope of recovery, is quite as strong and convicing as was that in *S. v. Quick,* 150 N. C., 820, and *S. v. Bagley,* 158 N. C., 608. In the case last cited we said: "Dying declarations are admissible in cases of homicide when they appear to have been made by deceased in present anticipation of death. It is not always necessary that the deceased should declare himself that he believes that 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." To like effect is Wigmore on Evidence, secs. 1430 and 1442. *S. v. Brodgen,* 111 N. C., 656. We held in *S. v. Tilghman,* 33 N. C., 513, that "In order to make the declarations of a deceased person evidence as 'dying declarations,' it is not necessary that the person should be *in articulo mortis* (in the very act of dying), it is sufficient if he is under the apprehension of impending dissolution, when all motive for concealment or falsehood is presumed to be absent, and the party is in a position as solemn as if an oath had been administered."

The wife of the defendant appeared to have known of her delicate condition, and to have become suddenly aware, the day before she died, that the violent assault of her husband and the injuries which he inflicted upon her would result fatally, and subsequent events disclosed, unfortunately, that her apprehension was well-founded. Her dissolution
was impending, and no one knew it better than she did. There
(491) was no error in admitting her declarations as to the assault upon her by the defendant, the evidence showing that the wounds she received were sufficient to cause death.

No error.

Cited: S. v. Watkins, ante, 483.

STATE v. MACK DUNLAP, JR.

(Filed 10 April, 1912.)

1. Recorder's Court—Statutory Misdemeanors—Second Offense—Indictment —Presumptions.

When the Legislature had conferred original, exclusive jurisdiction upon a recorder's court of an incorporated city or town, of larceny of goods not exceeding $20 in value, for the first offense committed, making it a petty misdemeanor, punishable by imprisonment in the county jail or on the public roads not exceeding a longer period than a year, and a conviction is had thereunder, it is presumed, upon the failure of the warrant to charge a second offense, that the conviction was for the petty misdemeanor within the terms of the statute.

2. Recorder's Court—Appeal and Error—Superior Court—Trial by Jury—Constitutional Law.

When the statute confers jurisdiction on a recorder's court of an incorporated city or town of larceny of goods not exceeding $20 in value, for the first offense, making it a petty misdemeanor punishable by imprisonment in the county jail or on the public roads for not exceeding one year, and provides for an appeal, an indictment by the grand jury of the Superior Court is dispensed with, the right to a jury trial is preserved in that court to be had upon the warrant of the recorder, and the act is constitutional and valid.

3. Recorder's Court — Statutory Misdemeanors — Felonies — Constitutional Law.

A statute is constitutional and valid which makes the offense of larceny of goods of not more than $20 in value, for the first offense, a petty misdemeanor, and confers jurisdiction thereof on a recorder's court of an incorporated city or town, and by the terms of the act makes the offense punishable in the county jail or on the public road for a period not exceeding a year.

WALKER and ALLEN, JJ., concurring in result.

APPEAL from *Whedbee, J.*, at January Term, 1912, of UNION. (492)

The defendant was charged in the Recorder's Court of Monroe Township with larceny of some corn, charged in the warrant to be of less value than $20. The defendant was convicted, and appealed to the Superior Court. In the Superior Court he was convicted and sentenced to jail for four months. The defendant appealed to the Supreme Court.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

J. J. Parker for the defendant.

BROWN, J. 1. It is contended by the defendant that the recorder's court had no jurisdiction of the offense charged in the warrant. The Recorder's Court of Monroe was created by chapter 860, Laws of 1907.

By section 4 (5) the court was given "exclusive, original jurisdiction to hear and determine all other criminal offenses within the county of Union below the grade of felony as now defined by law, and all such offenses committed in the county of Union are hereby declared to be petty misdemeanors."

The statute was amended by chapter 683 Laws 1909, the first section thereof providing: "That in all cases of larceny and receiving stolen property hereafter committed in the county of Union, where the value of the property alleged to have been stolen or received does not exceed the sum of $20, the punishment for the first offense shall not exceed imprisonment in the county jail or on the public roads a longer period than one year, and all such offenses hereafter committed in said county are hereby declared petty misdemeanors, and the recorder's court shall have original jurisdiction thereof: *Provided,* the right of appeal shall not be impaired."

It is manifest that the offense charged in the warrant was within the jurisdiction of the recorder's court, because the punishment was not in the penitentiary, and while the offense of larceny is generally a felony, yet the General Assembly has made the larceny of sums not exceeding the value of $20 a petty misdemeanor for the first offense.

It is true that the warrant does not charge that this was the (493) first offense, but that is presumed by law, for when the State desires to punish as for second conviction, the first conviction should be charged in the warrant or bill of indictment. *S. v. Davidson,* 124 N. C., 839.

A similar act relating to the Recorder's Court of Winston, was enacted in 1907, chapter 573. By that act larceny of goods less than $10 in value was made a petty misdemeanor. The constitutionality of the act was sustained in *S. v. Jones,* 145 N. C., 460, and it was held that upon appeal to the Superior Court from the judgment of the recorder's court an indictment by the grand jury of the Superior Court is dispensed with, and that the charge may be tried by the petit jury upon the warrant of the recorder.

2. It is contended that the defendant is denied his right of trial by a jury by this act. The contention has been decided adversely to the defendant in a number of cases. It is well settled by these decisions that the Legislature has the constitutional power to create recorder's courts and to give them original jurisdiction over all criminal offenses below

that of felony, and declare them to be petty misdemeanors. *S. v. Collins,* 151 N. C., 648; *S. v. Shine,* 149 N. C., 480; *S. v. Baskerville,* 141 N. C., 811; *S. v. Lytle,* 138 N. C., 738.

In nearly all of these cases it is said that an indictment by a grand jury on appeal to the Superior Court is unnecessary. The questions raised upon this appeal have been so fully and thoroughly discussed in the cases cited that it is unnecessary now to repeat what is there so well said.

The judgment of the Superior Court is

Affirmed.

WALKER, J., concurring in result: I must concur in the opinion of the Court because so many cases have been decided to the same effect; but it must not be understood that I assent to the doctrine of the Legislature, under the article of our Constitution providing for the trial of petty misdemeanors, without a jury, but with the right of appeal, has the arbitrary right to declare what offenses shall be petty misdemeanors, so as to confer jurisdiction to try and condemn to infamous punishment without a presentment or indictment by a grand jury (494) and a trial by a petit jury. What difference does it make that we call it a petty misdemeanor, when the crime is punished, upon conviction, with hard labor and with stripes—in other words, infamously and as a felony? It seems to me that it is calling a thing by the wrong name, and is violative, not only of the letter and spirit of the Constitution, but of the sacred rights of the citizen, guaranteed by that instrument, and which guaranty existed long before it was adopted. By the use of the term "petty misdemeanor" was meant such offenses as were known in the law by that name at the time the Constitution was ratified, or offenses of a similar grade. I am not attempting to overthrow the decisions of this Court by argument or precedent—for if that was my purpose, I would proceed in a different way—but merely to enter my earnest dissent to the principle, so often announced, as subversive of the rights and liberty of the citizen, and especially of the consecrated right of trial by jury. If you can, by legislative enactment, make larceny a petty misdemeanor, why not manslaughter, perjury, or other offenses of a higher grade of criminality? But we have often decided that this can be done—that is, that certain offenses which are punished infamously, by hard labor and involuntary servitude, and in a way far more degrading than corporal punishment, can be declared petty misdemeanors. The misdemeanant is sent to the roads, and by the same kind of reasoning he may be sent to the penitentiary, because, at last, it all depends upon the legislative will as to what offenses shall be felonies and what misde-

meanors. I think we should retrace our steps, and decide the question according to the plain meaning of the Constitution; but until this is done, I must abide by the precedents.

ALLEN, J., concurs in this opinion.

Cited: *S. v. Hyman,* 164 N. C., 415; *S. v. Denton, ib.,* 532; *S. v. Freeman,* 172 N. C., 926, 929, 930.

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(495)

STATE v. E. L. AVERY.

(Filed 28 May, 1912.)

Intoxicating Liquors—Unlawful Sales—Indictment—Several Counts—General Verdict—Appeal and Error.

The defendant was convicted under a general verdict of guilty upon an indictment charging these counts: (1) of unlawfully engaging in the business of retail liquor dealer; (2) of selling the liquor by the small measure: (3) for selling it for gain; and having moved to quash the bill of indictment and in arrest of judgment, he renewed his motion on appeal: *Held,* the motion to quash because of the general verdict should be denied.

APPEAL by defendant from *Justice, J.,* at the October Term, 1912, of LENOIR.

The defendant was convicted upon an indictment containing three counts. The first count charges that the defendant "did unlawfully and willfully engage in the business of a retail liquor dealer"; the second, that he "did sell and retail to a person or persons unknown a quantity of spirituous liquors by the small measure, to wit, by a measure less than a quart, without having a license from the State of North Carolina to so sell"; and the third, that he "did unlawfully and willfully sell spirituous and intoxicating liquors to a person or persons, to the jurors unknown, for gain."

The defendant moved to quash the bill of indictment, and in arrest of judgment, and excepted to the denial of each motion, and these motions are renewed in this Court.

There was a verdict of guilty, and from the judgment pronounced thereon the defendant appealed.

Attorney-General Bickett and Assistant Attorney-General T. H. Calvert for the State.

T. C. Wooten and Murray Allen for defendant.

PER CURIAM. The form of the third count in the indictment is approved in *S. v. Dowdy,* 145 N. C., 434, and a general verdict, as in this case, upon an indictment containing several counts, will be sustained if one is good. *S. v. Tisdale,* 61 N. C., 220; *S. v. Holder,* 133 N. C., 710; *S. v. Dowdy,* 145 N. C., 432. The motions to quash the indictment and in arrest of judgment were, therefore, properly (496) overruled.

There are several exceptions in the record to rulings upon evidence, and to parts of his Honor's charge, but as there are no assignments of error, they cannot be considered.

No error.

Cited: *S. v. Klingman,* 172 N. C., 950.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1912

EDMOND SNOWDEN v. C. M. BELL.

(Filed 11 September, 1912.)

1. Private Ways—Lands of Another—Adverse Possession.

While the right to a private way over the lands of another may be acquired by a continuous adverse use for twenty years, a mere user for the required period is not sufficient to confer the right.

2. Same—Claim of Right—Notice.

In order to acquire a private way over the lands of another by adverse user or possession, it is necessary to show that the true owner had notice of the claim as one of right by direct evidence or circumstances tending to prove it.

3. Private Ways—Lands of Another—Adverse Possession—Limitations of Actions—Evidence—Questions for Jury—Instructions.

When there is evidence that the use or possession of a private way over the lands of another is consistent with the contention of the true owner that it was not hostile and adverse, but permissive, with further evidence of notice to him that it was under a claim of right, for twenty years or more, the jury should decide the question of adverse user, and it is error for the trial judge to instruct the jury to answer the issue for the one claiming the right, if they believed the evidence.

4. Private Ways—Lands of Another—Conflicting Evidence—Findings—Inferences—Questions for Jury.

When a fact is to be proven by circumstantial evidence, the finding of the jury is not dependent altogether upon belief in the truth of the evidence; for the jurors must not only believe the witnesses, but must draw from their testimony the inferences from the facts proven.

5. Private Ways—Lands of Another—Conflicting Evidence—Adverse User—Instructions—Directions.

Upon conflicting evidence as to the right of a private way over the lands of another by adverse user or possession, the trial judge should explain to the jury the meaning of the term "adverse user," and instruct them to answer the issue in the affirmative if they found, by the greater weight of the evidence, there had been such user for twenty years, and, otherwise, to answer the issue in the negative.

(498) APPEAL by defendant from *Bragaw, J.*, at Spring Term, 1912, of CURRITUCK.

The plaintiff brings this suit to restrain the defendant from interfering with his use of a lane from the Etheridge farm, owned by plaintiff, and running eastwardly to the public road leading to Snowden Station. Plaintiff's evidence tends to prove that the Etheridge and Humphrey lands were originally owned by Isaac Snowden; that this lane in controversy runs between the Bell land on the north and the Humphrey land on the south, and runs to the Etheridge land; that for years the Isaac Snowden fence to Humphrey land was *inside* the lane, and that there was a line tree of the Etheridge farm at the end of this line; that the lane has been kept up jointly by Bell and Snowden heirs, and plaintiff when he succeeded the Snowden heirs, since its establishment. Also, that for fifty to sixty years the owners of the Etheridge and Humphrey farms have continuously used this lane for any and all purposes.

The plaintiff also offered evidence that he did not know of permission to use the lane being asked at any time, and that he used it as of right.

There was also evidence that the defendant caused a warrant to issue against a tenant of the plaintiff for using the lane, and that the plaintiff gave the defendant a bond to repair any injuries to the lane caused by his hauling logs over it, at a time when he wished to use it for that purpose.

The following issues were submitted to the jury:

(499) 1. Is the plaintiff the owner of an easement entitling him to use the lane in controversy? Answer: Yes.

2. If so, has defendant obstructed plaintiff in the use of said lane, as alleged? Answer: Yes.

At the conclusion of the evidence, his Honor instructed the jury to answer the first issue "Yes," if they believed the evidence, and the defendant excepted.

Judgment was rendered on the verdict in favor of the plaintiff, and the defendant appealed.

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

Ward & Grimes for defendant.

ALLEN, J. It is well established in this State that the right to a private way may be acquired by a continuous adverse use for twenty years, and that a mere user for the required period is not sufficient to confer the right. *Ingraham v. Hough,* 46 N. C., 43; *Mebane v. Patrick,* 46 N. C., 23; *Ray v. Lipscomb,* 48 N. C., 186; *Boyden v. Achenbach,* 79 N. C., 539, and same case, 86 N. C., 397.

In the last case cited, the doctrine is well stated as follows: "It would be unreasonable to deduce from the owner's quiet acquiescence, a simple act of neighborhood courtesy, in the use of a way convenient to others and not injurious to himself, over land unimproved or in woods, consequences so seriously detracting from the value of the land thus used, and compel him needlessly to interpose and prevent the enjoyment of the privilege in order to the preservation of the right of property unimpaired. And so it is declared in *Mebane v. Patrick,* 1 Jones, 23, and reiterated in *Smith v. Bennett, ib.,* 372, by the late *Chief Justice,* in his comments upon the charge that if the plaintiff had continuously, and without interruption, used and enjoyed the way for more than twenty years, he was entitled to recover. He says: 'The charge is correct as far as it goes; but it does not go far enough. There is another and very essential requisite, in order to raise the presumption of a grant. The user must be adverse and as of right.' Again, in *Ray v. Lipscomb,* 3 Jones, 185, referring to those adjudications, he says: 'These cases, as it seems to us, put the doctrine of presumption of a right of way from user on its true basis; and as was said in the argument, considering the state of things among us for many years past in regard (500) to a neighbor's passing on the uninclosed land of another, either on horseback or with his wagon, any other conclusion would have resulted in great and general inconvenience.' There must, then, be some evidence accompanying the user, giving it a hostile character and repelling the inference that it is permissive and with the owner's consent, to create the easement by prescription and impose the burden upon the land."

The term adverse user or possession implies a user or possession that is not only under a claim of right, but that it is open and of such character that the true owner may have notice of the claim; and this may be proven by circumstances as well as by direct evidence.

In *Parker v. Banks,* 79 N. C., 485, the Court, speaking of an adverse possession, says: "Mr. Angel says 'that the clearest and most comprehensive definition of a disseizin and adverse possession is an actual, visible, and exclusive appropriation of land, commenced and continued under a claim of right. The claim must be adverse and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action. It is the occupation with an *intent* to claim against the true owner which renders the entry and possession adverse; and it is the

settled doctrine that this question of adverse possession, as one of intention, ought to be found by the jury, or in some other way ascertained as an essential fact, without which the quality of the possession cannot be determined.

Applying these principles, we are of opinion that the plaintiff introduced evidence of an adverse user for more than twenty years, which entitled him to have his case submitted to the jury, but that it was not of such conclusive character as to warrant a peremptory instruction in favor of the plaintiff.

A user for more than forty years is clearly shown, but much of the evidence is consistent with the contention that it was not hostile and adverse, but permissive, and the evidence of notice to the defendant that it was under a claim of right was entirely circumstantial.

When a fact is to be proven by circumstantial evidence, the
(501) finding of the jury is not dependent altogether upon belief in the truth of the evidence, as the jurors must not only believe the witnesses, but must also draw from their testimony the inferences arising from the facts proven.

There is also evidence, although not clearly stated, that the defendant objected to one of the tenants using the way, and that he required the plaintiff to execute a bond to him to repair any injuries caused by hauling timber over it.

We think it was the duty of his Honor to explain to the jury the meaning of the term adverse user, and to instruct them to answer the issue in the affirmative if they found, by the greater weight of the evidence, there had been such user for twenty years, and, otherwise, to answer the issue in the negative, and that there was error in the instruction given.

New trial.

Cited: *S. c.*, 166 N. C., 209; *S. v. Haynie*, 169 N. C., 280; *Carmon v. Dick*, 170 N. C., 309.

W. T. MILLER v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 11 September, 1912.)

1. Telegraphs—Delay in Delivery—Burden of Proof—Service Message.

On proof of the delivery of a message to a telegraph company, and payment of the charges, or acceptance of the message without such payment, and failure to deliver to the sendee in a reasonable time, a *prima*

facie case of negligence is made out, with the burden upon the defendant to make all reasonable effort to deliver the message; and, upon failure to find the addressee, to wire back a service message for a better address.

2. Same—Nonsuit.

In an action for damages for mental anguish against a telegraph company for failure to promptly deliver a telegram announcing a death, there was evidence tending to show that the telegram could have been promptly delivered at the address given on its face. The defendant introduced no evidence, though it appears that by a phonetic mistake a change of the addressee from "Woodie Miller" to "Wood C. Miller" was made: *Held*, the burden of proof being on the defendant to show that it made a reasonable effort to deliver the message, including the sending of a service message asking a better address, a judgment of nonsuit should not have been rendered.

APPEAL by plaintiff from *Bragaw, J.*, at Spring Term, 1912, (502) of CHOWAN.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

Bond & Bond for plaintiff.

Pruden & Pruden and S. Brown Shepherd for defendant.

CLARK, C. J. This is an action for failure to deliver promptly a telegram. It was in evidence that at 4 p. m., Saturday, 19 November, 1910, a telegram from Norfolk, Va., addressed to "Woodie Miller, Edenton, N. C.," was delivered at his residence in that place, announcing the sudden death of his brother, in Norfolk, and asking plaintiff to "come at once." His wife at once requested the company to forward it to her husband, "care Everett's Hotel, Jacksonville, Fla.," and guaranteed the charges. The defendant accepted the message, but did not deliver it. His wife sent a night letter that night to her husband, asking if he had received the message. He received this the next day about 10 o'clock a. m. He thereupon went to the telegraph office in Jacksonville and was handed the undelivered telegram, which was directed to "Wood C. Miller, care Everett's Hotel." The plaintiff testified that if he had received the telegram at any time before 8 p. m., 19 November (which was four hours after the message was handed in to the office in Edenton), he could and would have reached Norfolk Sunday at 5:30 P. M., in time to have attended the funeral; that he left on the first train after he had actually received the message, but arrived in Norfolk too late to attend the funeral. The plaintiff further testified that the clerk at the Everett Hotel had known him a long time as T. W. Miller or Woodie Miller; that he had been at the hotel on this occasion for several days and was registered as T. W. Miller. The defendant offered no evidence.

It was an error to grant the motion for a nonsuit. There is an unbroken line of cases from *Hendricks v. Telegraph Co.*, 126 N. C., 304, and *Cogdell v. Telegraph Co.*, 135 N. C., 431, down to the present, that on proof of the delivery of a message to a telegraph company and payment of the charges, or the acceptance of the message without such payment, and of failure to deliver to the sendee in reasonable time, (503) there is *prima facie* proof of negligence, and the burden is upon the company to prove that it made all reasonable effort to deliver the message, and that, upon failure to find the sendee, it wired back a service message for a better address. Here the company showed no effort to deliver, nor any attempt to send a service message, nor any inquiry for sendee at Everett's Hotel, nor indeed any attempt to deliver even when through the night letter from the plaintiff's wife it had notice that the sendee was at the hotel in Jacksonville. Though this last was directed to T. W. Miller, it was notice that a message of importance which had been sent from Edenton, N. C., to a man named Miller, care Everett's Hotel, had not been delivered.

It seems probable that the message was changed from "Woodie Miller" to "Wood C. Miller" by a phonetic mistake as in *Cogdell v. Telegraph Co., supra.* But however that may be, the defendant has not met the burden of proof cast on it by reason of its failure to deliver the message in apt time.

The judgment of nonsuit must be

Reversed.

Cited: Ellison v. Telegraph Co., 163 N. C., 13.

J. H. TOWNSEND ET ALS. v. McLEAN CONSTRUCUTION COMPANY ET ALS.

(Filed 11 September, 1912.)

1. Navigable Waters—Bridges—Construction—Open Spaces—Passing Vessels—Negligence.

While constructing a bridge over navigable waters, in this case across Albemarle Sound, under the authority of the State and War Department, it is the duty of the builder to have open space sufficient to enable passing vessels to go through, and to keep those spaces free from all obstructions that would endanger them.

2. Same—Questions for Jury.

When the evidence tends to show that the builder of a bridge across navigable waters had left an opening for the passage of vessels, and that

the plaintiff's vessel was injured while attempting to pass through this opening by coming in contact with a raft of piling material swinging out into the opening, and which had been fastened by a rope to the side of the bridge, it is sufficient, in an action for damages to the vessel, to be submitted to the jury upon the question of defendant's negligence. *Whitehurst v. R. R.*, 156 N. C., 48, cited and distinguished.

3. Evidence—Nautical Terms—Explanation.

It is competent for witnesses to testify to the meaning of certain lights and what such lights are intended to communicate in nautical terms to vessels passing on navigable waters when it is material and relevant to the inquiry; though the meaning is fixed by rules and regulations of the National Government, it is not ordinarily known to the jurors.

APPEAL by defendant from *Bragaw, J.*, at June Special Term, (504) 1912, of PASQUOTANK.

The following issues were submitted to the jury:

First. Was plaintiff's vessel injured by the negligence of the defendants, as alleged? Answer: Yes.

Second. Did the plaintiffs by their own negligence contribute to their injury? Answer: No.

Third. What damage, if any, have plainitffs sustained? Answer: $500.

Fourth. Was the property of R. S. Neal injured by the negligence of plaintiff Townsend, as alleged in answer? Answer: .....

Fifth. What damage has defendant R. S. Neal sustained thereby? Answer: .....

Thomas J. Markham and E. F. Aydlett for plaintiffs.
Bond & Bond and Pruden & Pruden for defendants.

BROWN, J. This action is brought to recover damages against the defendant construction company for an injury to the defendant's vessel, a three-masted schooner called the "Edna A. Pogue," while attempting to pass through an opening in the bridge across Albemarle Sound, en route from Elizabeth City to Plymouth for a cargo.

There are several assignments of error contained in the record, but we deem it unnecessary to consider more than one or two. The defendants requested the court to instruct the jury that if they believe the evidence they should answer the first issue "No." This prayer (505) for instruction, we think, was properly refused.

At the time of the injury to the "Edna Pogue," the defendant company was engaged in constructing a bridge across Albemarle Sound for the Norfolk Southern Railway Company. While they had the right to construct this bridge under the authority of the State, as well as the War Department, it was the duty of the defendants to leave open a space

sufficient to enable passing vessels to go through. This the evidence shows that the defendants' agents in charge of the work undertook to do.

The evidence shows that on 12 December the "Pogue" sailed up to within three-quarters of a mile of the bridge and anchored to wait for a favorable breeze. It is common knowledge to all who are familiar with sailing craft that it is impracticable to "beat them" against a head wind through an opening in a bridge.

The evidence shows that at half-past 2 o'clock on the following morning, the wind having arisen, the captain weighed anchor and got under way up the sound. The evidence shows that at that time the regular drawbridge intended for the passage of vessels, one on one side of the sound and one on the other, had not been completed, and were not in use for the passage of vessels.

The evidence further shows that the open space through which the master of the "Pogue" attempted to sail her was in use with the knowledge and permission of the defendants' agents for the passage of craft going up and down the sound.

The captain testifies that he saw a large tugboat with large raft, and a number of other vessels, passing through this same opening, and that there was a light put there for the purpose of indicating that it was intended to be used for the passage of vessels.

In attempting to make the passage through the bridge, the vessel came in contact with a raft of piling material which had been tied by the constructors of the bridge to the east side of it, and to the south side of the gap, by a rope made fast to one end of the raft of piling,
(506) leaving the other end of the raft loose, so that it swung around into the opening and the vessel had come in contact with it, causing her to lose her headway, whereby she fell off to the leeward, and her rigging became entangled with the pile-driver, which had been left on the north end of this opening, and the vessel was very greatly injured. The evidence shows that the wind increased very much at the time, so that the captain was unable to free his vessel and get away from the bridge, and a large sea making up in the morning, she was badly chafed before she could get away.

The testimony of one of the witnesses, who was an employee of the defendants at the time, was to the effect that this gap or opening was being used by all the craft going up and down the sound while the drawbridge was being completed.

It scarcely needs the citation of authority to prove that, although the right to build this bridge cannot be gainsaid, it was nevertheless the duty of the constructors to do the work in a safe and careful manner; to open during the constructive period spaces amply sufficient for the

safe passage of vessels navigating the waters of Albemarle Sound; and to keep those spaces free from all obstructions that would endanger the passage of vessels through such spaces.

There are numbers of cases which support the contention of the plaintiffs in this case. *Jutte v. Bridge Co.,* 21 Ohio C. R., 422; *Maxon v. R. R.,* 122 Fed., 555; *Kelly Line Co. v. Cleveland,* 144 Fed. In this case it is said that a company constructing a bridge is liable for injury resulting from its negligence when a vessel collides with the partly constructed bridge, or with works used in the construction when such collision could have been avoided by reasonable precaution upon the part of the constructors. See, also, 29 Cyc., 214. *Jutte v. Keystone Bridge Co.,* 146 Pa. State Reports, 400; *Casement v. Brown,* 148 U. S., 615; *Wilson v. Chicago,* 42 F., 506.

At a prior term of this Court we considered the case *Whitehurst v. R. R.,* 156 N. C., 48. We think it has no bearing whatever upon this controversy. There was no evidence of negligence whatever upon the part of the defendant in that case, as it was perfectly mani- (507) fest that the vessel was lost before she ever reached the bridge by failing to respond to her helm at a critical moment.

The defendants except because the court permitted witnesses to testify to the meaning of certain lights and what such lights are intended to communicate in nautical terms. It is true that these are fixed by the rules and regulations of the National Government, but they are not known to jurors, but only to navigators and persons familiar with nautical regulations.

It was entirely competent to prove by witnesses the meaning of such terms and what certain kinds of lights were intended to indicate.

We have examined the charge of the judge, and deem it unnecessary to comment upon the exceptions relating to that. The charge was eminently clear and fair, and presented the matter to the jury fully and completely, with conspicious impartiality.

The motion to nonsuit is covered by the ruling on the prayer for instruction, and is therefore overruled.

Upon a review of the whole record, we find

No error.

WALSH MANUFACTURING COMPANY v. PLYMOUTH LUMBER COMPANY.

(Filed 11 September, 1912.)

1. Contracts—Conditional Warranty.

A contract for the sale of a lumber dry-kiln, to be returned to the vendor upon its failure to do certain work, upon the fulfillment of the vendee of specified conditions relative to giving the vendor the opportunity of remedying defects and causing it to do the work contracted for, when reasonable upon its face, is, in the absence of fraud, enforcible.

2. Same—Countersign—Damages—Performance of Conditions.

When in a contract of sale of a lumber dry-kiln it was guaranteed that the kiln would accomplish certain results, and that the material could be returned to the vendor in the failure of the kiln to do so after an opportunity had been afforded the vendor to remedy any defects and cause the kiln to meet the requirements, the vendee cannot maintain a counterclaim for damages in the vendor's suit for the contract price, without proving that he has performed the conditions upon which the guaranty was to have been effective.

(508) APPEAL by defendant from *Bragaw, J.*, at April Term, 1912, of WASHINGTON.

This action was brought to recover the contract price for a certain Green Gum Dry-Kiln, and is based upon a written contract.

The defendant resisted the right of the plaintiff to recover:

First, because the material and workmanship of the equipment was not first-class in every particular, as guaranteed in said contract, but, on the contrary, was of an inferior quality, and in many respects defective.

Second, because the dry-kiln failed to do the work which the plaintiff guaranteed it would do.

The defendant further contended that because of defects in the material of the dry-kiln and its failure to do the work guaranteed, it lost a large amount of lumber while testing same under the direction of the plaintiff. The defendant offered evidence tending to sustain its contention, and there was evidence to the contrary offered by the plaintiff.

The material parts of the written contract, under which the plaintiff sold the kiln to the defendant, are as follows:

"We guarantee the material and workmanship of the above specified equipment to be first-class in every particular, and in consideration of payments being made as agreed, we further guarantee that when kiln is constructed in strict accordance with our plans and operated as per our instructions and furnished with steam at 14 hours per day, and exhaust steam at 2 to 5 pounds the remaining ten hours, 70 pounds

pressure at kiln, to be of ample capacity to dry 7,500 feet 1-inch x 16-feet gum lumber per day of 24 hours continuous operation, without adding to any defects the stock may have when placed in the kiln, such as checking, mildewing, molding, or discoloring, and the (509) material so dried will not warp or twist to any greater extent than by outdoor piling. It is understood that you are to furnish all the necessary material for testing the capacity of the kiln, material to be green from the saw when it is placed in the kiln."

"In the event of the failure of the kiln to do the work as guaranteed, after you have given us due notice in writing to that effect and afforded us the opportunity of making any necessary corrections, and after such corrections the kiln should still fail to work as guaranteed, you are to reload the material furnished within 10 days and return to us. Upon receipt of bill of lading covering the shipment of same in good condition, we will refund all money covering freight charges paid by you, also the amount of any cash payments made to us, and further responsibility on our part shall then cease.

"It is agreed that should you violate any of the provisions of this agreement, then the right to return apparatus shall be forfeited and you will pay to us as liquidated damages the sum of money herein specified under the heading of price, the same as though you had volunteered your acceptance in writing."

After the jury was impaneled defendant admitted the execution of the contract and amount of debt, nothing else appearing, and assumed the burden upon its counterclaim and recoupment.

There was no evidence that, after notice in writing, the plaintiff was given the opportunity to correct any defects or that the defendant offered to return the property, and the defendant failed to make the cash payment of $700, and retained the kiln, and has continued to use it.

After the conclusion of the evidence, the court being of opinion that the failure of defendant to allow plaintiff to make test, together with defendant's failure to return or offer to return the property to plaintiff, the defendant could not maintain its counterclaim against plaintiff, and granted the motion to dismiss the alleged counterclaim, and gave judgment for plaintiff, and defendant excepted.

Pruden & Pruden, William Bond, and William Bond, Jr., for plaintiff.

H. S. Ward and Gaylord & Gaylord for defendants.

ALLEN, J. The correctness of the ruling in the Superior Court depends on the construction of the written contract entered into between

the plaintiff and the defendant. By its terms the plaintiff agreed to furnish the defendant a complete dry-kiln apparatus for the sum of $1,725, of which $700 was to be paid in cash, and it guaranteed its quality and workmanship, and it was provided therein that, upon failure of the kiln to do the work *as guaranteed,* the defendant should notify the plaintiff to that effect, and give it the opportunity to correct any defects, and if after such correction the kiln still failed to do the work as guaranteed, the defendant agreed to reload the material furnished and ship to the plaintiff.

It was further stipulated in the contract that, upon return of the material, the plaintiff would refund all money covering freight charges and cash payments paid by the defendant, and that further responsibility on the part of the plaintiff should then cease. The defendant did not give the plaintiff the opportunity to correct defects, if they existed, nor did it offer to return the material.

The contract is fair and reasonable on its face, and, in the absence of fraud, which is not alleged, must be enforced. It belongs to the class of contracts called "contracts of sale or return," of which it is said in Parson on Contracts (5th Ed.), vol 1, p. 539: "In these the property in the goods passes to the purchaser, subject to an option in him to return them within a fixed time or a reasonable time; and if he fails to exercise this option by so returning them, the sale becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered"; and in Cyc., vol. 35, p. 237: "Where the contract provides for a return of the goods if not satisfactory, the buyer cannot relieve himself from liability for the price, unless he returns or offers to return them, and the offer to return must be unconditional."

(511) This principle, as applicable to the facts in this case, is approved in *Main v. Griffin,* 141 N. C., 43; *Main v. Field,* 144 N. C., 307; and *Piano Co. v. Kennedy,* 152 N. C., 197, in which last cited case the Court says: "We have recognized the principle that there can be no implied warranty of quality in the sale of personal property where there is an express warranty, and that where a party sets up and relies upon a written warranty he is bound by its terms and must comply with them. 30 Am. and Eng., p. 199; *Main v. Griffin,* 141 N. C., 43. We recognize the further principle, applied by us in that case, that a failure by the purchaser to comply with the conditions of the warranty is fatal to a recovery for breach of the warranty in an action on it, or where, as in this case, damages for the breach are pleaded as a counterclaim in an action by the seller for the purchase money."

The defendant having failed to return the material, and not having offered to do so, and having failed to perform other stipulations con-

tained in the contract, was not entitled to recover on his counterclaim, and on the admitted facts judgment was properly rendered in favor of the plaintiff for the contract price.

No error.

Cited: *Robinson v. Huffstetler,* 165 N. C., 464; *Oltman v. Williams,* 167 N. C., 314; *Frick v. Boles,* 168 N. C., 657; *Bland v. Harvester Co.,* 169 N. C., 420; *Wilson v. Lewis,* 170 N. C., 48.

McKEEL HARDWARE COMPANY v. BUHMANN ET AL.

(Filed 11 September, 1912.)

1. Judgments—Excusable Neglect—Findings of Fact—Record—Appeal and Error.

While it is the duty of the trial judge to find the facts upon which he bases his refusal to grant a motion to set aside a judgment for excusable neglect, his not having done so is not held for reversible error on this appeal, it appearing from the affidavits of record that the neglect of the appellant was inexcusable.

2. Judgments—Appeal and Error—Findings of Facts—Request of Appellant—Practice.

It is the duty of the appellant upon the refusal of his motion to set aside a judgment for excusable neglect, to request the judge to find the facts upon which his refusal was based.

3. Pleadings—Agreements—Writing—Custom—Appeal and Error.

Agreements of extension of time to plead beyond the statutory period must be in writing to be recognized by the courts; and the fact that the party litigant had employed an attorney in another county where there was "a custom" to allow sixty days to answer, is not such excusable neglect as will warrant the court on appeal to set aside a judgment rendered for the want of an answer.

4. Appeal and Error—Pleadings—Judgments by Default—Record—Exceptions—Erroneous Judgments—Motions—Lower Court—Practice.

The Supreme Court will not set aside a judgment by default final for the want of an answer upon the ground that a judgment by default and inquiry upon the complaint should have been entered, when there has been no motion below, or exception presenting the point; but the order refusing to set aside the judgment for excusable neglect, affirmed on this appeal, does not bar the defendant from making his motion in the cause below upon the ground of irregularity.

APPEAL from BEAUFORT, by defendant from the refusal by (512) *Webb, J.,* to set aside a judgment for excusable neglect on motion heard 8 June, 1912.

Small, MacLean & McMullan for plaintiff.
J. W. Little for defendant.

CLARK, C. J. This is an appeal from the refusal of a motion to set aside a judgment on the ground of excusable neglect. The court held that no excusable neglect had been shown. It is true that it is the duty of the court in such case to find the facts, and that its finding is conclusive, and that upon such facts the conclusion of law only is reviewable. *Norton v. McLaurin,* 125 N. C., 185, and cases there cited. The failure of the judge to find the facts in this case, however, is immaterial, for, taking the affidavits of the appellant as correct, he has shown inexcusable neglect. It appears therefrom that the defendant employed a lawyer residing in New Hanover County to appear in a case pending in Beaufort Superior Court, which he was not in the habit of attending, and such counsel was not present at the term of the court and did not
(513) file answer. *Manning v. R. R.,* 122 N. C., 825; *Williamson v. Cocke,* 124 N. C., 585. Indeed, the appellant should have asked the judge to find the facts. *Albertson v. Terry,* 108 N. C., 75.

The excuse of the counsel is that in New Hanover there was a "custom" that the defendant was allowed sixty days in which to answer. But it is not contradicted that this was not the custom in Beaufort County. Besides, if it had been such custom, it would not jusify the defendant in failing to comply with the statutory requirement as to the time in which the answer should be filed, in the absence of a written or admitted agreement to that effect. *Brown v. Hale,* 93 N. C., 188. The judgment should therefore be affirmed.

It was suggested in this Court by the appellant that the judgment should be set aside for irregularity in that upon the verified complaint a judgment by default and inquiry should have been entered, and not a judgment by default final. There was no motion below nor exception in this appeal presenting that point, and no exception can be passed upon in this Court which was not regularly taken below, except that the court did not have jurisdiction of the subject-matter or that the complaint does not state a cause of action. But the order refusing to set aside the judgment for excusable neglect, which is affirmed by us, does not bar the defendant from hereafter making his motion in the cause below upon the ground of irregularity, if the facts and the law will justify the judgment being set aside or modified on that ground. *Jeffries v. Aaron,* 120 N. C., 167.

Affirmed.

Cited: McLeod v. Gooch, 162 N. C., 124; *School v. Pierce,* 163 N. C., 428.

C. H. BROCK v. S. J. SCOTT.

(Filed 11 September, 1912.)

1. Courts—Justices of the Peace—Contracts—Damages—Jurisdiction—Remitting Excess—Interpretation of Statutes.

A plaintiff may sue on contract in the courts of a justice of the peace when the damages for its breach exceed the sum of $200, by remitting so much of the principal of the demand that is in excess of that sum. Revisal, sec. 1421.

2. Same—Superior Courts—Nonsuit—Pleadings—Former Action.

When a plaintiff has remitted the excess of $200 of his damages arising from a breach of contract in his action brought before a justice of the peace, so as to confer jurisdiction on that court (Revisal, 1421), and has obtained a judgment from which the defendant has appealed to the Superior Court, he may prosecute his action in the Superior Court, and take a voluntary nonsuit in his former action before the pleadings are filed in the second action, or it came on for trial; and the plea of the pendency of the former action is bad.

3. Courts—Jurisdiction—Contracts—Justices of the Peace—Damages—Remitting Excess.

The amount of damages demanded by a plaintiff in good faith determines the jurisdiction of the Superior Court, and not the amount of recovery; and the fact that he has remitted damages in excess of $200 in his action on contract sued on in the court of a justice of the peace does not necessarily oust the jurisdiction of the Superior Court in an action brought on the same contract there.

4. Same—Waiver.

The plaintiff having remitted the amount of damages arising on contract in excess of $200, so as to confer jurisdiction on the court of a justice of the peace, and having taken a voluntary nonsuit in the Superior Court, on defendant's appeal is deemed to have waived the excess so remitted in his action on the same contract brought in the Superior Court, and his recovery is limited to the amount sued for in the justice's court.

APPEAL by plaintiff from *Bragaw, J.*, at March Term, 1912, (514) of CURRITUCK.

Action for debt, the plaintiff demanding, in his complaint, $251.02. An action had previously been instituted between the same parties before a justice of the peace, on the same cause of action, in which the amount above $200 was remitted to confer jurisdiction.

Appeal from the judgment rendered by the justice was taken to February Term, 1910, of the Superior Court of Currituck, at which term, and on Wednesday of the same, the plaintiff took a voluntary nonsuit.

Prior to the taking of this nonsuit, summons in this action was issued and served, which summons was returnable to this same February Term, 1910, at which the nonsuit above mentioned was taken. The nonsuit in the action instituted before the justice was taken be-
(515) fore any pleadings in this action were filed by either party. At this term the defendant appeared, and both parties asked and obtained time to plead. Between this and the succeeding term the plaintiff filed his complaint for the whole amount of $251.02, and at the succeeding or Fall Term, 1910, the defendant filed no plea and made no motion to dismiss, but again asked for time to answer.

Between September Term, 1910, and March Term, 1911, the answer of defendant was filed, setting up, among other defenses, a plea that an action was pending between the same parties for the same cause at the time of the institution of this action.

No motion for the determination of the plea filed was made by the defendant, though the cause was continued from term to term until February Term, 1912, from which this appeal was taken. At this last term, when the case was called, defendant for the first time moved to dismiss the action. The motion was allowed, and plaintiff excepted and appealed to this Court.

E. F. Aydlett and J. C. B. Ehringhaus for plaintiff.
Ward & Grimes for defendant.

ALLEN, J. The pendency of the action commenced before the justice of the peace, at the time this action was instituted in the Superior Court, did not justify the judgment of dismissal, because a judgment of nonsuit was entered in the former action before pleadings were filed in this or it came on for trial. *Grubbs v. Ferguson,* 136 N. C., 60; *Cook v. Cook, ante,* 46.

In the case last cited, *Justice Hoke,* speaking for the Court, says: "As a general rule, this right to plead the pendency of another action between the same parties before judgment had is regarded to a large extent as a rule of convenience, resting on the principle embodied in the maxim, *'Nemo debet bis vexare,'* etc. The defect is one that can be waived, and it may also be cured by dismissing the prior action at any time before the hearing."

Nor do we think it is true, as contended by the defendant, that the Superior Court has no jurisdiction of the plaintiff's cause of action.

(516) The plaintiff alleges in his complaint facts which, if true, entitle him to a judgment for more than $200, and it has been repeatedly held that it is the sum demanded in good faith which de-

termines the jurisdiction. *Sloan v. R. R.*, 126 N. C., 487; *Cromer v. Marsha,* 122 N. C., 564; *Horner School v. Wescott,* 124 N. C., 518; *Boyd v. Lumber Co.,* 132 N. C., 186; *Shankle v. Ingram,* 133 N. C., 254; *Thompson v. Express Co.,* 144 N. C., 392.

The fact that the plaintiff was mistaken as to the legal effect of remitting the excess over $200, in order to confer jurisdiction on the justice, and cannot now recover more than that sum, does not oust the jurisdiction.

In *Boyd v. Lumber Co., supra,* the sum demanded was $225, and the plaintiff admitted on the trial that he was not entitled to recover more than $178.25, and *Justice Walker* says, in discussing a motion to nonsuit, which was denied: "The aggregate sum demanded in good faith is the test of jurisdiction, and if the plaintiff claimed more than $200, the fact that he failed in his proof to establish all of his claim did not oust the jurisdiction of the court. The plaintiff may claim a sum sufficient to give the court jurisdiction and a part of his claim may be based upon an erroneous principle of law, and for this reason he may fail to recover that part, and the total recovery may therefore fall short of the jurisdictional amount; but the court will still have jurisdiction of the case and may award judgment for the smaller sum, provided it appears that the right to recover the larger amount was asserted in good faith." And in *Horner School v. Wescott, supra,* it was held that the Superior Court had jurisdiction of a cause of action based on a contract, the plaintiff demanding $479.25, when he was mistaken as to the construction of the contract and under its terms could not recover more than $200.

There is no suggestion that the plaintiff was not acting in good faith and did not believe that he was entitled to recover the amount demanded, and no reason can be assigned, upon the facts appearing in the record, for taking a nonsuit in the action commenced before the justice, except that he believed he was entitled to and would claim the full sum alleged to be due him, as an appeal had been taken, and the case (517) would be tried in the Superior Court in any event.

We are of opinion, however, that the act of the plaintiff in remitting the excess over $200 in order to confer jurisdiction on the justice operates as a release, and that the recovery must be limited to that sum.

The statute, Revisal, sec. 1421, provides that, "Where it appears in any action brought before a justice, that the principal sum demanded exceeds $200, the justice shall dismiss the action and render a judgment against the plaintiff for the costs, unless the plaintiff shall remit the excess of the principal above $200, with the interest on said excess, and shall, at the time of filing his complaint, direct the justice to make

this entry: 'The plaintiff in this action forgives and remits to the defendant so much of the principal of this claim as is in excess of $200, together with the interest on said excess.' "

The justice of the peace has no jurisdiction in civil actions founded on contract, if the sum demanded, exclusive of interest, exceeds $200, and the plain purposes of section 1421 of the Revisal is to give to one holding a debt the opportunity of a speedy trial before a justice by reducing his debt to $200, instead of requiring him to wait for a term of the Superior Court.

The plaintiff was not compelled to sue before a justice, but he had the privilege of doing so, and the statute imposes as a condition to the exercise of this privilege that he "forgive and remit to the defendant" so much of the principal of the claim as is in excess of $200, which is in effect a release. If this is not the correct interpretation of the statute, it would seem that but one other conclusion could be reached, and that is, that the plaintiff having a claim in excess of $200 can remit the excess and recover judgment for $200, and hold the excess as a claim against the debtor, which could not have been contemplated.

Coggins v. Harrell, 86 N. C., 320, sustains this view. In that case the plaintiff sued a surety on the bond of a constable, the penalty of the bond being $4,000, to recover $140, and undertook to remit the penalty of the bond in excess of $140, and the Court, after holding that the plaintiff did not have the right to remit, says: "If (518) this plaintiff could remit the penalty of the bond as attempted in his case, the bond would be satisfied by the judgment rendered upon it, and no action would lie for any further breaches thereof by other parties claiming to be injured thereby."

We conclude that the Superor Court has jurisdiction, but that the plaintiff cannot recover more than $200 principal money.

Reversed.

Cited: Fields v. Brown, 160 N. C., 300; *McLeod v. Gooch,* 162 N. C., 127; *Tillery v. Benefit Society,* 165 N. C., 263; *Barnett v. Mills,* 167 N. C., 584; *Wooten v. Drug Co.,* 169 N. C., 67; *R. R. Iron Works,* 172 N. C., 191.

J. A. PARKER v. E. A. DANIELS.

(Filed 11 September, 1912.)

1. Contracts—Statute of Frauds—Direct Assumption of Liability.

A contract to answer the "debt, default, or miscarriage of another," which the statute of frauds requires to be in writing to be binding, relates only to agreements to be surety for the debts of another; and the statute does not apply to verbal contracts assumed by the promisor so as to discharge such other from liability to the creditor.

2. Same—New Contract—Evidence.

The plaintiff, who had been transporting cargoes by water in connection with a steamboat operated by a corporation, receiving as compensation a certain proportionate part of the freight charges, refused to continue this arrangement for the reason that the corporation was in arrears of its payment to him. The corporation having made a change of management, its president told the plaintiff that he would not assume the arrearage of debt, but would be personally responsible from then on for the amount the plaintiff should earn under the former arrangement: *Held*, the promise of the president of the corporation, the defendant in the action, created a new contract, not within the statute of frauds, and was binding on him.

3. Contracts—Statute of Frauds—Pleading—Waiver—Objection and Exception—Appeal and Error.

The defense that a verbal promise was within the meaning of the statute of frauds, and unenforcible, must be pleaded and objection raised, to be available; and while in this case it was not done, the court decided upon the merits of the case, as no exception had been entered, the case argued upon its merits, and the point seemed to have been waived.

APPEAL by defendant from *Bragaw, J.*, at January Term, (519) 1912, of PASQUOTANK.

The following issues were submitted without objection:

1. Did defendant contract with the plaintiff to personally pay for the freight hauled, as alleged? Answer: Yes.

2. What amount is due plaintiff by defendant? Answer: $399.10.

From the judgment rendered, the defendant appealed.

I. M. Meekins, Ward & Thompson for plaintiff
E. F. Aydlett, W. A. Worth for defendant.

BROWN, J. We have considered the several assignments of error set out in the briefs of the learned counsel for the defendant and do not think that any of them can be sustained. The matter seems to be one almost entirely of fact, and was settled by the jury adversely to the defendant under the clear charge of the court.

The only assignment of error we deem it necessary to consider is that which relates to the statute of frauds. The plaintiff sought to recover from the defendant the sum of $399.10, alleged to be due plaintiff by the defendant for freights hauled by plaintiff for the LeRoy Steamboat Company, a corporation of which the defendant was president, the plaintiff contending that the defendant agreed to be responsible for the indebtedness.

The defendant denied the contract, and contended further that it was a contract to answer for the debt of another, and was not in writing, and came within the statute of frauds.

Upon his feature of the case his Honor charged the jury: "That if you shall find from the evidence and by the greater weight thereof that the defendant agreed to be responsible to plaintiff for such sums as might become due to the plaintiff if he would continue his work of freighting, and would see that plaintiff should be paid such sums as he earned thereby, then you should answer the first issue "Yes"; otherwise, you should answer it "No."

(520) There is abundant evidence in the record sustaining the charge of the court intending to prove a contract upon the part of the defendant, not so much to assume a debt of the LeRoy Steamboat Company as to create a new responsibility for which the defendant alone agreed to be held responsible.

The evidence tends to prove that the plaintiff had been operating a boat between Weeksville and Elizabeth City in conjunction with the LeRoy Steamboat Company under an agreement whereby he was to receive a certain portion of the freights; that on 14 June, 1911, the said company owed the plaintiff about $700, which has never been paid; that at that time the management of the said company changed hands and the defendant became its president.

The testimony tends further to prove that on that date the plaintiff refused to carry any further freight, or to go on with his work in connection with the said company, because it had failed to pay him the aforesaid indebtedness; that plaintiff had a conversation with the defendant and told him that he would not do any more work under the contract with the said company, and that the defendant said that he would not be responsible for any past debt of the company, but that if Parker would go on with his work, from then on the defendant would be personally responsible for what Parker should earn. This statement was made by the defendant on 14 June, 1911, and is proven by several witnesses and expressed in various forms of language.

Under this contract with the defendant the plaintiff worked up to 19 July, 1911, at which time the amount due him by the defendant was $399.10.

It is to be observed that the defendant does not plead the statute of frauds, nor did he object to the evidence when it was offered, and strictly speaking, the point cannot be fairly raised upon this record. But as that seems to have been waived, we consider the question upon its merits as if the statute had been properly pleaded, or the point raised upon an objection to the evidence.

We are of opinion that upon this evidence, which is scarcely controvertible, the contract is not one within the statute of frauds. This statute, which requires a special promise to answer the (521) "debt, default, or miscarriage of another" to be in writing, is intended only to invalidate verbal agreements to be surety for the debt of another, for which that other continues to remain liable. It does not forbid a verbal contract to assume the contract of another who may be discharged from all liability to the creditor, the promisor becoming sole debtor in his place. *Haun v. Burrell,* 119 N. C., 547; *Whitehurst v. Hyman,* 90 N. C., 489; *Sheppard v. Newton,* 139 N. C., 533; *Jenkins v. Holley,* 140 N. C., 380; Clark on Contracts, page 57.

Applying this principle to the evidence in this case, it is apparent that the plaintiff had ended his contract with the LeRoy Steamboat Company because of its insolvency and refused to go on further with his work. When the management was changed and the defendant became president, the evidence shows that a new contract was entered into, not between the LeRoy Steamboat Company and the plaintiff, but between the defendant and the plaintiff, whereby the defendant personally assumed the liability to the plaintiff for the payment of the amounts which he should earn, and that the credit was given exclusively to the defendant.

This was not in any view of the evidence an assumption of a debt for and on account of the LeRoy Steamboat Company, but was in every sense a new contract, for which the defendant became personally liable. *Mason v. Wilson,* 84 N. C., 51; *Packer v. Benton,* 35 Conn., 350.

No error.

HENRY CLARK BRIDGERS v. J. I. BEAMAN ET AL.

(Filed 11 September, 1912.)

1. Railroads—Subscriptions of Stock—Deeds and Conveyances—Escrow—Consideration—Location of Depot—"On" Certain Town Limits—Evidence—Contracts.

When a deed to lands is given for a subscription to the stock of a railroad company in the course of constructing its lines, placed in escrow,

to be "null and void" if the grantee "fails to construct a depot on the southern limits of H," a small town, and where the grantor owned other lands: *Held*, in an action to compel the delivery of the deed, that, construing the word "on" as meaning "near to" the southern limits of the town, the provision upon which the delivery of the deed was made to rest was not complied with by the grantee locating the depot 1,450 feet from the southern boundary, when, from the size of the town, this location placed the depot 100 feet from its eastern boundary, within 300 feet of the northern boundary, thus locating it in the northeastern part of the town.

2. Same—Town Charter.

A provision in a deed to lands given for subscription to stock in a railroad, placed in escrow to be delivered when a line of the railroad, in the course of construction, should locate its depot "on the southern limits" of a named town, the location of the "southern limits of the town" is found by referring to the charter in force at the time of the deed, and not to that named in a subsequent charter.

(522) APPEAL by plaintiff from *Justice J.*, at February Term, 1912, of GREENE.

The plaintiff, having under consideration the building of a railroad from Farmville to Snow Hill or Hookerton, was offered inducements by parties at both places. Among them was J. I. Beaman, who offered and subscribed to pay $1,100 in consideration that the road was constructed to Hookerton and *a depot constructed on the southern limits of the town of Hookerton by 29 March, 1908;* that in consideration of the inducements offered by the said Beaman and others, it was decided to build the road to Hookerton, and the subscriptions of the said Beaman and others were so accepted by the plaintiff; and in consideration of the subscriptions of the said Beaman and others, the construction of the said railroad to Hookerton was undertaken and begun; that the said Beaman concluded to pay a part of his subscription in money and a part in land, and executed the deed set out in the pleadings, of date 11 April, 1906, conveying land to plaintiff; that said deed was deposited with a committee, the defendants, to be delivered to plaintiff when he had constructed the railroad and established the depot he had agreed to. The grantor, Beaman, to more fully protect himself and to insure the construction of the depot on the southern limits of Hookerton,
(523) put the following clause in said deed: "to be null and void if said Henry Clark Bridgers (the plaintiff) fails to construct a depot on southern town limits of Hookerton, and build a railroad from Farmville to the depot in Hookerton by 29 March, 1908." The said Beaman owned land on the southern limits of Hookerton. Under the foregoing circumstances the deed was executed and placed in the hands of the committee for future delivery, as events should determine. The

plaintiff constructed a depot in Hookerton and built a railroad from Farmville to the depot in Hookerton before 29 March, 1908, and demanded of the committee, the defendants, the possession of said deed; they refused to give plaintiff possession of said deed, and the plaintiff brings this action against them to compel them to do so.

The town of Hookerton has had two charters, one granted in 1867 and the other in 1907. According to the charter of 1867, the depot is located within 300 feet of the northern boundary of Hookerton, within 100 feet of its eastern boundary, about 1,450 feet of the southern boundary at the nearest point, and the surveyor, who was introduced as a witness by the plaintiff testified that the depot was not on the southern limits at all, according to the charter of 1867.

The defendant paid the part of the subscription which was to be paid in money, but resisted the delivery of the deed, upon the ground that the plaintiff had not constructed the depot on the southern limits of Hookerton.

At the conclusion of the plaintiff's evidence, his Honor sustained a motion for judgment of nonsuit, and the plaintiff excepted and appealed.

J. L. Bridgers for plaintiff.
Jarvis & Blow for defendant.

ALLEN, J. The plaintiff and the defendant have made the location of the depot on the southern limits of Hookerton material, because they have stipulated that the deed shall be void if it is not so located, and the reason the defendant insisted on this provision is apparent.

The defendant owned land on the southern limits of Hooker- (524) ton, which was a small town, and as it was anticipated that its population and wealth would increase after the construction of the railroad, he was desirous of having the depot located on his side of the town, so that business might be attracted in his direction instead of away from him.

The deed was delivered in escrow in 1906, and we agree with his Honor that the southern limits of Hookerton then in existence under the charter of 1867, are those referred to; but if it was otherwise, in our opinion, based upon the map, the southern limits under the charter of 1907 are, in so far as they affect the controversy between the plaintiff and the defendant, substantially the same as under the charter of 1867.

The determination of the question presented to us depends, therefore, on the location of the depot and whether it can be said to be *on* the southern limits.

The word "on" has various meanings, dependent upon the purposes for which it is used. Webster says: "The general significance of *on*

is situation, motion, or condition with respect to contract or support beneath; as: At or in contact with the surface or upper part of a thing and supported by it. To or against the surface of. At or near; adjacent to—indicating situation, place, or position." And the Century: "In a position above and in contact with; used before a word of place indicating a thing upon which another thing rests or is made to rest. In a position so as to cover, overlie, or overspread. In a position at, near, or adjacent to; indicating situation or position, without implying contact or support. In or into a position in contact with and supported by the top or upper part of something."

Adopting the definition most favorable to the plaintiff, "near to," we are of opinion, when all the circumstances are considered, that the plaintiff has not located the depot *"on"* the southern limits.

The only witness introduced by the plaintiff, and who surveyed all the lines under an order of court, says that the depot is not on the southern limits as contained in the charter of 1867, and while, if distance alone controls, the depot may be said to be near those limits,
(525) it would not convey this impression when the size of the town and the location of the other limits are considered. The town of Hookerton is a small town, and the distance from the northern to the southern boundary is only about 1,750 feet. The depot is within 100 feet of the eastern boundary, within 300 feet of the northern boundary, and 1,450 feet from the southern boundary, which would seem to locate it in the northeastern part of Hookerton and not on its southern limits.

We conclude that the plaintiff, upon his own evidence, has failed to comply with the condition in the deed, and is not entitled to recover. No question is raised by either party as to the legality of the contract.

Affirmed.

J. B. HODGES v. R. L. SMITH.

(Filed 11 September, 1912.)

1. Vendor and Vendee—Sale of Horse—False Warranty—Deceit—Personal Injury—Damages—Evidence—Question for Jury.

Evidence tending to show that a dealer in horses sold a vicious horse to one who told him that he was inexperienced in horses, and that he wanted a gentle horse that his wife and family could safely drive, and which ran away with the vendee soon after his purchase, and injured him; that the horse trader had had the horse for some time, is sufficient to take the case to the jury in an action to recover damages for the in-

juries inflicted, it being a fair inference from the period of possession of the horse by the defendant that he knew the character of the horse he was selling, and it being incumbent upon him, under the circumstances, not to make representations of this character unless he knew them to be true.

2. Vendor and Vendee—Sale of Horse—False Warranty—Deceit—Personal Injury—Tort—Damages.

When there is an affirmative finding on the issue of false warranty and deceit in the sale of a horse, which proximately caused the purchaser to be injured in a runaway while driving it, a suit for damages being in tort, the plaintiff's damages are not confined to those in the contemplation of the parties at the time of the sale.

APPEAL by defendant from *Webb, J.*, at May Term, 1912, of (526) BEAUFORT.

The following issues were submitted to the jury:

1. Did defendant warrant and represent to plaintiff that the horse in question was gentle in harness and safe to drive, as alleged in the complaint? Answer: Yes.

2. If so, was said warranty and representation false, as alleged in the complaint? Answer: Yes.

3. If so, was plaintiff injured in consequence thereof, as alleged in the complaint? Answer: Yes.

4. What damage is plaintiff entitled to recover of defendant? Answer: $1,000.

From the judgment rendered, the defendant appealed.

Small, MacLean & McMullan for plaintiff.
F. G. James & Son, Ward & Grimes for defendant.

BROWN, J. This case was before this Court on a former appeal, 158 N. C., 256. The plaintiff seeks to recover damages for personal injuries sustained by the running away of a horse purchased by him of the defendant, on the ground that the horse was falsely warranted to be gentle. On a former trial a motion to nonsuit was sustained, and this Court held that there was sufficient evidence to go to the jury, and ordered a new trial.

The issues as to warranty and false representation as to the qualities of the horse have been found against the defendant on a charge not excepted to, and those findings may be considered as settled. The case now comes before this Court upon the sole question as to whether in any view of the evidence there is sufficient ground to warrant a recovery for damages for injuries consequent upon the running away of the horse.

As we read the case upon the record now sent up, the facts and evidence as developed in the second trial are substantially the same as on the former trial, and are recited fully in the opinion of *Mr. Justice Walker*. It is contended, however, upon this hearing, that the plaintiff can recover only the difference between the value of the horse as
(527) warranted and as he actually turned out to be, upon the ground that there is not evidence of a false representation upon the part of the defendant, or that he knew of the vicious character of the animal.

We think the contention of the learned counsel for the defendant cannot be sustained. It was held by us on the former trial that there was evidence tending to prove that the defendant falsely and knowingly represented that the horse was kind and gentle. The evidence on both trials seems to be practically the same. The plaintiff testified that he went to the defendant's stables in Greenville to purchase a horse, and that he told the defendant that he wanted a gentle horse, "one for my mother and father to drive; that they are old, and I want one that is safe." He said: "All right; we have got him. Here is one that I can sell you that I know is gentle. I can guarantee this horse to be gentle and that any lady can drive him." The plaintiff testified that he told the defendant that he did not know anything about horses; that he had never bought one before in his life; and the defendant repeatedly stated that he knew this horse to be gentle and that he guaranteed him to be perfectly gentle.

If the evidence introduced by the plaintiff is to be believed, the animal was anything else but gentle, and his "natural gait was running away and kicking." He ran away shortly after the plaintiff got him, threw him out of the buggy and seriously injured him.

It is not necessary to offer evidence that is conclusive of the defendant's knowledge of the vicious character of the horse, but it is only necessary to offer such evidence as is sufficient to go to the jury. The defendant was told by the plaintiff the purpose for which the plaintiff desired the animal, and the defendant repeatedly stated that he knew the horse to be gentle. The horse had been in the defendant's possession for some time, and it is a fair inference, although not a necessary one, that the defendant knew the vicious character of the horse, and misrepresented his qualities to the plaintiff. It is not for us nor for the judge below to draw such inferences, but the evidence in the case is of such a character that his Honor was well warranted in submitting it to the jury, that they might draw such inferences if they saw fit.

(528) Assuming that the defendant made this representation as to the horse's qualities in good faith, he had no right to do it unless he positively knew that the horse was a gentle one, which the evidence shows that he was not, but was an animal of the most vicious and un-

reliable character. *Allen v. Truesdale,* 135 Mass., 75, cited in the former opinion of this Court, is almost on all-fours with the present case, and fully warrants the judgment of the court upon the issues as found by the jury.

It being thus adjudicated on the former hearing of this case that there is evidence of false warranty and deceit in the sale of a horse, the rule of damage does not confine the plaintiff solely to such as was in the contemplation of the parties, but having established to the satisfaction of the jury a tort, the plaintiff is entitled to recover such damages as naturally flow from and as were consequent upon the wrongful and tortious conduct of the defendant.

No error.

Cited: *Fields v. Brown,* 160 N. C., 299.

CLAUDE GRANT v. ELLA EARLY GRANT.

(Filed 18 September, 1912.)

1. Special Appearance—Jurisdiction—General Appearance.

A special appearance may only be entered for the purpose of moving to dismiss for want of jurisdiction, and when it is made for the purpose of a motion to remove the cause to another county, the appearance is general, by whatever name the party may designate it.

2. Same—Waiver.

A party by entering a general appearance in an action remedies any irregularity in the service of the summons on him.

3. Divorce—Pleadings—Verification—Waiver.

An objection that a complaint, in an action for divorce, has not been verified in accordance with Revisal, sec. 1569, is jurisdictional.

4. Divorce—Pleadings—Verification—Amendments—Courts.

When the verification of the complaint in an action for divorce avers the truth of the matters therein in the usual form, and then sets forth the statutory requirements as to levity and collusion, etc., and especially when the complaint alleges no facts on information and belief, the verification will not be held as fatally defective; but, if otherwise, it may be remedied by an amendment allowed by the court which complies with the statute.

APPEAL by defendant from *Cline, J.,* at April Term, 1912, of (529) NORTHAMPTON.

This is an action, commenced in Bertie County, to obtain an absolute divorce, and at the return term of the summons the defendant, through counsel, filed the following motion:

"The defendant, by her attorneys, appears specially in this action and moves to dismiss this action for want of jurisdiction of this court, for the following causes:

"1. That at the time this action was begun the plaintiff was not a resident of this county, but a resident of the county of Northampton, North Carolina, and is still a resident of that county.

"Wherefore the defendant prays that this action be dismissed; but if the court be of opinion that the defendant is not entitled to have this action dismissed, then that it be removed to said Northampton County for trial."

His Honor refused to dismiss the action, but found as a fact that the plaintiff was a resident of Northampton County, and on motion of the defendant, based on affidavits of Alex. Lassiter and others, filed by her, removed the action for trial in that county.

The defendant excepted and appealed.

One of the affidavits filed in support of the motion was made by the father of the defendant, in which, among other things, he says:

That he is the father of the defendant, Ella Early Grant, and that she left this State last summer to make her residence and domicile in a distant State beyond the borders of this State, where she still resides.

That she has written to him expressing a strong desire to be at this term of this court, but was unable to reach here in time to be present during this term.

(530) That if the case is removed to NORTHAMPTON for trial, she can be at the next term of the Superior Court of that county; but if not removed, but continued to the next term of this court, she can be present at that term.

When the action was called for trial in Northampton County, the defendant, through her counsel, filed the following motion:

"The defendant, Ella E. Grant, appears specially and through her attorneys, Winborne & Winborne and J. H. Kerr, alone to move and do hereby move to dismiss this action, for the following reasons:

"1. Because the summons has not been legally served, and this court has not acquired jurisdiction of the defendant.

"2. That the court has not jurisdiction of this action."

The motion was denied, and the defendant excepted.

The motion to dismiss for want of jurisdiction is based upon the alleged failure to verify the complaint as required by Revisal, sec. 1563.

The verification is as follows:

Claude Grant maketh oath that he is the plaintiff in the above-entitled cause, and that the foregoing complaint is true of his own knowledge, except as to those matters therein stated on information and belief, and as to them he believes it to be true; that the said complaint is not made out of levity or by collusion between plaintiff and his wife, nor for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in the complaint; that the facts set forth in the complaint as grounds for divorce have existed to his knowledge at least six months prior to the bringing of this action and filing this complaint, and he has been a resident of the State of North Carolina for more than two years next immediately preceding the filing of this complaint and bringing of this action. CLAUDE GRANT.

Sworn to and subscribed before me, this 16 November, 1911.

W. L. LYON,
Clerk Superior Court.

After the denial of the motion, the defendant entered a general appearance and moved for a continuance.

There was verdict and judgment for the plaintiff, and the (531) defendant appealed.

Peebles & Harris and Winston & Matthews for plaintiff.
Winborne & Winborne for defendant.

ALLEN, J. The effect of special and general appearances is fully considered in the learned opinion of *Justice Walker* in *Scott v. Life Association,* 137 N. C., 517, in which it is held that a special appearance cannot be entered except for the purpose of moving to dismiss for want of jurisdiction, and that if the motion affects the merits, the appearance is general; and it is there said: "The test for determining the character of an appearance is the relief asked, the law looking to its substance rather than to its form. If the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character. 3 Cyc., pp. 502, 503. The question always is, what a party has done, and not what he intended to do. If the relief prayed affects the merits or the motion involves the merits, and a motion to vacate a judgment is such a motion, then the appearance is in law a general one."

It follows from this statement of the law that the appearance in Bertie for the purpose of making a motion to remove the action to Northampton County was general, although styled special, and if so, it cured any defects in the process and gave the court jurisdiction of the person of the defendant.

If, however, there was any doubt upon this question, it appears in the record that the defendant afterwards formally entered a general appearance in Northampton and moved for a continuance, which made a service of the summons unnecessary.

The other ground for the motion to dismiss is on account of alleged defects in the verification of the complaint.

It is true, as contended by the defendant, that an objection to the verification of a complaint in an action for divorce is jurisdictional *Hopkins v. Hopkins,* 132 N. C., 23; *Johnson v. Johnson,* 142 N. C., 462, but in our opinion the verification in this case substantially complies with the statute, and particularly as the complaint alleges no facts on information and belief, but if it did not, the judge states that the (532) plaintiff is allowed to amend the affidavit of verification by adding, "That the facts set forth in the complaint are true to the best of affiant's knowledge and belief," which conforms to the words of the statute. This disposes of both appeals.

There is no error.

Affirmed.

Cited: School v. Pierce, 163 N. C., 430; *S. v. White,* 164 N. C., 410; *McDowell v. Justice,* 167 N. C., 494.

M. T. LEACH v. FOSBURGH LUMBER COMPANY.

(Filed 11 September, 1912.)

1. Contracts—Rights of Way—Deeds and Conveyances—Payment—Accepting Check—Explanation—Evidence.

Pending negotiations with defendant for the defendant to have the right of way for a lumber or logging road over his land, the plaintiff received a draft of a contract from defendant's attorney for a right of way for five years, together with his check for $275 to pay for it. The plaintiff returned the contract, refusing to grant the right of way for a longer period of time than one year for that sum, with privilege of renewing for another year at the same price, but indorsed the check and received the money for it. The defendant's attorney returned the contract to the plaintiff, instructing him to make such changes as he pleased, which plaintiff changed to a one-year period, with the privilege of renewal, returned it to the attorney, who delivered it to the defendant, who entered upon the land and occupied the right of way: *Held,* (1) plaintiff's indorsing the check was not sufficient to convey a right of way or other interest in his land; (2) not admitting plaintiff's evidence tending to explain his indorsement of the check, *i. e.,* that he did so to await further negotiations, and not as in payment for a five-year period, was error.

2. Rights of Way—Deeds and Conveyances—Acceptance—Terms and Conditions—Contracts—Evidence.

By accepting a conveyance of a right of way over lands, and by entering thereon and occupying the lands for the purpose named, the grantee is bound by the terms and condition of the deed; and, in this case, the question as to whether there was a contract entered into between the parties depends upon whether there was such an acceptance by the grantee.

3. Deeds and Conveyances—Rightful Entry—Willful Trespass—Exemplary Damages—Measure of Damages—Contracts—Payment—Accounting.

One who has entered upon the lands of another under contract with him for a right of way, but under a misunderstanding of its terms, is not a willful trespasser, and cannot be held liable for exemplary damages, but for the value of the right of way and its use for the time of its occupation, and for any real injury that the land may have sustained in consequence; and the owner will be held to account for any moneys he may have received by virtue of the occupancy, with interest.

APPEAL by plaintiff from *Cline, J.*, at January Term, 1912, (533) of HALIFAX.

Action to recover damages for entering upon the plaintiff's land and occupying a right of way across the same. The defendant claimed the right of way under a contract alleged to have been executed by the plaintiff.

The following issues were submitted to the jury:

1. Is the paper-writing set out in the complaint, providing for a one-year right of way and a one-year privilege, the contract and agreement entered into between the parties hereto? Answer: No.

2. Is the paper-writing originally prepared by Joseph P. Pippin, providing for a five-years right of way and a five-years extension privilege, the contract and agreement between the parties, as alleged in the answer? Answer: Yes.

3. Has the defendant failed and refused to comply with its agreement, as alleged in the complaint? Answer: .....

4. Is the defendant trespassing upon plaintiff's lands, as alleged in the complaint? Answer: .....

5. What are the plaintiff's damages? Answer: .....

From the judgment rendered, the plaintiff appealed.

Mason, Worrell & Long, and George C. Green for plaintiff.
W. E. Daniel, E. L. Travis, and R. C. Dunn for defendant.

BROWN, J. The defendant was negotiating with the plaintiff for a right of way across his lands in Halifax County, and the question to be determined is whether the defendant acquired any title thereto. The

desired right of way was three-quarters of a mile long and was to be used for a lumber road to haul out the defendant's logs. The negotiations were conducted with the plaintiff by one Joseph Pippin, an attorney.

The evidence shows that Pippin prepared a contract for a
(534) five-year right of way and sent it to Leach, together with a check for $275. The plaintiff requested the court to instruct the jury substantially in the fifth and sixth prayers for instruction that there was no sufficient evidence that Leach executed or assented to the contract for five years as first prepared and sent to him, and that the jury should be directed to answer the second issue "No." His Honor refused to give this instruction, and in so doing we think he was in error.

The evidence shows that when the plaintiff received the five-year contract he placed the check in the bank for collection for his credit, and that he returned the contract for five years to Pippin, refusing to sign it. The plaintiff testified that he told Mr. Gray, defendant's agent, that he would not sign a contract for any specific number of years beyond one.

It is further in evidence, by testimony of Pippin himself, a witness for the defendant, that he returned the contract to the plaintiff with instructions to make such changes as he saw fit, and that the plaintiff changed it to its present form, then executed and returned it to Pippin, who delivered it to the defendant's agent. As returned to Pippin, as delivered to the defendant, and as executed by the plaintiff, the contract conferred a right of way for one year for the consideration of $275, with the right of renewal for one additional year upon the payment of the further sum of $275.

There is no evidence whatever that the plaintiff ever executed any other contract than this. A mere indorsing of the draft for money and placing it in the bank for collection upon the part of the plaintiff would not be sufficient of itself to convey a right of way or any other interest in the plaintiff's land. This is not such a memorandum as fulfills the requirement of the statute. Pell's Revisal, sec. 976, and cases cited. *Hall v. Misenheimer,* 137 N. C., 186.

The act of receiving the check and depositing it in the bank for collection is an act which in itself is open to explanation. Clark on Contracts (2 Ed.), page 27. This opportunity to explain why he deposited the check was denied to the plaintiff, and is the basis of one of his exceptions.

(535) All the evidence, we think, shows that the plaintiff deposited the check in the bank to his credit, being admittedly solvent, to await the result of further negotiations. That he did not accept it in

payment for five-years contract for the right of way is conclusively shown by the admitted fact that he at once returned the contract to Pippin, refusing to execute it in its then form. Besides, he had also informed Mr. Gray, the defendant's agent, he would not sign a contract for five years.

It appears in evidence that when the plaintiff received the contract from Pippin and changed its form to one year and signed it and returned it to Pippin, that Pippin delivered it to the defendant's agent.

The question then to be determined is, Did the defendant, after receiving this contract from Pippin, as executed by the plaintiff, accept it and enter upon the plaintiff's lands and prosecute his work under it? If so, the defendant would be bound by it and compelled to perform it, for one who accepts a deed is bound by its terms and conditions. *Fort v. Allen,* 110 N. C., 184.

If the jury should find that the defendant did not accept the contract as finally executed and returned by the plaintiff and did not act under it, then there would be no contract in existence between the plaintiff and the defendant, no coming together of two minds, and the parties would stand upon their legal rights as if no contract had been attempted to be made.

We do not think in any view of the evidence that the defendant can be held to be a willful trespasser, for he entered upon the land by the plaintiff's permission, although there seems to have been a misunderstanding as to terms.

Such being the case, it would be liable to the plaintiff for the value of the right of way, its use and occupation, and any real injury that the land had sustained in consequence of such occupation, but the defendant could not in any view be held for exemplary damages.

At the same time the plaintiff must necessarily account for the $275 and interest thereon accruing since he received it.

We are of opinion that a new trial should be had, to the end that proper issues be submitted to the jury.

New trial.

(536)

WALKER & MYERS v. GEORGE P. COOPER.

(Filed 11 September, 1912.)

1. Principal and Agent—Deceased Agent—Declarations—Evidence—Interpretation of Statutes.

Declarations of a deceased agent of a party litigant made at the time of a transaction for his principal, and within the scope of his authority as such, is not a conversation with a deceased person within the meaning of Revisal, sec. 1631.

2. Evidence, Corroborative.

Testimony of a witness in corroboration of a party litigant, as to what he said in regard to a matter relevant to the inquiry, is competent.

3. Evidence—Depositions—Available to Both Litigants—Appeal and Error—Record—Prejudice.

When a party who has taken evidence under the provisions of Revisal, sec. 865, introduces a part of it, *Semble*, that the other parties, by express provision of the statute, may introduce the other part thereof; but no error can be adjudged on appeal when the examination does not appear of record, so that it may be seen whether the excepting party has been prejudiced.

4. Instructions—Construed as a Whole — Contracts — Breach — Measure of Damages.

The charge of the judge, in this case, upon the measure of defendant's damages upon his counterclaim, alleged to have been received from failure on plaintiff's part to fulfill his part of the contract sued on, construed as a whole, is not held for reversible error, as the jury must have understood that defendant was to be awarded, as damages, the net profit he would have made under the contract upon a finding that plaintiff had failed in his duty to the defendant thereunder, with further pertinent instructions free from error.

5. Instructions, Specific—Exceptions—Special Request—Procedure.

When the charge construed as a whole is correct, exceptions that it was not more specific cannot be sustained on appeal, it being the duty of the excepting party to tender instructions covering the desired details.

APPEAL by plaintiff from *Cline, J.*, at April Term, 1912, of BERTIE.

This is an action to recover certain personal property, in which the defendant alleges a counterclaim, and demands damages for

(537) breach of a logging contract, and this appeal is based upon exceptions relating to the counterclaim, the jury having awarded damages in favor of the defendant.

The defendant offered evidence tending to prove that he entered into a contract with the plaintiffs, under which he was to deliver the timber from two tracts of land at Plymouth for $5 per thousand; that the plain-

tiffs were to furnish him money and equipment to enable him to perform the contract on his part; that they were to furnish him iron for a railroad track and other equipment; that the plaintiffs failed to perform their agreement, and that he was damaged thereby; that among other elements of damage he lost a profit of $1.50 per thousand, which he would have made under said contract.

The plaintiff offered evidence to the contrary, and particularly that the defendant would have made no profit under said contract, or in any event less than $1.50 per thousand.

There was no evidence that the contract could not have been completed prior to the commencement of this action.

The defendant was examined as a witness and testified, among other things, that the iron for the railroad was not furnished him, and that he made complaints about it; that he told Mr. Bash that he did not have enough iron, and he replied: "We can't get any more right now, and as we can get boats we will send you more." Mr. Bash was general manager for the plaintiffs, with authority to make contracts, and was dead at the time of the trial. The plaintiffs objected to this evidence, under Revisal, sec. 1631, because it was a conversation with a deceased person. The objection was overruled, and the plaintiff excepted.

One Smithwick was a witness and testified that he had heard the defendant complain of the failure of the plaintiffs to furnish iron, and plaintiffs excepted. His Honor explained to the jury that this evidence was admitted in corroboration of the plaintiff only.

The defendant was examined before the trial, under Revisal, sec. 865, and at the trial the plaintiffs introduced a part of this examination, and the defendant was permitted, over the objection of the plaintiffs, to introduce the whole examination, and plaintiffs excepted.

The examination is omitted from the record at the request of (538) the plaintiffs, and there is no statement as to its contents.

The plaintiffs excepted to the part of the charge as to the recovery of profits by the defendant, because of failure to state a rule for measuring the damages.

There was a verdict for the defendant on his counterclaim, and the plaintiffs appealed.

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

Winston & Matthews for defendant.

ALLEN, J. Four exceptions are considered in the plaintiff's brief, and all others are deemed abandoned.

The first three relate to rulings upon the evidence, and none of these can be sustained.

The evidence of the defendant as to a conversation with a deceased agent of the plaintiffs is not condemned by Revisal, sec. 1631. (*Roberts v. R. R.*, 109 N. C., 670; *Gwaltney v. Assurance Society*, 132 N. C., 925), and it was clearly competent to prove by the witness Swithwick that he had heard the defendant complain of the failure to furnish iron, in corroboration of the evidence of the defendant, for which purpose alone it was admitted.

The exception to the introduction of the examination of the defendant, taken under Revisal, sec. 865, cannot be considered, because we are unable to see that it was in any way prejudicial to the plaintiff, as there is no statement of what was in the examination, and it was omitted from the record by direction of the appellant.

It would seem, however, that the exception could not have availed the plaintiffs, as they introduced a part of the examination, and further, the statute (Revisal, sec. 867) provides that the examination "may be read by either party on the trial."

The charge of his Honor is subject to the criticism that he did not state explicitly the measure of damages, but when the part excepted to, for this reason, is considered as a whole, we do not think the jury could fail to understand that they were to award the defendant, as damages, the net profit he would have made under the contract, if any. (539) He stated fully the contentions of the parties, and instructed the jury substantially that the defendant was entitled to recover damages if the plaintiffs had agreed to furnish iron and had failed to do so; that the defendant contended that if the contract had been performed by the plaintiffs, he would have made a clear profit of $1.50 per thousand; that the plaintiffs contended that his profits would have been nothing, or in any event less than $1.50 per thousand; and that they must ascertain the amount of this damage under the fourth issue. If the plaintiffs thought more specific instructions necessary, it was their duty to call it to the attention of the court by prayers for instruction. *Simmons v. Davenport*, 140 N. C., 407; *Ives v. R. R.*, 142 N. C., 131.

Wilkinson v. Dunbar, 149 N. C., 20, sustains the ruling that the defendant is entitled to recover the profits he would have made, but it is not authority in favor of the plaintiffs upon the exception taken, as in that case a new trial was ordered on account of an erroneous rule laid down in the charge for estimating damages, and not because of failure to charge. We find

No error.

FLORENCE EASON v. JOSEPH C. EASON.

(Filed 18 September, 1912.)

Husband and Wife—Jus Accrescendi—Deeds and Conveyances—Interpretation—Intent—Tenants in Common—Second Wife—Dower.

In construing a deed to a husband and wife as a whole, to arrive at its intent, it is held that in a conveyance of land to them, "each a one-half interest," creates a tenancy in common, and the right of survivorship does not apply; and when the wife is dead, the husband remarries and then dies, leaving a widow, the widow is only entitled to dower in the undivided one-half interest in the lands.

APPEAL by defendant from *Justice, J.*, at February Term, 1912, of GREENE.

Petition for dower, heard upon issues raised by the plaintiff. (540)

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE BROWN.

W. F. Evans and L. I. Moore for plaintiff.
George M. Lindsay and J. Paul Frizzelle for defendant.

BROWN, J. The plaintiff is the second wife of Nathan Eason, and as such claims dower in the whole of a certain tract of land described in a deed dated 30 December, 1904, executed by Thomas Lassiter to Nathan Eason and his first wife, Carrie.

It is contended by the plaintiff that the deed in question conveys the land to Nathan Eason and his said wife Carrie, jointly, and that the doctrine of survivorship, as between husband and wife, applies, inasmuch as Nathan Eason survived his first wife. *Ray v. Ray*, 132 N. C., 895.

The premises of the deed are as follows: "This deed, made this the 30th day of December, A. D. 1904, by Thomas U. Lassiter and his wife. Alice Lassiter, of Greene County and State of North Carolina, of the first part, to Nathan Eason and wife, Carrie G. Eason, each one-half interest, of Greene County and State of North Carolina, of the second part."

It is unnecessary to set out the remainder of the deed. The *habendum* as well as the *tenendum* conveys the property to said Nathan and Carrie G. Eason and their heirs and assigns.

We are of opinion that in construing the deed in question the language used in the premises, to wit, "to Nathan Eason and wife, Carrie G. Eason, each *one-half interest*," should be taken into consideration in construing the deed. We have said repeatedly in recent decisions that 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,* 158 N. C., 338; *Triplett v. Williams,* 149 N. C., 394; *Gudger v. White,* 141 N. C., 513.

Giving the language quoted its ordinary significance, we are of opinion the deed created a tenancy in common, and that the plaintiff is entitled to dower in only one-half of the land described in the petition.

The language used is too plain to admit of discussion as to its (541) meaning. The evident purpose of the draftsman was to convey one undivided half of the land to the husband, and the other undivided half to the wife.

This question is very fully discussed by *Mr. Justice Hoke* in *Highsmith v. Page,* 158 N. C., 226, which we think is a case very much in point. See, also, *Stalcup v. Stalcup,* 137 N. C., 305; *Hodges v. Fleetwood,* 102 N. C., 122; 13 Cyc., 666.

The cause is remanded, with instructions to enter judgment in accordance with this opinion.

Cited: *Beacom v. Amos,* 161 N. C., 366; *Holloway v. Green,* 167 N. C., 94.

R. T. DICKERSON v. E. E. DAIL.

(Filed 18 September, 1912.)

1. Appeal and Error—Evidence—Questions Ruled Out—Expected Answers—Prejudice.

It must appear on appeal that the objecting party has been prejudiced by the exclusion of evidence; and when questions are ruled out there must be a statement of what the answers of the witnesses were expected to be, for the appellate court to pass upon whether reversible error had been committed.

2. Damages—Facts in Mitigation—Evidence—Pleadings.

For evidence to show facts in mitigation of damages to be competent, the facts must be alleged in the answer.

APPEAL by plaintiff from *O. H. Allen, J.,* at January Civil Term, 1912, of PITT.

This is an action to recover damages for slander, the plaintiff alleging that the defendant had charged that he had stolen certain hoes.

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

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE ALLEN.

W. F. Evans for plaintiff.
F. C. Harding and Harry Skinner for defendant.

ALLEN, J. The exceptions set out on the record relate to (542) rulings upon the evidence, and all belong to one of two classes.

In the first class the questions are set out, but there is no statement as to the answer of the witness when the question was admitted, nor as to the evidence sought to be elicited when it was excluded; and as we cannot see that the defendant has been prejudiced, the exceptions cannot be sustained. *S. v. Leak,* 156 N. C., 643.

If, however, the evidence was of the character indicated on the argument, we are of opinion that there was no error in the rulings of the court.

The other exceptions relate to the exclusion of evidence as to facts in mitigation of damages, which are not alleged in the answer, and it is settled that such evidence is not admissible. *Upchurch v. Robertson,* 127 N. C., 127. We find

No error.

Cited: In re Smith, 163 N. C., 466; *Warren v. Susman,* 168 N. C., 464; *Burris v. Bush,* 170 N. C., 395.

CITY OF NEW BERN v. ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

(Filed 18 September, 1912.)

1. Cities and Towns—Railroads—Use of Streets—Franchise—Contracts—Consideration—Prospective Conditions.

When the express consideration for a franchise given by a city to a railroad company for the latter to have a right of way for its railroad through a street is that the railroad shall keep and preserve the street in good order for the use of the citizens of the town, the railroad, by operating under its franchise, impliedly promises to perform the same obligations in respect to keeping up this street as the municipality should owe to its citizens, contemplating the growth of the city and such improvements as would be suitable and proper in the future.

2. Same—Paving Streets.

A railroad company, in consideration of having a right of way through the streets of a city, contracted with the city, at the time the street was a dirt street, but that it would keep and preserve the street in good order for the use of the citizens of the town. It appears that, owing to the

increased size of the city and travel over the street, it is necessary that the street should be paved with permanent material to insure the public a reasonable use of it: *Held*, the responsibility of the railroad under its contract extends beyond that of keeping the dirt street in proper condition, and it is its duty to meet the present requirement of paving for the use of the citizens.

(543) APPEAL by defendant from *Whedbee, J.*, at May Term, 1912, of CRAVEN.

This action was tried upon the pleadings, exhibits thereto attached, and agreed statement of facts, made a part of the judgment.

The purpose of the action is to secure a mandatory injunction commanding the defendant to pave Hancock Street in accordance with the terms of a written contract entered into between the plaintiff and the defendant on 12 April, 1856. His Honor gave judgment against the defendant, and the defendant appealed to this Court.

W. D. McIver and R. A. Nunn for plaintiff.
Moore & Dunn for defendant.

BROWN, J. It appears in the statement of facts that at the time this road was constructed, it was granted the franchise by the municipal authorities of New Bern, whereby it obtained the right of way for its railroad through Hancock Street, with a right to construct its roadbed and run its cars thereon.

The consideration of the franchise is expressed in the written contract entered into between the defendant and the municipal authorities, as follows: "Said railroad company shall, under the supervision of the town authorities and their engineers or agents, grade said Hancock Street and keep and preserve the same in good order for the use of the citizens of the town, except the sidewalks, and shall provide ample and convenient crossings of said railroad where the same may intersect any of the streets of the town, and build and construct all necessary aqueducts for the draining of said streets."

It seems to be admitted that the decision of this case depends entirely upon the construction of this contract, and the determination as to what obligation the defendant assumed.

We are of opinion that, fairly construed under the terms of (544) the said contract, in consideration of the use of Hancock Street as a right of way, granted to it by the city authorities, the defendant assumed and promised to perform in respect to said street, except the sidewalks, the obligations which the municipality owed to its citizens in respect to the keeping up of the street.

This obligation is not to be measured by the size and condition of the city at the time when the contract was entered into. The increase of

population and the consequent growth of the city must necessarily have been within the purview of the parties at the time the contract was made.

In a case very similar to the one at bar, the Supreme Court of Pennsylvania says: "The proposition that, because cobblestone was the kind of pavement ordinarily in use when defendant company was chartered, it is in no event bound to repave with any other and more expensive kind of material, etc., is wholly untenable. It cannot be entertained for a moment. It was never contemplated that the railway company would continue to exist and perform its corporate functions in a cobblestone age. It was called into being with the view of progress.

"The duties specified in its charter were imposed with reference to the changes and improved methods of street paving which experience might sanction as superior to and more economical than old methods. In other words, the company is bound to keep pace with the progress of the age in which it continues to exercise its corporate functions."

The phrase "keep and preserve in good order for the use of the citizens of the town" is to be construed with reference to the purpose to be accomplished, and to the character of the object to which the words apply. As has been said, "to keep the street in repair is to have it in such state as that the ordinary and expected travel of the locality may pass with reasonable ease and safety." *McMahon v. R. R.*, 75 N. Y., 236.

The Supreme Court of Massachusetts, in construing language very similar to that in the contract under consideration, says: "A provision in a charter of a tollbridge corporation that the bridge should at all times be kept in good, safe, and passable repair, meant in such condition as befitted a public highway, and safe and convenient for all kinds of travel at all seasons and at all times, by day and night. (545) *Commonwealth v. Central Bridge Corporation,* 66 Mass., 242, 244; 4 Words and Phrases, 3125.

The Supreme Court of Georgia, in *Atlanta v. Buchanan,* 76 Ga., 589, says: "To keep, applied to streets, sidewalks, and bridges, might very reasonably include the idea expressed by the words, 'to construct, to make,' especially when coupled with the words, 'in a reasonably safe condition for travel.' To keep a street in such safe condition means to have it so, to make and remake it so, to construct that sort of bridge, and reconstruct it when rotten or out of repair."

But the defendant contends that although it obligated to preserve and keep Hancock Street in good order, such obligation does not go to the extent of requiring it to pave the street, and the defendant cites a number of authorities in support of this contention. The defendant is confronted, however, in respect to this contention with an admission in the case agreed as follows:

"It is further admitted that by reason of the increased travel over said Hancock Street and by reason of the growth of the city and increase of the traffic through its streets, it is impossible to keep and maintain the said Hancock Street in good order as a dirt street, it being at the time of the execution of said contract a dirt street, and it has so remained up to this date; that in order to insure the public a reasonable use of the same, it has become necessary that the same should be paved with some permanent material; it is also agreed that it has remained and been used as a dirt street from date of contract to this time."

In construing the language of an ordinance granting a franchise similar to this, the Supreme Court of Pennsylvania says: "That the franchise to occupy and the obligation to keep in repair are coextensive, and that whatever the duty of a municipality would have been in respect to the streets where the tracks are laid is now the duty of the railway company laying and using the tracks. *Philadelphia v. R. R.*, 169 Pa., 270; *Atlanta v. Buchanan, supra.*

In a case somewhat similar, the Supreme Court of Minnesota (546) says that this duty is a continuing one and has reference to future exigencies, and requires the railroad company from time to time to put the street in such condition as changed circumstances may render necessary for its proper enjoyment and use by the public. *Minneapolis v. R. R.*, 35 Minn., 131.

In the opinion the learned *Judge Mitchell* goes on to say: "The condition of the street might be entirely adequate for the accommodation of the public under one condition of things, and entirely inadequate under another; and, consequently, a provision which at one juncture would be a discharge of this statutory duty, would at another amount to its violation."

The learned counsel for the defendant has cited a number of authorities which apparently sustain his proposition that the defendant cannot be compelled to pave this street, but that its obligation is confined to keeping it in repair as a dirt street.

While the cases appear on first view to be somewhat conflicting, yet all of the cases cited by the defendant seem to be founded upon the leading case of *Chicago v. Sheldon*, 76 U. S., 50. An examination of that case discloses that the ordinance in question, by which the city of Chicago granted to the railway company the right to construct a railway, set out with minute particularity the duties which the railway company was to perform, and specified those duties as relating to the "grading, paving, macadamizing, filling, or planking of the streets or parts of the streets upon which they shall construct their railways."

The Supreme Court of the United States held that under the language of this ordinance the company could not be held liable for curbing,

grading, and paving the streets with entirely new pavement, and that the obligation of the company extended to repairs only.

We do not think the case is similar to the one under consideration. In our case the defendant has assumed an obligation to keep and preserve the street in good order for the use of the citizens of the town, except the sidewalks, and it is admitted in the case agreed that this obligation can only be kept in order to insure the public a reasonable use of Hancock Street by paving it with some permanent material.

It is admitted that all the other streets of the city, with the (547) exception of one, are paved with modern paving material, and that that street is not a very important street, and is paved with oyster shells. The public have the right to use Hancock Street, and it is admitted that there is much passing and hauling upon it.

Inasmuch as the defendant cannot keep it and preserve it in good order and condition as a dirt street, so that the public may use it, we think its obligation can only be met by paving it with some substantial material.

The judgment of the Superior Court is

Affirmed.

Cited: Hendrix v. R. R., 162 N. C., 18.

ANGE A. FOREST ET AL. v. ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

(Filed 18 September, 1912.)

1. Drainage Districts—Remedy—Interpretation of Statutes.

The provisions of Revisal, sec. 4026, are necessary for the cultivation and improvement of lowlands required to be drained, and should be construed to carry into effect the beneficent purposes of the act, when practicable.

2. Drainage Districts—Words and Phrases—Ditches—Canals—Interpretation of Statutes.

Revisal, sec. 4026, should be construed in connection with the other sections of the chapter wherein it is found, relating to the drainage of lowlands, and therein the terms "ditch" and "canal" are used indiscriminately to designate an artificial drain.

3. Same.

An artificial drain in some places from 3 to 5 feet wide and from 2 to 5 feet deep, made for the purpose of cultivating and improving lowlands by draining them, is a canal within the meaning of section 4026 of the Revisal.

4. Drainage Districts—Canals—Maintenance—Original Construction—Interpretation of Statutes.

It is not necessary that the owner of lands lying along a drainage canal, within the meaning of Revisal, sec. 4026, shall have contributed to its original construction to make him liable to assessments for its maintenance under the provisions of the statute.

5. Drainage Districts—Owners of Land—Easements—Railroads—Interpretation of Statutes.

While a railroad company may not be the absolute owner of lands in fee, they have the proprietorship and control of those constituting its rights of way; and when these lands are benefited by a canal which comes within the meaning of Revisal, sec. 4026, the provisions of the statute relative to the maintenance of the canal apply.

(548) APPEAL by defendants from *Foushee, J.*, at March Term, 1912, of PITT.

This is a proceeding under section 4026 of the Revisal, to compel contribution to the maintenance of a certain artificial drain, sometimes referred to in the evidence as a ditch and at others as a canal. The drain is in some places from 3 to 5 feet wide and from to 2 to 5 feet deep, and in other places not so large.

The town of Winterville and A. G. Cox are among the petitioners, and B. W. Tucker, W. L. House, and the Atlantic Coast Line Railroad Company are the defendants.

The defendants filed a demurrer to the petition, which was overruled, and the defendants excepted.

The defendants then filed answers, and upon issues raised the jury returned the following verdict:

1. Was the ditch prescribed in the complaint constructed along a natural depression or waterway, and was it constructed seven years prior to the beginning of this action? Answer: Yes.

2. Who constructed said ditch? Answer: A. G. Cox.

3. Did either of the plaintiffs or the defendants contribute anything to construct or maintain said ditch, except A. G. Cox? Answer: No.

4. Are the plaintiffs the owners of the land described in the complaint? Answer: Yes.

5. Do the defendants claim under A. G. Cox? Answer: Yes.

6. Does the defendant the Atlantic Coast Line Railroad Company own any land on said ditch (except its right of way), inside the town of Winterville? Answer: No.

7. Is any of the right of way of the defendant the Atlantic Coast Line Railroad Company, outside of the corporate limits of the town of Winterville, drained by said ditch? Answer: Yes, six or seven hun-
(549) dred yards.

8. Is the land of the defendant B. W. Tucker, outside of the corporate limits of the town of Winterville, drained by said ditch? Answer: Yes.

9. Is the land of the defendant W. L. House, outside of the town of Winterville, drained by said ditch? Answer: Yes.

10. Is said ditch necessary to drain the streets of the town of Winterville? Answer: Yes.

11. Has the plaintiff A. G. Cox contributed anything to the mainteance of this ditch since its construction? Answer: No.

Judgment was rendered upon the verdict in favor of the petitioners, and the defendant excepted and appealed.

All of the defendants join in the contentions:

(1) That section 4026 of the Revisal refers to canals, and that the drain described in the petition is a ditch.

(2) That said statute does not purport to confer a remedy except in favor of those who contributed to the construction of the canal.

The defendants House and Tucker contend, further, that they ought not to contribute to maintain the drain, because (1) they acquired their land after its construction; (2) a part of their land is in the town of Winterville, and they are required to pay taxes on such part to maintain the drainage of the town.

The defendant railroad company contends, further, that it owns no land which is drained, and that it is not liable to contribute on account of the fact that a part of its right of way may be benefited.

S. J. Everett for plaintiffs.
Harry Skinner for defendants.

ALLEN, J. The statute under which this proceeding is instituted is necessary for the cultivation and improvement of lowlands, and should be construed to carry into effect its beneficent purposes, if practicable.

It provides: "After a canal has been dug along any natural depression or waterway and maintained for seven years, it shall (550) be *prima facie* evidence of its necessity, and upon application to the clerk of the Superior Court of any landowner who contributed to digging and is interested in maintaining the same, it shall be the duty of the clerk of the Superior Court to appoint and cause to be summoned three disinterested and discreet freeholders, who, after being duly sworn, shall go upon the lands drained or intended to be drained by said canal, and after carefully examining the same and hearing such testimony as may be introduced touching upon the question of cost of canal, the amount paid and the advantages and disadvantages to be shared by each of the parties to the action, shall make their report in writing to the

clerk of the Superior Court, stating the facts and apportioning the cost of maintaining such canal among the parties to the action, and the cost of the action shall be divided in the same ratio; and their report when approved shall be properly registered by the clerk. The collection of cost and proportion of work on the canal shall be as prescribed in this chapter."

The statute is found in a chapter of the Revisal providing for drainage, and by reference to its various sections it will be seen that the term "ditch" and "canal" is used indiscriminately to designate an artificial drain.

In the ordinary acceptation of the terms, both indicate a channel constructed for the purpose of conveying water, the only difference being that the word "canal" suggests a channel of larger dimensions than does the word "ditch," but as defined by the authorities, a ditch may be natural or artificial (Black Law Dic., 381; 14 Cyc., 552; *Goldthwaite v. Bridgewater,* 71 Mass., 64), while a canal is an artificial trench for confining water to a defined channel (Black L. Dic., 166), or a trench or excavation in the earth for conducting water and confining it to narrow limits. 14 Cyc., 268; *Bishop v. Seely,* 18 Conn., 394.

Tested in either way, by the ordinary use of words or by legal definitions, the drain described in the petition, not being natural and being of considerable dimensions, is a canal, although called a ditch.

(551) Nor does the statute require that all of the petitioners should have contributed to the original construction of the canal, and the reason for omitting this requirement is obvious.

If such a provision had been inserted in the statute, its usefulness would have been largely destroyed, as a change in the ownership of the land, after the construction of a canal at great expense, would render it difficult, if not impossible, to maintain it.

It directs the clerk, in plain language, to make the order appointing the commissioners upon the application of "any landowner who contributed to digging and is interested in maintaining" the canal, and the verdict establishes the fact that at least one of the petitioners "contributed" and is "interested" in maintenance.

What has been said disposes of the first contention made separately by the defendants Tucker and House, and their second contention affects only the amount of the assessment for which they may be liable, which is not before us on this appeal. The separate contention of the defendant railroad is also untenable.

The statute requires the assessments to be made according to advantages and disadvantages, and the verdict finds that the railroad is benefited by the drainage of its right of way, and it is reasonable and just that it should contribute in proportion to its benefits. Nothing is more

important to the maintenance of its roadbed than proper drainage, and it should not expect this to be maintained at the expense of others.

If, however, the statute in express terms said that only owners of land should contribute to the maintenance of the canal, this would not necessarily relieve this defendant, as the term "owner of land" may not only include those who have an absolute ownership in fee, but those who have the proprietorship and control of the land. Cyc., vol. 29, p. 1549.

Upon an examination of the whole record, we find

No error.

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

(552)

HENRY HARDEE ET ALS. v. H. A. TIMBERLAKE ET ALS.

(Filed 18 September, 1912.)

Appeal and Error—Service of Case—Time Allowed—Period Expired—Judgment Affirmed—Practice.

Under an agreement that appellee have thirty days in which to serve his case on appeal, the time begins to run from the time the court left the bench for adjournment *sine die;* and the service of the case after the time allowed is a nullity; and no error being found on the face of the record proper, the judgment below will be affirmed.

APPEAL by plaintiffs from *Whedbee, J.,* at May Term, 1912, of PITT.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

W. F. Evans for plaintiffs.

F. G. James & Son for defendants.

CLARK, C. J. This is a motion to dismiss because the "case on appeal" was not served on time. The facts found by his Honor are that "on Friday, 24 May, 1912, all jury trials being concluded, the court discharged the jury, but announced that he would come to the courtroom Saturday morning, 25 May, to sign judgments, which he did at that time, and then went to his home, which was in the same town. The case on appeal was served 26 June, 1912. By agreement, the appellant was allowed thirty days in which to serve case on appeal."

The term of the court expired Saturday morning, 25 May, when the court left the bench for the term. *Delafield v. Construction Co.,* 115 N. C., 21, where the subject is fully discussed. May having thirty-

one days, the time allowed by consent (thirty days) in which to serve case on appeal expired 24 June, and therefore service on 26 June was too late and a nullity. *Guano Co. v. Hicks,* 120 N. C., 29, and cases there cited.

There being no error upon the face of the record proper and there being no case on appeal, the judgment below must be

Affirmed.

Cited: S. c., post, 553; *Board of Education v. Orr,* 161 N. C., 220; *May v. Insurance Co.,* 172 N. C., 796.

(553)

H. A. TIMBERLAKE v. HENRY HARDEE ET AL.

(Filed 18 September, 1912.)

APPEAL by defendants from same term of court.

Same counsel as in next preceding case.

PER CURIAM. On authority of *Hardee v. Timberlake,* next above, this judgment is

Affirmed.

MRS. G. W. PARTIN v. R. E. PRINCE.

(Filed 16 October, 1912.)

1. Contracts—Guaranty—Consideration—Statute of Frauds.

When one at his own request receives money for investment from another, saying "he would guarantee it to be safe, and that the investor could look to him for the amount," and not to the borrower, and acts independently of the investor in making the loan, the transaction does not come within the statute of frauds, for at the time of the guarantee there was no other debt contracted, the only contract, at that time, being one of guarantee between the parties, separate and distinct from the obligation of a principal debtor, and the faith of the investor in the guarantee was a sufficient consideration.

2. Same—Contemporaneous Transactions.

When one receives money from another to be invested by him under his promise to guarantee its safety, the contract of guaranty being contemporaneous with the principal debt, requires no other consideration to support it and does not fall within the meaning of the statute of frauds. It is otherwise if the guarantee is made afterwards without any new consideration.

3. Contracts—Guaranty—Consideration—Interests—Statute of Frauds.

When one receives for investment money for another upon his guarantee that the investment proposed was a safe one, and assumes personal responsibility therefor, and it appears that the one receiving the money invested it in a concern for which he was doing business locally, his pecuniary interest in the local business wherein he was interested is a sufficient consideration to support the guaranty.

APPEAL by plaintiff from *Bragaw, J.*, at April Term, 1912, of (554) WAKE.

At the conclusion of the evidence, a motion of nonsuit was sustained. The plaintiff appealed.

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

W. B. Snow and J. W. Bunn for plaintiff.
No counsel for defendant.

BROWN, J. The plaintiff sued to recover $500 which the defendant procured from the plaintiff for the purpose of investing the same. The plaintiff claimed that the defendant promised to guarantee the investment at the time the money was placed in his hands at his request; that the defendant had the use and control of the money without any direction from the plaintiff, and that this formed a consideration which supported the guaranty.

The defendant claimed that the transaction, upon the plaintiff's own showing, was a promise to answer for the payment of the debt of another, and not being in writing, it comes within the statute of frauds and is void. His Honor being of opinion with the defendant, sustained the motion to nonsuit.

The plaintiff supports her alleged cause of action with a written guaranty contained in a letter of the defendant to the plaintiff, dated 8 November, 1906. The plaintiff testified that the defendant came to see her and told her that he heard that she had some money, and he desired to know if she wanted to lend it out, saying that he could invest it better out of the State, as then she would not have to pay taxes on it.

The plaintiff testified the defendant went to see her several times and each time endeavored to persuade her to let him invest the money. She at first refused, because she did not want it invested away from home. The last time the defendant came he said if she would let him have it, "he would guarantee it to be safe, and that she could look to him for the amount, and not to these other men."

It appears that upon the faith of that guaranty the plaintiff let the defendant have $500. The statements of the plaintiff are fortified

(555) and corroborated by the letter of 8 November, 1906. The defendant offered no evidence.

In our view his Honor erred in supposing that this transaction, if the evidence is taken to be true, presents the ordinary case of a promise to answer for the debt of another. At the time of this transaction there was no other debt contracted. The only contract that had been made was between the plaintiff and the defendant, and that contract is a guaranty, that is to say, an obligation of the guarantor, and separate and distinct from the obligation of a principal debtor. *Carpenter v. Wall,* 20 N. C., 144; *Coleman v. Fuller,* 105 N. C., 328; Tell on Guaranties, 1; Smith on Mercantile Law, 277.

We think that the fact that this money was placed in the hands of the defendant at his request, and that he was given absolute control over it upon the faith of his promise to guarantee its safety, is a sufficient consideration to support the contract; but we doubt if any consideration is necessary, for where the contract of guaranty is contemporaneous with the principal debt, no other consideration is necessary, because the contract is founded upon the consideration existing between the parties. It is otherwise if the guaranty be made afterwards without any new consideration. *Green v. Thornton,* 49 N. C., 231.

It appears further in the evidence that the defendant invested this money in a New Jersey concern without consultation with the plaintiff, who evidently relied entirely upon his guaranty, which concern was doing business in Raleigh and the defendant was its agent or representative.

If a consideration is necessary, the pecuniary interest of the defendant in the transaction is a sufficient consideration to support the guaranty. *Whitehurst v. Hyman,* 90 N. C., 487; *Dale v. Lumber Co.,* 152 N. C., 651; *Peele v. Powell,* 156 N. C., 558; and *Whitehurst v. Padgett,* 157 N. C., 424.

We think his Honor erred in sustaining the motion to nonsuit.

Reversed.

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(556)

AMERICAN STEEL AND WIRE COMPANY v. A. S. COPELAND ET AL.

(Filed 9 October, 1912.)

1. Contracts of Sale—Vendor and Vendee—Parol Evidence—Written Order—Statute of Frauds.

The defendant contended the contract was in parol and the plaintiff that it was in writing: *Held,* competent to introduce evidence of the terms of the contract, and that the rule excluding evidence on the ground that it added to or varied a written order was not applicable.

2. Principal and Agent—Declarations—Evidence of Agent—Contradictions—Discretion of Court.

Declarations of an agent as to an alleged contract made by him for his principal after the event are incompetent as evidence, but may be admitted by the trial judge, in his discretion, subject to the condition that they be thereafter made competent; and in this case they are held competent in contradiction of the evidence of the agent as to the terms of the contract.

3. Contracts of Sale—Breach—Damages Remote—Continued Offer to Sell—Loss of Profits—Certainty of Admeasurement.

In an action upon a breach of contract of a manufacturer of wire fencing to furnish a supply merchant with a sufficient quantity of the fencing for his trade during a certain period, it appeared that several car-loads of the wire were necessary for the purpose, and that the vendor had undertaken to send out and distribute among the vendee's customers, according to a list furnished, circulars advertising the merits of that particular fencing; that the vendee told vendor's agent that he would purchase only upon condition that he could get all he wanted; that in consequence of the transaction and the failure and refusal of the vendor to ship the second car-load, he had been prevented from obtaining his profits, in a certain sum, on sales he would otherwise have made in certain specified transactions: *Held*, (1) vendee was entitled to recover his profits so shown on the second car-load ordered, in any event, as the agreement constituted a continuing offer to sell before the withdrawal of the offer; (2) these profits were reasonably in the contemplation of the parties at the time of making the contract of sale, and the cost and selling price being fixed, were not difficult of ascertainment; and, *semble*, profits shown of this character could be recovered in the failure of the vendor to make further shipments embraced by the contract of sale.

APPEAL by plaintiff from *O. H. Allen, J.*, at June Term, 1912, (557) of LENOIR.

This action was instituted to recover $610.94, as the purchase price of a car-load of wire shipped by the plaintiff to the defendants. The defendants admitted the purchase of the car of wire at the price named, and set up a counterclaim for damages in the sum of $650 for breach of contract by the plaintiff, under which they allege that the plaintiff agreed to furnish the defendant wire, which contract was entered into between the plaintiff and defendants on or about 21 June, 1910, and that the car-load of wire, for the purchase price of which the plaintiff is suing, represented only a portion of the wire which the plaintiff was to ship the defendants under the contract. The plaintiff denied the contract set out by the defendants.

The defendants offered evidence tending to prove that they were general farm supply merchants in the city of Kinston, North Carolina; that on or about 21 June, 1910, McKelcan, an agent and representative of the plaintiff company, approached the defendants for the purpose of selling wire; that the defendants at this time were using another brand

of wire and had a large demand for wire fencing from their customers; that B. W. Canady and Son were handling the plaintiff's wire in Kinston, and on this account McKelcan stated to them that he could not ship them wire to Kinston, but would ship wire to Graingers, which is near Kinston, from which point the defendants could have it sent to Kinston; that the defendants stated to McKelcan that they would not care to purchase any wire from the plaintiff unless they could get all they wanted; that they would sell a car-load a month, or at least five or six car-loads a year, and probably more; that McKelcan thereupon agreed that the plaintiff would furnish the defendants all the wire that they wanted for their trade, and in addition thereto would help advertise this wire all through the different counties, and guaranteed to the defendants to furnish them all the wire that they would require; that in pursuance thereof, the defendants and the plaintiff's agent sent the order for the one car, for the purchase price of which this action is brought;

(558) that upon the request of the said McKelcan, the defendants furnished the plaintiff with the mailing list of their customers, containing about five hundred names, to whom it appears the plaintiff wrote circular-letters, which read in part as follows: "In order that you and others in your vicinity may see this fence and look into its good qualities, we have arranged that a liberal stock be carried by Copeland Brothers, Kinston, North Carolina, who will be glad to give you one of our complete catalogues"; that the plaintiff also sent the defendants an electrotype containing a photograph of the wire fences, which the defendants used in advertising in the *Kinston Free Press* at the rate of $25 per month; that the one car-load arrived and was sold by the defendants in about two or three weeks, and the second car ordered under the contract; and the plaintiff declined to ship the second car; that the defendants were out of wire about six weeks, during which time they could have sold a car at a profit of $300 per car. This was based upon the demands made by their customers for the wire. One hundred and twenty half rolls of wire is a minimum car-load lot; that the defendants could have bought some lighter wire, made by different people than the plaintiff, from L. Harvey & Son, at 5 per cent discount, but not the same kind or grade of wire that the plaintiff should have furnished the defendants and which they were advertising as being sold by the defendants; but they could not have purchased from their competitors, B. W. Canady & Son, wire at any such per cent advance.

The plaintiff, by the depositions of McKelcan and Dietrich, denied that there was any contract except the order for the one car of wire, and further attempted to deny that the agent had any authority to bind the plaintiff, although Dietrich stated that McKelcan's authority "was such as is generally given to a traveling salesman."

Exception was taken by the plaintiff to the admission of the evidence tending to prove that the agent of the plaintiff agreed to furnish all the wire the defendants wanted, upon the ground that the order for the car, which was shipped, constituted the contract, and that parol evidence was inadmissible to add to or vary it.

The defendants were permitted to prove that they had a conversation with the agent of the plaintiff, McKelcan, after the (559) refusal to ship the second car, and that he admitted that he agreed to furnish all the wire the defendants wanted, and the plaintiff excepted.

The plaintiff introduced the deposition of McKelcan, in which he denied the contract as contended for by the defendants.

His Honor charged the jury on the question of damages as follows: "You will confine the question of damages to the inquiry as to whether there was an agreement made with the defendants by the agent, approved by the plaintiff and ratified by them, by their conduct, correspondence, and if they refused to comply with the agreement, and by reason of that refusal the defendants were damaged, and if so, in what amount they were damaged; that damages would have to be confined to such evidence as would enable you to ascertain reasonably the amount; that is to say, the defendants could not recover for what we call speculative damages. He could not calculate that he might have sold large amounts of wire and make estimates upon that, but he would have to base his estimates as to what he could have sold upon the demands for wire made upon him by his customers, and such expenses as he went to preparatory to carrying out the agreement, like the advertising. The defendants cannot recover in their counterclaim more than they can show they have been damaged by advertising and by failure to be able to supply the actual demands that were made upon them, and it was their duty to exercise care in restricting the amount of loss, if any, as much as possible; and as I have already said, the defendants cannot recover speculative profits nor remote profits for damage to his business if any. I believe he is making no claim for that; nor can he recover for possible or probable profit on sales of goods, except such sales as he shows to the jury he could have made by reason of demands that were made upon them by their customers. And the burden is upon the defendants to prove by the greater weight of the evidence that they are damaged and the amount of the damages." Plaintiff excepted.

The evidence as to damages was as to the loss of profits on one car of wire, and the jury awarded the amount claimed, $300, and from the judgment rendered, the plaintiff appealed. (560)

G. G. Moore for plaintiff.
Rouse & Land for defendants.

ALLEN, J. The contention of the defendants is that the entire contract between them and plaintiff was in parol, and that the order given for the car of wire, which was shipped, was in part execution of the contract, while the plaintiff contends that there was no agreement outside of the written order.

It was competent for both parties to introduce evidence in support of their contentions, and the rule excluding parol evidence which adds to or varies a written contract has no application.

The evidence of the defendants as to the conversation with the agent of the plaintiff was not strictly competent at the time it was offered, because it was a declaration after the event; but it appears that the deposition of the agent was on file, in which he denied the contract as contended for the defendants, and that this deposition was introduced by the plaintiff and the declaration of the agent was competent to contradict his evidence contained in the deposition.

His Honor could have permitted the introduction of the evidence out of its order, in the exercise of his discretion; and if his ruling was not on this ground, it is not reversible error, because the evidence was made competent by the introduction of the deposition.

This brings us to the consideration of the principal question debated between counsel, and that is, whether the agreement, as proven by the defendants, is wanting in mutuality or is so uncertain that it cannot be enforced.

We have said at this term in *Elks v. Insurance Co., post,* 619, that a contract must be definite and certain, or capable of being made so; and the plaintiff contends that under this rule an agreement on its part, if made, to furnish all the wire the defendants might want, would be too indefinite to create an enforcible contract.

(561) The authorities are not in harmony on this question; some sustaining in whole or in part the contention of the plaintiff, as in *Bailey v. Austrian,* 19 Minn., 535; *Tarbox v. Gotzion,* 20 Minn., 139; *Drake v. Vorse,* 52 Iowa, 419; *R. R. v. Bagley,* 60 Kan., 425; *Harrison v. Lumber Co.,* Ga., while others hold to the contrary view.

A contract was sustained in *Furniture Co. v. Manufacturing Co.,* 110 Ill., 427, to supply all the pig iron which the party should need, use, or consume in his business; in *Cooper v. Wheel Co.,* 94 Mich., 272, to furnish such quantity of wheels as he may require during a certain season; in *Smith v. Moore,* 20 La. Ann., 220, to furnish all the ice they might require for two hotels for five years; in *L. Co. v. Coal Co.,* 160 Ill., 85, to furnish the coal company its requirements of coal for a certain season; in *Doiley v. Can Co.,* 128 Mich., 591, to furnish all the tin cans that plaintiff might use in his factory for a stated time; and in *Wells v. Alexander,* 130 N. Y., 642, to furnish the coal needed for steamers during one year.

These authorities would justify us in sustaining the agreement as a valid contract, binding between the parties, at the time the agreement was made; but it is not necessary to go so far, as it appears that after the shipment of one car, the defendants ordered another, which the plaintiff refused to deliver, and the evidence as to the amount of damages was directed to the loss of sales from this car, and his Honor restricted the recovery to the profits that would have been made on sales to customers who applied for the wire and could not get it.

In any event, the agreement constituted a continuing offer to sell, on the part of the plaintiff, which when accepted, before the withdrawal of the offer, became effective as a contract, and the order for the second car was an acceptance of the offer *pro tanto.*

This was decided in *R. R. v. Witham,* 9 C. P., 19, and is approved in Clark on Contracts, 119-120; 1 Page Con., sec. 307; Bish. Con., sec. 78. The case from the Court of Common Pleas is summarized in Bishop, *supra,* as follows: "In one case parties agreed that one of them should supply the other during a designated period with certain stores, as the latter might order. He made an order, which was filed; then made another, which was declined; and on suit brought the de- (562) fendant rested his case on the lack of mutuality in the contract, which, he contended, rendered it void. Plainly it stood, in law, as a mere continuing offer by the defendant, but, when the plaintiff made an order, he thereby accepted the offer to the extent of the order, and it was too late for the other to recede. So judgment went for the plaintiff."

We are also of opinion that the defendants were entitled to recover profits.

This question has been discussed so clearly and elaborately by *Justice Walker* in *Machine Co. v. Tobacco Co.,* 141 N. C., 284, and by *Justice Hoke* in *Wilkinson v. Dunbar,* 149 N. C., 22, in which the leading authorities are reviewed, that we need do no more than refer to those cases.

In the first the Court says: "Generally speaking, the amount that would have been received if the contract had been kept, and which will completely indemnify the injured party, is the true measure of damages for its breach. Where one violates his contract he is liable for such damages, including gains prevented as well as losses sustained, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed. It is the rule last stated which principally raises the doubt as to whether profits of the future should be included in the estimate of damages. They may be necessary to completely indemnify the injured party, and they may also answer the other requirement, in that the loss of them may naturally

be expected to proximately result from a breach of the contract; but there still remains another important element to be considered, and that is whether there is any reliable standard by which they can be ascertained, for we have seen that the damages must be certain, and this certainty which is required does not refer solely to their amount, but also to the question whether they will result at all from the breach. It is clear that whenever profits are rejected as an item in the calculation of damages, it is because they are subject to too many contingencies (563) and are dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for an estimate of damages. . . . It will be seen, therefore, that the earlier rule which excluded profits altogether, as an element of damages, as being in their nature too uncertain to be considered (Hale on Damages, 72), has been modified so as to permit their inclusion in the assessment if they are proximate and certain." And in the second: "It is well established that where there has been definite and absolute breach of a contract which is single and entire, that all damages, both present and prospective, suffered by the injured party, may and usually must be recovered in one and the same action, and when prospective damages are allowed, they must be such as were in reasonable contemplation of the parties, and capable of being ascertained with a reasonable degree of certainty. This requirement as to the certainty of damages recoverable is frequently said to exclude the idea of profits, but this statement must be understood to refer to the profits expected by reason of collateral engagements of the parties, or the profits of a going concern to arise from current sales and bargains which are yet to be made, and dependent, to a great extent, on the uncertainty of trade and fluctuations of the market. . . . But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement. The parties may indeed have entertained different opinions concerning the advantages of the bargain, each supposing and believing that he had the best of it; but this is mere matter of judgment going to the formation of the contract, for which each has shown himself willing to take the responsibility, and must, therefore, abide the hazard.

Such being the relative position of the contracting parties, it is (564) difficult to comprehend why, in case one party has deprived the

other of the gains or profits of the contract by refusing to perform it, this loss should not constitute a proper item in estimating the damages."

In the case before us profits were within the contemplaton of the parties. The defendants were merchants and supplied their customers with wire; they had five hundred customers and sent their names to the plaintiff; they were not buying for their own use, but for sale, and the plaintiff knew of these facts.

Nor were the profits difficult of ascertainment, as the cost and selling prices were fixed.

It is not at all certain that his Honor, on all the facts, would not have been warranted in submitting to the jury the question of damages on the whole agreement, but as he did not do so, and limited the right of recovery, we find no error of which the plaintiffs can complain.

No error.

Cited: Hardware Co. v. Buggy Co., 167 N. C., 426; *Gardner v. Tel. Co.*, 171 N. C., 408.

STATE'S PRISON v. HOFFMAN & BROTHERS.

(Filed 30 October, 1912.)

1. Vendor and Vendee—Contracts—Delivery—Parol Agreement—Accommodation Bailee.

When the vendor of goods has contracted for delivery at one of two designated places at the option of the vendee at a specified time, and at the request of the vendee agrees to keep them beyond that time after payment thereof, stipulating only that the vendee should keep the insurance paid while remaining in his warehouse, the title passes to the vendee at the time of his payment and acceptance, and the vendor becomes an accommodation bailee, required to exercise only slight care, and the goods thus kept are at the risk of the vendee.

2. Same—Waiver.

When a vendor of goods has agreed to deliver them at or before a certain time, and thereafter becomes an accommodation bailee without further agreement as to the time of delivery, he may not be held liable for failure to deliver under the original contract, but is entitled to have reasonable prior notice, depending upon the circumstances then existing, from his vendee, as to when he desires delivery to be made; and when, under the original contract, the vendee has the option of two places of delivery, one convenient and the other inconvenient to the vendor, and without reasonable notice requires the vendor to deliver at the inconvenient place, the latter will not be held liable for damages to the goods

by reason of their delivery to the more convenient place at the request of the vendee, the second order to deliver them being a waiver of the vendee's right of delivery at the place first designated.

3. Facts Found by Judge—Agreement—Judgment—Mere Statements—Appeal and Error.

In this case, the parties having agreed that the judge should find the facts, it is held that the court, on appeal, is not bound by a statement found in the judgment, that "the defendants agree that under protest they directed the delivery (of the goods sold to them) at the river landing," it appearing that such was not a finding of fact by the court or an admission by the plaintiff, but a mere statement by the defendants at variance with their own evidence.

ALLEN, J., dissenting; HOKE, J., concurring in the dissenting opinion.

(565) APPEAL by defendant from *Bragaw, J.*, at April Term, 1912 of WAKE.

Action upon contract for sale and delivery of goods, wherein the defendants set up a counterclaim for damages for the plaintiff's failure to deliver in accordance with its terms.

The defendants appealed from the following judgment:

This case coming on to be heard, and being heard before his Honor, *Stephen C. Bragaw,* judge presiding, and a jury, at the April Term, 1912, of WAKE.

After the conclusion of the evidence, the following admissions having been made for the respective parties, the plaintiff and the defendant, through their counsel in open court, to wit:

The plaintiff admits that if it is determined that it has been guilty of breach of contract in refusing to deliver to the railroad station as requested, and that the breach has not been waived, that such breach of contract was the cause of the injury sustained by the defendant.

The defendants agree that under protest they directed the delivery to the river landing after a refusal of Captain Rhem to deliver to
(566) the railroad station, and if they thereby waived breach of contract, that they are liable for the full amount of balance due on the peanuts and insurance for additional time.

It is further stipulated that the above admission should be construed in the light of the evidence.

It was then agreed that the court should answer the issue upon the evidence and admissions herein set out, the said answer to be treated as though found by the jury. The court thereupon finds that the plaintiff was guilty of breach of contract, in that it refused to deliver peanuts at the railroad station as requested. The court further holds as a matter of law that the defendant waived said breach. The court therefore

answers the issue as follows: "Is the defendant indebted to the plaintiff, and if so, in what amount?" A. "Yes; $773.16, with interest from 1 June, 1911."

It is therefore ordered and adjudged by the court that the plaintiff recover from the defendant the sum of $773.16, with interest thereon from 1 June, 1911, until paid, together with costs of this action, to be taxed by the clerk.

STEPHEN C. BRAGAW,
Judge Presiding.

The further facts are stated in the opinion of the Court by MR. JUSTICE BROWN.

Attorney-General and Winston & Biggs for plaintiff.
E. L. Travis, J. W. Hinsdale, Jr., and A. P. Kitchin for defendants.

BROWN, J. In this action plaintiff seeks to recover balance due on 10,475 bushels of peanuts, sold to defendants, who pleaded a breach of contract by way of counterclaim.

By consent, the judge below tried the case as judge and jury. He rendered a verdict and judgment for plaintiff.

We concur with his Honor in the judgment rendered, but think that, while reaching a correct conclusion, he gave the wrong reason for it. In no view of the evidence has there been a breach of the contract by plaintiffs. The peanuts were sold in December, 1909, to be delivered and paid for 1 January, 1910, at the railroad station at Tillery, four miles distant, or at the river landing a few hundred yards from (567) plaintiff's barn, at option of defendants. On 1 January defendants paid for 10,000 bushels and requested that the entire lot remain in plaintiff's barn until called for. This was agreed to upon defendants paying the insurance. On 24 May, 1910, defendants requested Supervisor Rhem, at plaintiff's farm, to deliver at once to Tillery's Station 500 bags of peanuts. Rhem replied that he had no authority to deliver them at Tillery's; that defendant must phone Superintendent Laughinghouse. The latter had made the contract. Defendants did not phone the superintendent, who was at the time on the farm and within reach, and request of him a delivery at Tillery's. The evidence shows the demand on Rhem was a sudden demand without notice and made at a moment when all the teams were engaged in plowing and when it was extremely inconvenient to make the delivery at a place four miles distant.

As the entire contents of the barn had been sold to defendants, and nothing remained but to measure them, and as defendants had paid for the estimated contents, and accepted them, the title passed to defend-

ants, 1 January, and after that the peas were held at their risk. *Waldo v. Belcher*, 33 N. C., 609. Then plaintiff became a mere accommodation bailee without hire, and required to exercise only slight care.

The plaintiff had notified defendants it was prepared to deliver 1 January, according to contract. The time for hauling the peas to the station or the boat was indefinitely postponed at defendant's request without any consideration. Under such circumstances the plaintiff was entitled to reasonable notice; it could not be compelled to stop the plows as a moment's notice to commence hauling peas to a distant station. All the authorities agree that where delivery is at the option of the buyer, the seller is entitled to reasonable time *after notice* within which to make delivery. 35 Cyc., 182, and cases cited. What is a reasonable time is to be determined by the circumstances attending the particular transaction. In this case no prior notice whatever was given, and the seller, it seems, was expected to make immediate delivery without it. The demand was unreasonable.

(568) We are further of opinion that there was a waiver of delivery at Tillery's and that the delivery on 24 May at the steamer landing was made at defendant's *voluntary* request.

It is true that it is stated in the judgment that "the defendants agree that under protest they directed the delivery to the river landing." This is not a finding of fact by the court or an admission by plaintiff. It is a mere statement of defendants, and is at variance with their own evidence. M. Hoffman in his testimony states that immediately after he returned to Tillery from the State Farm he phoned to Rhem to deliver the peanuts at the rver landing, and did not attempt to phone or wire Laughinghouse at any time, as it was plainly his duty to do, if he still desired a delivery at Tillery's.

This is not a case of compulsion, or involuntary waiver from necessity, like the cases cited in defendant's brief. The judgment is

Affirmed.

ALLEN, J., dissenting: I dissent from the conclusion of the majority of the Court because I think the record has been misunderstood, and the Court has reversed a finding of fact upon the ground that there is no evidence to support it, when there is no exception to the finding, which it has no power to do.

A fair interpretation of the record is that the parties waived a jury trial and agreed for the judge to find the facts; that evidence was introduced and admissions made to be considered together by the judge; that the judge found as a fact that the plaintiff had broken its contract, and held as matter of law that the defendants had waived the breach.

If so, I think no question is before us except to inquire into the correctness of the legal conclusion as to the waiver, as it has heretofore been regarded as settled that the finding of fact by the judge, a jury trial being waived, is conclusive and binding upon this Court, in the absence of any exception that there is no evidence to support it (*Millhiser v. Balsley,* 106 N. C., 433; *Travers v. Deaton,* 107 N. C., 500; *Roberts v. Insurance Co.,* 118 N. C., 435; *Matthews v. Fry,* 143 N. C., 384), and, as was said in *Baker v. R. R.,* 137 N. C., 222: "This Court best serves its purpose and discharges its legitimate function in our govern- (569) mental system when it confines itself to its constitutional orbit to review any decisions of the courts below, upon any matter of law or legal inference."

Possibly the strongest argument that can be made in favor of this view of the record is the fact that the learned counsel for the plaintiff do not devote a line in their carefully prepared brief to the discussion of the contention that the judge did not find the fact as to the breach of the contract against them, or that, if he did so, there was no evidence to support the finding. On the contrary, they say: "Upon these admissions and the evidence in the case, we think that the trial judge was correct in holding that there was a waiver by the defendants of the breach of the contract by the plaintiff to deliver the peanuts at the railroad station if the defendants so elected. Both parties requested the trial judge to find the facts just as a jury would have done. The plaintiff, in order to relieve the court of a finding along that line, admitted that 'if it is determined that it has been guilty of a breach of contract in refusing to deliver to the railroad station as requested, and that the breach has not been waived, that such breach of contract was the cause of the injury sustained by the defendants.' In other words, the plaintiff thereby admitted that if the peanuts had been delivered at the railroad siding, they would not have gotten wet, and that they did get wet because they were not delivered at the railroad station. Thereupon the court 'found that the plaintiff was guilty of breach of contract in that it refused to deliver the peanuts at the railroad station, as requested.' The court likewise held, 'as matter of law, the defendants waived said breach,' and the court thereupon answered the issue, 'Is defendant indebted to the plaintiff, and if so, in what amount?' Answer: 'Yes; $773.16, with interest from 1 June, 1911.' Now, if there is any evidence to sustain the court in its finding that there was a waiver of the breach of contract, we submit that the judgment should be affirmed, and we have endeavored to point out above that there was abundant evidence along this line."

It is no answer to this position to say that the plaintiff could not review the finding of the judge, because the judgment was in its favor.

In *Matthews v. Fry,* 143 N. C., 384, a jury trial was waived,
(570) and upon findings made by the judge, judgment was entered in favor of the defendant, which was reversed on appeal.

"When the certificate of opinion was presented in the court below, the plaintiff moved for judgment in accordance therewith. The defendant resisted this judgment and asked for a trial *de novo,* and insisted that some of the findings of fact had been made by the judge without any evidence to support them."

An appeal was then taken by the defendant, and in disposing of the same the Court says: "The judgment was properly entered for plaintiff in accordance with the mandate of this Court to reverse the judgment. *Summerlin v. Cowles,* 107 N. C., 462; *Bernhardt v. Brown,* 118 N. C., 711. The findings of fact by the judge, when authorized by law or consent of parties, are as conclusive as when found by a jury, if there is any evidence. *Branton v. O'Briant,* 93 N. C., 103; *Roberts v. Insurance Co.,* 118 N. C., 435; *Walnut v. Wade,* 103 U. S., 688. If there was any ground to except to such findings because without evidence to support the finding, upon any point, or for any other cause, the defendant should have done so and have brought up his side of the case also when the plaintiff appealed, or at least he should have entered an exception so as to preserve his rights. It is not unusual for both parties to appeal. Having acquiesced in the findings of fact without exception, it is too late to except now."

Again, the Court says in the opinion in the case we are now considering: "The plaintiff had notified defendants it was prepared to deliver 1 January, according to contract. The time for hauling the peas to the station or the boat was indefinitely postponed at defendant's request, without any consideration."

This is alleged in the complaint and denied in the answer, and no evidence was offered to support the allegation of the complaint.

In addition to the admissions recited in the judgment, it was also admitted "that the contract stipulated that the plainiff should deliver the peanuts either to the railroad station at Tillery, N. C., or to the boat at the river landing, as the defendant might desire at the time of de-
livery, and that defendant was to pay the insurance which the
(571) State had to pay on the said peanuts from 1 January, 1910, to 24 May, 1910, and that the amount of such insurance was to be calculated by Mr. T. W. Fenner."

"It was also admitted by counsel that there was no controversy as to the amount of damage to the peanhts, the same being $926.25."

I think, therefore, upon a just and fair consideration of the record, we must begin our investigation with the facts established that the plaintiff has broken its contract, and that the defendants have been damaged

thereby in the sum of $926.25, which they are entitled to recover by way of counterclaim, or to use as a set-off, unless they have waived the breach, and, upon the facts, I do not think there has been a waiver.

The legal position is not denied, that conduct relied on to constitute a waiver must be *voluntary* and *intentional* and *inconsistent* with the right. A. and E. Ency., 29, pp. 1091-5; Cyc., 40, pp. 253, 261; *Robinett v. Hamby,* 132 N. C., 356.

The law will not permit a party to claim as a waiver an act which it has compelled another to do, by its own default and wrong. It would be violative of the fundamental principle of equity that no man shall profit by his own wrong.

"The act relied on to show an intent to waive must have been done voluntarily and in the absence of compulsory or particularly urgent circumstances. If such circumstances exist, the presumption to waive does not arise." A. & E. Ency., 29, 1096.

"Waiver is a voluntary act. What one does in a dilemma forced upon him by the default of another cannot be counted upon as a waiver. Voluntary choice is of the essence of the act." Cyc., 40, 259; *Cox v. Long,* 69 N. C., 7; *Austin v. Miller,* 74 N. C., 274; *Spiers v. Halstead,* 74 N. C., 620.

"The justice of the rule that acceptance after breach, even though waiver of the right to treat such breach as discharge, is not a waiver of a right of action for damages, is apparent when it is considered that the party not in default is often constrained by his necessities to take what he can get under his contract, when he can get it. Such conduct should not operate as a waiver of the right of action for (572) damages." Page on Contracts, sec. 1510.

"A waiver is the voluntary and intentional relinquishment of a known right. It implies an election to dispense with something of value, or to forego some advantage which he might at his option have demanded or insisted upon. To constitute a waiver, therefore, the acts relied upon must have been intentionally done with a knowledge of the facts, and the party acting must have been in such situation of freedom to choose that his relinquishment can fairly be said to have been voluntary. What one does in a dilemma, forced upon him by the default of the other, cannot be counted upon as a waiver." Mechem on Sales, sec. 1071.

"The difficulty is in determining whether the acceptance is voluntary and unconditional. The party may have been put in such situation that there is nothing left but to accept the performance tendered and thus make the best of a bad matter; and where this is the case, his acceptance is not necessarily deemed a waiver." Mechem on Sales, sec. 1079.

"Where the circumstances are such as to show that acceptance can, in no just sense, be regarded as voluntary, but rather as compulsory, the

presumption of an intention to waive does not arise." *Bailey v. Tully,* 12 Ill. App., 463.

"It often so happens that the purchaser is so situated that it is necessary for him to accept the article in its defective condition. It would indeed be singular that one who had placed him in this position should be allowed to escape liability on his contract." *Cordage Co. v. Rice,* 5 N. D., 432.

The facts are that the plaintiff had sold to the defendants 10,000 bushels of peanuts, under a contract to deliver at the railroad or the landing, at the option of the defendants, and that the defendants had paid for them. The defendants demanded delivery at the railroad, which the plaintiff refused, and the judge finds that there is a breach of contract by the plaintiff. The defendants then directed a delivery at the landing, and the court says this is a waiver.

(573) I think not, because they were under compulsion, and the act was not voluntary. The plaintiff had the peanuts and the money of the defendants in payment for them, and refused to deliver according to its contract.

The defendants could not sue to recover the money or the peanuts, because it is provided in the act incorporating the plaintiff, that "Any suit or action against such corporation shall be construed to be brought against the State, and no person shall have the right to bring or maintain any suit or action against it, nor shall any of the courts of the State have jurisdiction to try, or determine any such suit or action, except as allowed by the Constitution in cases of claims against the State." Revisal, sec. 5383.

They had to accept delivery at the landing or lose everything, and were, in my opinion, as much under compulsion as any one who has ever been made "to stand and deliver."

MR. JUSTICE HOKE concurs in this opinion.

TOWN OF WARSAW v. C. N. MALONE.

(Filed 9 October, 1912.)

Cities and Towns—Bond Issues—Bridges—Necessary Expense—Legislative Restrictions—Vote of the People.

The building of bridges is a part of the necessary municipal expense. Hence an act which authorizes a bond issue in a certain amount "to establish a better sewerage system, etc., and other public improvements,"

requiring that the question of the issuance of the bonds be first submitted to the qualified voters of the town, includes bridges within its terms, and restricts the issuance of bonds for that purpose within the requirements of the act.

APPEAL by plaintiff from *Carter, J.*, at August Term, 1912, of DUPLIN.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

Johnson & Johnson for plaintiff.
Charles N. Malone for defendant.

CLARK, C. J. This is an action submitted without controversy (574) under Revisal, 803. In July, 1912, the commissioners of the town of Warsaw passed an ordinance to issue $5,000 in town bonds running thirty years and bearing 6 per cent interest, to be sold at not less than par, "the proceeds to be used exclusively for the purpose of building and maintaining bridges in the town of Warsaw." The purchaser declined to accept the bonds, alleging their invalidity, and this is an action to compel him to do so.

The defendant does not contest that bridges are a necessary municipal expense and that the town, in the absence of legislative restriction, would have the power to issue bonds for that purpose (*Fawcett v. Mounty Airy*, 134 N. C., 125), but he relies upon chapter 204, Private Laws 1909. The preamble and section 1 of that act provides for the issuance by the town of $5,000 in bonds "to establish a better sewerage system and drainage system and other public improvements." The act provides that the question of the issuance of the said bonds should be first submitted to the qualified voters of said town.

The above act of 1909, which fixes the amounts of bonds that could be issued and the purposes for which the proceeds could be used, and requiring the issuance to be first submitted to the qualified voters of the town, was intended as a restriction upon the power of the town to issue bonds even for necessary purposes. *Murphy v. Webb*, 156 N. C., 402. The words "sewerage system and drainage system and other public improvements" include bridges, which are certainly a public improvement. And this attempted issue of bonds in excess of the $5,000 and without submitting their issuance to the qualified voters is in violation of the act, which thus restricted the amount of the bonds that could be issued for public improvements and which required even those to be submitted to the popular vote.

The judgment below which declared the attempted issue of these bonds to be invalid is

Affirmed.

(575)

WEATHERS & PERRY v. FRANCIS COX, RECEIVER, GRAND THEATER COMPANY, ET ALS.

(Filed 30 October, 1912.)

Liens—Registration—Lessor and Lessee—Provisions Against Lessor's Liability—Interpretation of Statutes.

Under a lease of lands, duly recorded, which provided that the lessees were to construct or erect on the leased premises a building at a cost to be not less than a certain sum, which shall be the property of the lessor at the termination of the lease; and that the lessor "shall not be chargeable for any contracts or liabilities, whether arising from negligence or otherwise" of the lessee: *Held*, a lien filed for material furnished the lessee in the construction of the building erected by him is in no wise a claim or lien on the building as against the interest of the lessor, upon the termination of the lease under a forfeiture clause contained therein.

APPEAL by plaintiff from *Bragaw, J.*, at April Term, 1912, of WAKE.

Action heard on appeal from a justice's court.

The plaintiff filed his complaint, amended by leave of court, stating his cause of action and his claim for a lien on the premises, in effect as follows: "That on 15 September, 1909, the owners of the property conveyed same to Grand Theater Company, by written lease, for the term of ten years, with privilege of renewal for five additional years, at a stated and increasing rental per annum, with a clause giving the landlords a lien for the rent and one of forfeiture in case of nonpayment. There was a provision in the lease that the lessees were to construct or erect on the premises, for use in their business, a theater and auditorium, to cost not less than $6,000, and a covenant, on the part of the lessees, that, at the termination of the lease, the improvements on the property should belong to the lessors, the owners of the property, and the contract contained further the following stipulation: "10. It is mutually understood between the party of the first part and the party of the second part, that the party of the second part shall have leave to make improvements upon the auditorium building, but not to make any alterations or changes that will tend to decrease the value of or in any
(576) way damage said building; and, further, that the party of the first part shall be in no wise chargeable for any contracts or liabilities, whether arising from negligence or otherwise, of the said Grand Theater Company"; that said lease, having been duly registered according to law, the property was put in possession of the lessees, the Grand Theater Company, who proceeded to construct the auditorium and improve the premises, pursuant to the terms. Plaintiffs had an unpaid claim amounting to about $100 for plastering and papering the

hall, under a contract with the Grand Theater Company, and the said company, the lessees, having become insolvent, and the lease forfeited for nonpayment of rent, plaintiffs instituted this action against the lessors, the owners of the property, to recover the amount due and to enforce same as a valid lien against the landlord's ownership and interest. A demurrer to demand, as stated, was sustained by the court, and plaintiffs excepted and appealed.

T. H. Calvert for plaintiff.
Jones & Bailey for defendant.

HOKE, J. Our statute relating to the question presented (Revisal, sec. 2016) is in terms as follows: "Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building may be situated, and every lot, farm, or vessel or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work on the same or material furnished. This section shall apply to the property of married women when it shall appear that such building was built or repaired on her land with her consent or procurement, and in such case she shall be deemed to have contracted for such improvements"; and the decisions with us have uniformly held that, in order to a valid lien, under its provisions, the relation of creditor and debtor must be first established, and, applying the principle that the property of a lessor could not be held for the debt of the lessee, unless a contract to pay on the part of the lessor could be expressly shown or reasonably inferred from the circumstances. *Boone v. Chatfield,* 118 N. C., 916; *Nicholson v. Nichols,* 115 N. C., 200; *Bailey v. Rutjes,* 86 N. C., 517; *Wilkie* (577) *v. Bray,* 71 N. C., 205; Boisnot on Liens, sec. 289.

Not only do the facts in the present case fail to show any contract on the part of the lessor or any conduct from which such a contract could be equitably and reasonably inferred, but, in the lease itself, duly registered under the requirements of law, Revisal, sec. 980, there appears a provision expressly negativing any and all liability on the part of the landlord for the contracts or liabilities of the lessee. Speaking to this question, in *Bailey v. Rutjes, supra, Ruffin, J.,* said: "But in the case at bar, the defendants, if their testimony is to be believed, had leased the premises to Rutjes for five years, and he had undertaken to have the improvements made which called for the use of the lumber furnished by the plaintiff. They were therefore absolutely without the power either to give or to withold their sanction to its delivery and use, and ought not to be required to pay for it, unless they knew, or had reason to believe, that the plaintiff was looking to them for pay for his lumber, and allowed him to deliver it under that expectation and without objection on

their part." *Boone v. Chatfield* is an authority decisive against plaintiff, on the facts stated in the complaint. The lease having been avoided under a forfeiture clause contained in the instrument for nonpayment of rent, and there being no contract shown, on the part of the lessor, expressed or implied, the interest of the owners may not be subject to plaintiff's claim. 2 Jones on Liens, sec. 1273, in which it is said: "A mechanic's lien attaches to a lessee's leasehold estate, subject to all the conditions of the lease, although the lessee has made valuable improvements, which are to become the property of the lessor at the end of the term or which are to revert to him upon his failure to perform the covenants of the lease. Upon the lessee's default, the property reverts to the lessor, free from the lien of mechanics, unless these are in some way protected by the statute."

We were referred by counsel to numerous authorities in which a mechanic's or material man's lien, arising by reason of a contract for improvement, through or with the lessee, had been enforced against the interest of the lessor, but all of these, so far as examined, were (578) on statutes which in terms provided for such a liability or were on contracts in which the lessee was held to have contracted as agent for the lessor. Thus, in *Haus v. Amusement Co.,* 236 Ill., 458, the lien was given by statute "where the contract for improvements was made with the owner or with one whom the owner has authorized or *knowingly permitted* to contract for such improvements," etc., and in *Burke v. Harper,* 79 N. Y., 273, the statute made provisions for the lien on the property "where the contract for repairs, etc., was made by the owner or his agent or . . . with any person permitted by the owner to build, repair, or improve the same." But, on a different statute, substantially similar to our own, the New York Court held that a lien for improvements, made under contract with the lessee, could not be enforced against the interest of the landlord. *Knapp v. Brown,* 45 N. Y., 207. In *Kremer v. Walton,* 11 Washington, 120, it was held that under the terms of the lease the contract for improvements was made for the lessor, and the lien was therefore enforcible against his interests; but, under a lease like this now before us, the same Court, *Mills v. Gordon,* 8 Washington, held: "That the liens of mechanics and material men, for labor performed and material furnished in the alteration and repair of buildings, at the instance of the lessee thereof, attached only to the leasehold interest, and do not bind the owner in the absence of authority to the lessee to act as his agent."

In the present lease, as we have heretofore shown, the improvements were to be made by the lessee, and any and all liability of the owners therefor is expressly negatived. There is no error, and the judgment sustaining the demurrer is

Affirmed.

(579)

W. H. HARDISON v. J. R. DUNN ET ALS.

(Filed 3 October, 1912.)

1. Deeds and Conveyances—Standing Timber—Warranty—Less Quantity of Timber—Contracts.

A deed for standing timber upon lands described by metes and bounds and as containing 140 acres, without warranty as to the quantity of timber thereon, cannot be construed as a contract to sell a greater quantity of timber than was actually growing thereon.

2. Deeds and Conveyances—Standing Timber—Payments as to Quantity Cut —Conditions—Measure of Damages.

In an action to recover a greater quantity of timber growing upon certain described lands under an averment that a greater quantity had been purchased than the land contained, the deed provided that the vendee was to pay $2,000 before any of the timber should be cut, $2,000 when 600,000 feet had been cut not later than a certain date, and $2,000 when 600,000 feet more had been cut not later than a certain further date. The vendee made the two first payments, but there was evidence that only 387,000 feet of timber remained on the land. A judgment rendered upon the pleadings for the last payment of $2,000, *Held*, erroneous, the last payment being one upon the condition that 600,000 feet should first be cut, and as all the timber had been cut before the expiration of the period allowed, only such quantity as remained beyond that settled for under the second payment could be recovered, according to the contract price, by the defendant upon his counterclaim.

APPEAL by plaintiff from *Cooke, J.*, at April Term, 1912, of NASH.

The plaintiff sues to recover damages in failing to furnish a certain quantity of timber under a written contract, dated 22 December, 1909.

The land upon which the timber grew is described as containing 140 acres, and the metes and bounds are set out with particularity. After commencement of this action, survey was made and the land found to contain 109 acres only. The defendant set up a counterclaim for $2,000 unpaid purchase money (being the last payment) on timber.

Upon the pleadings, and admission that the tract of land contained only 109 acres, his Honor adjudged that the plaintiff take nothing by his writ, and the defendants recover $2,000 and interest (580) on their counterclaim. Plaintiff excepted and appealed.

E. B. Grantham and Murray Allen for plaintiff.
Bunn and Spruill for defendants.

BROWN, J, We agree with the Superior Court that the plaintiff has no cause of action against the defendants. There is no warranty in the timber contract that the tract of land contains any specific number of acres, or that there is a certain number of feet of standing timber of the required dimension.

There is nothing in the paper which indicates that the defendants guaranteed either the acreage of land or quantity of timber.

The payments for the timber are provided for in the following clause: "The said W. H. Hardison is to pay $2,000 before any of the timber is cut; $2,000 when 600,000 feet have been cut, not later than 15, July, 1910; $2,000 when 600,000 feet more have been cut, not later than 15 January, 1911, this payment completing all payments."

The plaintiff voluntarily made the first two payments, and is not entitled to recover any part of them back. When plaintiff made the second payment, he was given this receipt:

Received of W. H. Hardison $2,000 in full for the second payment on timber contract and in full for second payment of 600,000 feet.

J. R. DUNN,
Agent.

In the absence of a warranty and any allegation of fraud, misrepresentation, and deceit, we fail to see that plaintiff has any cause for action against defendants, either for damages or to recover any part of the money paid.

We are of opinion, however, that the court erred in rendering judgment upon the pleadings in favor of the defendants upon their counterclaim for the entire third payment of $2,000. The payments provided for in this contract are conditional, and are not to be made until the condition has been performed.

(581) The second payment was made and is acknowledged to be in full for 600,000 feet of timber admitted to have been cut. Before the plaintiff can be required to make the third payment of $2,000 he must cut 600,000 more feet of timber, for the payment *is to be made only when that quantity has been cut,* and plaintiff must either cut it or pay for it by 15 January, 1911.

It turns out that plaintiff cannot cut the second 600,000 feet because it is not on the land to cut. He is entitled to 600,000 feet for the second payment, and to same quantity additional (1,200,000 feet in all) before he can be required to make the third payment. We find nothing in the contract to sustain plaintiff's contention that defendants undertook to sell him 1,800,000 feet.

The plaintiff admits in his complaint that he has cut 600,000 feet and paid for it, and received the receipt above recited. He avers that immediately after paying the second $2,000 and receiving said receipt, he proceeded to cut under the third installment, and cut only 387,000 feet, when the timber on the tract gave out.

This being so, the plaintiff could only be required to pay the value of the 387,000 feet, measured by the purchase price of the entire tract, and not the entire payment of $2,000, as adjudged by his Honor.

On the next trial either party can offer evidence as to the quantity of timber cut.

Reversed.

CHARLES HENDERSON, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 16 October, 1912.)

1. Nonsuit—Circumstantial Evidence—Province of Courts.

Upon competent circumstantial evidence, when sufficient to raise more than "a possibility or conjecture" of the fact sought to be proved, it is the duty of the court, upon a motion to nonsuit, to give the evidence the interpretation most favorable to the plaintiff; and the court will not weigh the evidence to see if it is satisfying of the ultimate fact sought to be proved or say which theory arising therefrom should be adopted.

2. Railroads—Negligence—Helpless on Track—Burden of Proof—Requisites.

In his action to recover damages of a railroad company, for the negligent killing of his intestate, upon evidence tending to show that he was down and helpless upon the track at the time, the plaintiff must prove: (1) that the deceased was down on the track in an apparently helpless condition; (2) that the engineer could have discovered him in time to have stopped the train before reaching him, by the exercise of ordinary care; (3) that he failed to exercise such care, and as a direct result the deceased was killed.

3. Same—Evidence.

In this action against a railroad company for damages for the negligent killing of plaintiff's intestate, evidence held sufficient which tended to show that about two hours before he was killed he was asleep in a path near the cross-ties of defendant's railroad; that he was wakened and went to a near-by store; remained there a while; went back to the crossing and walked, while drunk and staggering, up the track in the direction where his body was found about two hours afterwards, at a distance of about two miles from the crossing, his head severed and on one side of the track, with his body on the other; that the train gave no signs or warning of its approach, under such conditions as would render the deceased observable to the engineer in time to have stopped his engine and have avoided the injury.

4. Railroads—Negligence—Helpless on Track—Statements — Coroner — Evidence.

In this action against a railroad company for the alleged negligent killing of plaintiff's intestate while he was down on the track in a help-

less condition, a statement of the engineer, taken before the coroner, that he saw a man lying on his left side with his hat on his head, so he could not tell whether he was white or black, was properly excluded.

(582) APPEAL by plaintiff from *Carter, J.*, at July Term, 1912, of ONSLOW.

This is an action to recover damages for the alleged negligent killing of the intestate of the plaintiff.

The defendant denied negligence, and alleged that the death of the intestate was caused by his own contributory negligence.

At the conclusion of the evidence for the plaintiff his Honor rendered a judgment of nonsuit, and the plaintiff excepted and appealed.

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

(583) ALLEN, J. The only question presented by this appeal is whether there is any evidence fit to be submitted to the jury, and in considering it we cannot weigh the evidence for the purpose of seeing if it satisfies us of the ultimate fact sought to be proved, nor can we exercise the power, committed by law to the jury, of saying which theory arising upon the evidence shall be adopted.

Our duty is performed when we determine whether there is any evidence worthy of consideration, and in its performance we are not permitted to accept a view of the evidence favorable to the defendant, as a jury would have the right to do, if one is presented which sustains the contention of the plaintiff, the law requiring us, on a motion to nonsuit, to give to the evidence the interpretation most favorable to the plaintiff.

If, so considered, the evidence does no more than "raise a possibility or conjecture of a fact," a judgment of nonsuit ought to be sustained (*Cobb v. Fogalman,* 23 N. C., 440; *Lewis v. Steamship Co.,* 132 N. C., 909), but if the "more reasonable probability" is in favor of the plaintiff's contention the question ought to be submitted to the jury. *Fitzgerald v. R. R.,* 141 N. C., 535.

The statement of the law in this last case is pertinent. "It is very generally held that direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances; and it is well established that if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. Thus in Shearman and Redfield on Negligence, sec. 58, it is said: 'The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this, he is

entitled to recover unless the defendant produces evidence to rebut the presumption. It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's default; but this is going too far. If the facts proved render it probable that the (584) defendant violated its duty, it is for the jury to decide whether it did so or not. To hold otherwise would be to deny the value of circumstantial evidence. As already stated, the plaintiff is not required to prove his case beyond a reasonable doubt, though the facts shown must be more consistent with the negligence of the defendant than the absence of it. It has never been suggested that evidence of negligence should be direct and positive. In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence, and as that fact is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly on the fact of negligence; a kind of evidence which might not be so satisfactory in other classes of cases open to clear proof. This is on the general principle of the law of evidence which holds that to be sufficient and satisfactory evidence which satisfies an unprejudiced mind.' "

The allegation of negligence in the complaint is that the deceased was down on the track in an apparently helpless condition, and that the engineer of the defendant could have discovered him in time to stop the train before reaching him, by the exercise of ordinary care.

The burden was on the plaintiff to prove the truth of this allegation and to establish in the minds of the jury: (1) that the deceased was down on the track in an apparently helpless condition; (2) that the engineer could have discovered him in time to stop the train before reaching him, by the exercise of ordinary care; (3) that he failed to exercise such care, and as a direct result the deceased was killed. *Clegg v. R. R.*, 132 N. C., 294.

Applying these principles, we are of opinion that there was error in entering the judgment of nonsuit, and we forbear from discussing the evidence at length, for fear we may present arguments in behalf of the plaintiff, without giving those favorable to the defendant.

It was in evidence that about two hours before the deceased was killed, he was asleep in a path near the cross-ties; that he was awakened and went to Sabiston's store near-by; that he remained at the store a short time, and went back to the railroad at Sabiston's (585) crossing; that he was walking and went up the railroad in the direction his body was afterwards found; that he was drunk and staggering, one witness saying "both sides of the road was his"; that about two hours after leaving Sabiston's crossing, his body was found near a trestle of the defendant, across Cary's branch, which was about two miles from the crossing; that the head was severed from the body

and was on one side of the track, and the body, according to one witness, on the other side, and according to another, between the rails, and an arm under the trestle; that the body was mangled, or, as one witness expressed it, "badly chewed up," "badly mashed up"; that there was evidence of blood on the rail, a witness testifying:

Q. Did you see any blood, and where did you see it? A. That was on the north side of the trestle, and a bundle on this side—a bundle of overalls.

Q. What did you see on the roadbed? A. I didn't see anything unusual except where the man was cut to pieces on the trestle.

Q. Where was that? A. On the northeast side of the trestle.

Q. Right on the side of it? A. You may say the first tie—right on the roadbed between the first and second tie.

Q. With reference to the T iron, where was it? A. It must have been right over the T iron on the east side.

Q. How far did you see the evidence on the track from where you first observed the condition? A. Over there south, it was about half a dozen or eight ties as far as it was. He was cut right alongside of the trestle after we crossed.

Q. Where was the head? A. When I first observed the head it was down in the ditch.

Q. How far was that from the other edge of the trestle? A. The head was north side of the trestle, eight or ten cross-ties from the trestle?

Q. Where was the body? A. Right on the other side, just clear of the T iron.

Q. With reference to the railroad track? A. Right side of
(586) the track, just clear of the track on the edge of the cross-ties, on this end.

Q. (The Court:) Was any part of the body between the rails or outside of the rails? A. To the best of my recollection, the head was on one side of the railroad in the ditch and the body was on the other side of the track, and the arm was down under the trestle. I believe the other arm was badly mangled; that the deceased was killed by a passenger train, which stopped a short distance beyond the body; that no whistle was sounded; that it was a clear day; that an object down on the track, about the place the defendant was killed, the size of a man could be seen from the direction the train was running 1,065 yards, and that it was a man, if one was on the track, a distance of 265 yards.

There is other evidence tending to establish the contention of the defendant.

His Honor properly excluded the statement of the engineer, made before the coroner, that he saw a man lying on his left side with his hat

on his head, so he could not tell whether he was white or black. *Southerland v. R. R.*, 106 N. C., 100.

We are of opinion the plaintiff is entitled to have the evidence considered by a jury.

Reversed.

Cited: Holder v. R. R., 160 N. C., 8; *Smith v. R. R.*, 162 N. C., 36; *Lloyd v. R. R., ib.*, 496; *Harrison v. R. R.*, 168 N. C., 384; *Barnes v. R. R., ib.*, 514; *McRainey v. R. R., ib.*, 571; *Hill v. R. R.*, 169 N. C., 741, 743; *Harrison v. R. R.*, 171 N. C., 752.

PINK CAMPBELL v. RALEIGH AND CHARLESTON RAILROAD COMPANY.

(Filed 23 October, 1912.)

Railroads—Construction—Embankments—Damages—Limitation of Actions—Interpretation of Statutes.

An action against a railroad company for damages caused to plaintiff's lands by an embankment built by the defendant's grantor, a railroad company, which at the time of its erection produced the same physical conditions, necessarily causing the same or substantial injury and interference on plaintiff's lands that have existed since, is barred by the statute of limitations after five years. Revisal, sec. 394, subsec. 2.

APPEAL by plaintiff from *Peebles, J.*, at April Term, 1912, (587) of ROBESON.

Civil action to recover damages to plaintiff's land, caused by the building of a railroad embankment.

Defendant duly pleaded three and five years statute of limitations. At the close of the testimony, on adverse intimation from the court, the plaintiff submitted to a nonsuit and appealed.

McNeill & McNeill and Britt & Britt for plaintiff.

McLean, Varser & McLean and McIntyre, Lawrence & Proctor for defendant.

HOKE, J. Our statute, Revisal, sec. 394, subsec. 2, provides as follows: "No suit, action, or proceeding shall be brought or maintained against any railroad company by any person for damages caused by the construction of said road or the repairs thereto, unless such suit, action, or proceeding shall be commenced within five years after the cause of action accrues; and the jury shall assess the entire amount of damages

which the party aggrieved is entitled to recover by reason of the trespass on his property." The summons in this action was first issued on 17 September, 1908, and, on a perusal of the entire testimony, that of plaintiff and others, it clearly appears that the embankment complained of was constructed by the Carolina Northern Railroad Company in 1901, and has been since maintained; that the rights and interest of said company have been duly conveyed to the present defendant, the Raleigh and Charleston Railroad Company. It further appears that the enbankment, at the time of its erection, produced the same physical conditions, necessarily causing the same or substantial injury and interference on plaintiff's land that have existed since. Upon the admitted facts, therefore, and in any aspect of the matter, the plaintiff's cause of action is barred by the statute of limitations above quoted. *Pickett v. R. R.*, 153 N. C., 150; *Stack v. R. R.*, 139 N. C., 366; *Ridley v. R. R.*, 124 N. C., 34. This being true, and the statute having been properly pleaded it would serve no good purpose to consider and pass upon the other questions presented in the record, and the judgment of nonsuit will
(588) will be affirmed. *Oldham v. Rieger*, 145 N. C., 258; *Cherry v. Canal Co.*, 140 N. C., 422.

Affirmed.

Cited: *Duval v. R. R.*, 161 N. C., 450; *Clark v. R. R.*, 168 N. C., 417; *Perry v. R. R.*, 171 N. C., 4.

JANE CULBERTH v. M. M. HALL AND J. E. WILSON.

(Filed 16 October, 1912.)

1. Deeds and Conveyances—Fraud—Mortgages—Evidence—Nonsuit.

In an action to convert a deed into a mortgage on the ground of fraud in its procurement, there was evidence tending to show that the plaintiff was an illiterate colored woman, working for the defendant as a "washerwoman"; that she had purchased the land in question with the understanding that the defendant would lend her the balance of the purchase price, to be secured by a mortgage thereon, and that the deed was written by a notary public, the defendant's son, who also probated it, and was signed by the plaintiff upon being misled to believe that it was the mortgage agreed upon; that the plaintiff remained in possession for twelve months without any demand for rent, and listed the land for taxes and claimed it as her own: *Held*, a motion for a nonsuit was properly denied.

2. Deeds and Conveyances—Evidence Dehors—Fraud—Burden of Proof.

In an action to convert a deed into a mortgage on the ground of fraud in its procurement: *Held*, in this case, the plaintiff's possession without demand upon her for rent, and the gross inadequacy of the price, were inconsistent with the defendant's claim of absolute ownership, and is evidence *dehors* the deed; if such evidence was required.

3. Pleadings—Lis Pendens—Notice.

A complaint containing the names of the parties, the object of the action to set aside a deed to lands for fraud in its procurement, given when a mortgage to secure the balance of the purchase price of the lands should have been executed, and a description of the lands, is a *lis pendens*, and is notice to a subsequent purchaser without the necessity of filing a separate and formal notice.

4. Justices of the Peace—Title to Lands—Jurisdiction—Judgment—Superior Court—Estoppel.

A judgment of a justice of the peace in a summary action of ejectment wherein the title to the lands is controverted by the answer does not estop the plaintiff, in his action theretofore brought in the Superior Court, to convert the deed to the lands in question into a mortgage on the ground of fraud. The proceedings before the justice are void upon their face, in view of the title therein set up by the defendant, and in the absence of any adjudication of tenancy by the justice; and the judgment of the Superior Court, having assumed jurisdiction over the whole subject-matter, is final.

5. Landlord and Tenant—Mortgagor in Possession—Demand—Ejectment—Justice's Court—Jurisdiction.

The landlord and tenant act does not apply to a mortgagor who is allowed to remain in possession, and on demand, after default, refuses to surrender possession; and its provisions cannot be extended by any contrivance so as to give to the mortgagee the benefit of summary proceedings in ejectment, in a court of a justice of the peace.

6. Deeds and Conveyances—Fraud—Mortgages—Liens—Rents and Profits—Measure of Damages.

The plaintiff being successful in her action to convert a deed into a mortgage to secure a loan for the purchase of land, wherein the right of redemption is found to exist, is entitled to recover the entire estate in the property, subject to the amount of the lien and interest, upon which amount the rents and profits for the period of her wrongful "ouster" are to be credited.

APPEAL by defendant from *Carter, J.*, at July Term, 1912, (589) of SAMPSON.

These issues were submitted:

1. Was Jane Culbreth induced to sign the deed to M. M. Hall, instead of a mortgage, by the fraud of defendant M. M. Hall, as alleged in the complaint? Answer: Yes.

2. What amount did defendant Hall pay Melvin at the time the deed was executed by Melvin to the plaintiff, Jane Culbreth? Answer: $319.

3. Did the defendant Wilson have legal notice of plaintiff's cause of action, by her complaint on file as a *lis pendens,* prior to the registration of his said deed for said lands? Answer: Yes.

4. Is plaintiff estopped by the proceedings and judgment of (590) R. H. Hubbard, J. P.? Answer: No.

5. What damages has plaintiff sustained by reason of the defendant Hall failing to permit the plaintiff to redeem said land and wrongfully conveying same to his codefendant, Wilson? Answer: $361.17.

From the judgment rendered the defendants appealed.

George E. Butler for plaintiff.
Faison & Wright for defendants.

BROWN, J. This action is brought to convert a deed into a mortgage, upon the ground of fraud, the plaintiff averring that she was induced by the fraud of the draftsman to sign the instrument, thinking it was a mortgage, instead of an absolute deed.

We have examined the eighteen assignments of error, and find nothing in the record that justifies us in directing another trial.

1. It is contended that his Honor should have sustained the motion to nonsuit.

The plaintiff's evidence tends to prove that she purchased a dwelling-house and lot from one Melvin and owed him a balance of $319 on it; that the property was worth about $700; that she applied to defendant Hall for a loan of $319; that after some "chaffering," defendant agreed to lend plaintiff $319 on two years credit at interest, and that Hall paid said sum to Melvin for her, and Melvin executed a deed to plaintiff.

The deed from plaintiff to Hall was written by his son, James Hall, a notary public, who also probated it. The plaintiff testifies positively that the transaction was a loan and not a sale, and that the notary fraudulently substituted an absolute deed for a mortgage. There is abundant evidence to support the plaintiff's own testimony.

It is in evidence that she is an illiterate, ignorant colored woman of excellent character, and the "washerwoman" for Hall's family; that she had purchased the property from Melvin and made payments on it; that the exact sum she obtained from Hall was the sum she owed Melvin; that Hall agreed to lend it to her for two years; that plaintiff remained in possession for twelve months, without any demand for rent; that

she listed the property for taxes, and claimed it as her own. The (591) motion to nonsuit was properly denied.

2. It is contended his Honor erred in not charging the jury that there must be evidence *"dehors* the deed" before it can be set aside. His Honor charged the jury that the plaintiff must sustain her allegations not only by the greater weight of evidence, but by evidence clear, strong, cogent, and convincing.

The theory upon which this case was tried was that the defendant Hall fraudulently and falsely substituted an absolute deed for a mortgage, and took advantage of plaintiff's ignorance.

The gravamen of the action is a pure fraud and not mutual mistake. In view of this, it may be open to doubt as to whether his Honor did not err on the side of the defendants as to the *quantum* of proof.

In *Harding v. Long,* 103 N. C., 1, the subject is elaborately discussed by *Justice Avery,* and it is held that where it is sought to have a deed declared void because its execution was obtained by false and fraudulent representations of the grantee, the degree of proof, as stated by his Honor in the case at bar, is not required.

We think his Honor's charge under the facts of this case is not justly open to exception by the defendants. *Cobb v. Edwards,* 117 N. C., 245; *Avery v. Stewart,* 136 N. C., 426; *Ely v. Early,* 94 N. C., 1; *Wilson v. Land Co.,* 77 N. C., 447.

Besides, there are facts in evidence *dehors* the deed, and inconsistent with the claim of absolute ownership upon the part of Hall, such as gross inadequacy of price, possession retained by plaintiff and no demand for rent. *Kelly v. Bryan,* 41 N. C., 287.

3. It is contended that his Honor erred in holding that the defendant Wilson had legal notice of the plaintiff's equity. His Honor correctly directed the jury upon the record evidence to answer the third issue "Yes." The summons was issued and a duly verified complaint filed on 13 January, 1911. The deed from Hall to Wilson was not probated or registered, nor is there any proof of its delivery until 16 January, 1911.

The complaint has all the requisites of a *lis pendens,* and contains the names of the parties, the object of the action, and a (592) description of the land to be affected. It was, therefore, unnecessary to file a separate and formal notice. *Arrington v. Arrington,* 114 N. C., 151; *Collingwood v. Brown,* 106 N. C., 362.

4. It is contended further that a summary proceeding in ejectment before a justice of the peace operates as an estoppel and precludes the plaintiff from prosecuting this action. The record shows that the proceeding aforesaid was commenced on 20 February, 1911, and this action was commenced and the complaint filed on 13 January, 1911.

In the summary proceeding the defendant, Jane Culbreth, pleaded that the justice of the peace had no jurisdiction, for that the title to real estate is brought into controversy, and she set out in her answer the pendency of this suit in the Superior Court of Sampson County, averring all of the several facts which are alleged in her complaint in this action.

There is no evidence that she ever attorned to Hall and no claim by Wilson that she ever attorned to him. On the contrary, she stoutly denied any tenancy, but averred that she went into possessesion as a purchaser from Melvin and has never surrendered that possession to any one.

It is to be observed that the justice of the peace did not find it a fact that Jane was a tenant of either Hall or Wilson, but, without any such adjudication, simply ordered that she be removed from the premises.

It is contended by the counsel for the plaintiff that this summary proceeding was a part of the fraudulent scheme to "oust" the plaintiff from her property, and there is color for such allegation; but in our view the whole proceeding was void on its face, in view of the plea of title set up by the defendant in the said proceeding, and in the absence of any adjudication of tenancy by the justice of the peace. It appears from that record that the justice did not pass on that question, but simply directed the removal of Jane from her property.

The Superior Court had prior to this assumed jurisdiction over the whole subject-matter, as well as over the persons interested, and its judgment is necessarily final.

In speaking of estoppel arising from the relation of land-
(593) lord and tenant, *Mr. Justice Hoke* says: "It is incident to the tenure and the enjoyment of the right, after the relationship has ended and the enjoyment has ceased in the one case, or the possession has been surrendered in the other, the question is then at large, and it is open to the tenant to show the truth of the matter." *Tise v. Harvey Co.*, 144 N. C., 514.

It is settled that the landlord and tenant act does not apply to a mortgagor who is allowed to remain in possession, and, on demand after default, refuses to surrender possession; and the provisions of that act cannot be extended by any contrivance so as to give to the mortgagee the benefit of having summary proceedings. *Greer v. Wilbur*, 72 N. C., 593; *McCombs v. Wallace*, 66 N. C., 481.

5. There are some exceptions relating to the fifth issue in respect to the measure of damage which it is not necessary to consider. We think his Honor applied the proper rule of damage in the event that the plaintiff had lost her equity of redemption by the fraudulent conduct of Hall; but that is not the case, for she has recovered her entire estate in

the property as against both of these defendants, subject to the lien of $319 and interest. Therefore, she is not entitled to recover the value of her equity of redemption as assessed under the fifth issue; but she is entitled to recover of these defendants the rents of the property from the date when she was "ousted" up to the time when it shall be restored to her, together with such other actual damages as she may have sustained by reason of her wrongful "ouster," which sum will be credited upon the $319.

At the next term of the Superior Court the presiding judge will submit an issue in order that such damages and rents may be ascertained.

The judgment of the Superior Court is modified and affirmed. The costs will be taxed against defendants.

No error.

Cited: *Torrey v. McFadyen,* 165 N. C., 241; *Lamb v. Perry,* 169 N. C., 444; *Glenn v. lenn, ib.,* 731; *Johnson v. Johnson,* 172 N. C., 531.

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(594)

W. W. GRAVES v. THOMAS HOWARD, EXECUTOR, ET AL.

(Filed 9 October, 1912.)

1. Husband and Wife—Wife's Separate Property—Limitation of Actions—Mortgages—Foreclosure—Wife's Disability—Interpretation of Statutes.

A married woman holds her separate real and personal property free from any debts, obligations, or engagements of her husband, according to the provisions of our Constitution and the Revisal, sec. 2093; and since chapter 78, Laws of 1899, removes the disability of marriage, and Revisal, sec. 408, allows a wife to maintain an action without the joinder of her husband when it concerns her separate property, and against her husband, when it is between the husband and wife, and there being no exception in favor of the wife when she holds a claim against him, the statute of limitation will run against a note thus held by her.

2. Husband and Wife—Limitation of Actions—Once Commenced.

When the statute of limitation has begun to run on a note, and afterwards the wife of the debtor becomes the owner, the fact that the husband has become the debtor to his wife thereon will not repel the bar, and the time of her ownership will be counted.

3. Mortgages—Power of Sale—Limitation of Actions—Obligations of Contract—Statutes—Remedy—Reasonable Time—Constitutional Law.

Revisal, sec. 1044, declaring the power of sale contained in a mortgage shall be inoperative when the note it secured is barred by the statute of

limitations, is applicable to those contracts which existed at the time of its becoming operative; but, as to those, it only affected an existing remedy, which does not impair the obligations of the contract, when a reasonable time has elapsed thereafter within which the action could have been instituted.

APPEAL by defendant from *Ferguson, J.*, at November Term, 1911, of WILSON.

This is a controversy between W. W. Graves, the purchaser under a second mortgage executed by J. B. Stickney, and the owner of the first mortgage, heard upon the following agreed facts:

1. That on 4 January, 1900, J. B. Stickney and his wife, Martha H. Stickney, executed and delivered unto Mrs. M. P. Morgan of the State of Alabama, and the sister of J. B. Stickney, a mortgage deed (595) upon certain lands lying and being in the town of Wilson, County of Wilson, North Carolina, containing two acres, and being the residence of the said J. B. Stickney and his wife, Martha H. Stickney, the said J. B. Stickney being the owner in fee thereof, which mortgage is duly recorded in Book No. 54 at page 579, in the office of the Register of Deeds of Wilson County, for the purpose of securing a note given by the said J. B. Stickney to the said M. P. Morgan for the sum of $1,000, due and payable on 4 January, 1901.

2. That on 17 January, 1903, for the purpose of securing the note given by the said J. B. Stickney to J. Alvin Clark, for $1,000, due one year after date, the said J. B. Stickney and wife, Martha H. Stickney, executed unto the said J. Alvin Clark a mortgage upon the same property described in the mortgage of J. B. Stickney and wife to M. P. Morgan, above referred to, which said mortgage was duly recorded in Book No. 66, at page 207, in the office of the Register of Deeds of Wilson County.

3. That thereafter, before 6 May, 1907, the said Mrs. M. P. Morgan died domiciled in the State of Alabama, having first made and published her last will and testament, which said last will and testament was duly admitted to probate in a court of competent jurisdiction, and the executor therein named duly and properly qualified under the laws of the State of Alabama.

4. That by the terms of her last will and testament the said M. P. Morgan bequeathed the said note to Martha H. Stickney, and the said note was thereafter duly and properly transferred and assigned to the said Martha H. Stickney by her executor.

5. That thereafter, to wit, on about 1 November, 1908, the said Martha H. Stickney died domiciled in the county of Wilson, State of North Carolina, having first made her last will and testament, in which

said last will and testament she named Thomas Howard as executor, and the said last will and testament was duly admitted to probate in the Superior Court of Wilson County.

6. That by the terms of said last will and testament all the property of said Martha H. Stickney was given to Thomas Howard, as trustee, to be held by him upon certain uses and trusts fully set forth in the said last will and testament. (596)

7. Thereafter, on the.....September, 1911, the said J. B. Stickney died domiciled in the county of Wilson, intestate, and no administration has been taken out upon his estate, he having left no property other than the real estate described and conveyed in the mortgage above referred to, and which had been allotted to him in appropriate proceedings as a homestead. At the death of the said J. B. Stickney he owed various mortgage indebtedness, and there were various judgments docketed against him, the aggregate of which amounts to more than the value of his said homestead.

8. That nothing whatever was paid by the said J. B. Stickney, or by any one for him, on account of the note, which he gave to the said M. P. Morgan, and which was due on 1 January, 1901, and which was secured in the mortgage given by him and his wife, Martha H. Stickney, to the said M. P. Morgan, being the mortgage hereinbefore referred to.

9. That on 31 October, 1911, J. Alvin Clark, pursuant to the power of sale contained in the mortgage above referred to, sold the property conveyed therein at public auction to W. W. Graves, for the sum of $7,700.

10. That the said Thomas Howard, executor of Martha H. Stickney, has threatened to cause the said real estate to be sold pursuant to the power of sale contained in the mortgage given by J. B. Stickney and wife to M. P. Morgan, and to take all necessary steps to have the said power of sale executed.

11. That said W. W. Graves contends that the purchaser under such a sale would acquire no title as against him; his contention being that, under the statute, more than ten years have elapsed since the note, secured in the mortgage, fell due, and no payments having been made thereon, neither the mortgagee nor her executors or administrators can execute such power.

12. The said W. W. Graves has agreed to and with the said Thomas Howard, trustee and executor aforesaid, that if the court shall be of the opinion that the power of sale contained in the mortgage aforesaid can be executed, that he will pay off and discharge the indebtedness secured therein, claiming that he has a right, as such purchaser, to discharge any and all valid and existing liens. (597)

Wherefore it is agreed that if upon the foregoing facts the court shall be of the opinion that the authority to execute such power

of sale is inoperative and barred by the statute, the said Thomas Howard, executor aforesaid, will not demand and cause the same to be executed; but if the court shall be of the opinion that the authority to execute such power is not inoperative and barred, the said W. W. Graves will pay off and discharge the indebtedness secured in the said mortgage, without a sale being had.

The only legal question raised on these facts is whether the right of action and the right to foreclose under the first mortgage are barred by the statute of limitations, and it is admitted that the right of action on the note is barred if the time from 6 May, 1907, to 1 November, 1908, during which time the note and mortgage were the property of the wife of J. B. Stickney is counted. It is also admitted that the right to sell under the power of sale is barred if the act of 1905 is applicable and is constitutional, and applied to the facts of this case.

His Honor held that the claim of the defendant under the first mortgage and the right to sell were barred, and he excepted and appealed.

Connor & Connor for plaintiff.

Pou & Finch and Thomas W. Shelton for defendant.

ALLEN, J. The learned counsel for the defendant referred us to the decisions of the highest courts of Indiana, New Jersey, Louisiana, Wisconsin, and Pennsylvania, holding that the statute of limitations does not run in favor of the husband against a claim owned by his wife, to which we have given careful and respectful consideration.

The cases from these courts rest upon the principle of the common law, that the wife cannot maintain an action against her husband, because of the unity of the person, or upon the ground that the removal of the common-law disability by statute generally does not confer upon the wife the right to sue the husband, in the absence of express legislative declaration to that effect, and as she cannot sue, the period of (598) coverture is not counted against her.

If, therefore, the disability of marriage has been removed and, in addition, the right to sue the husband has been conferred on the wife by statute in this State, it follows that the authorities relied on are not applicable, and the conclusion would seem to be inevitable, in the absence of an exception in the statute of limitations, that the period of coverture would be counted against the wife.

Under our Constitution and the Revisal, sec. 2093, the real and personal property of any female in this State, acquired before marriage, or to which, after marriage, she may become in any manner entitled, is her sole and separate estate and property, freed from any debts, obligations, or engagements of her husband, and by chapter 78, Laws 1899,

the disability of marriage was removed (*Bond v. Beverly,* 152 N. C., 63), and since then the staute of limitations runs against wife during coverture.

The Revisal, sec. 408, further provides that the wife may maintain an action without the joinder of her husband: (1) When the action concerns her separate property. (2) When the action is between herself and her husband; and his court has construed this section to confer upon the wife the right to maintain an action against her husband. *Shuler v. Millsaps,* 71 N. C., 297; *McCormac v. Wiggins,* 84 N. C., 279; *Manning v. Manning,* 79 N. C., 293; *Robinson v. Robinson,* 123 N. C., 137; *Perkins v. Brinkley,* 133 N. C., 158.

The statutes of limitation contain no exception in favor of the wife when she holds a claim against her husband.

It therefore appearing that the common-law disability has been removed, that the wife may sue her husband, and that there is no exception in the statute of limitations, we are of opinion that the time from 6 May, 1907, to 1 November, 1908, must be counted against the defendant, and that the right of action is barred upon the note secured by the mortgage. This conclusion has been reached by other courts, under statutes similar to our own. *Wilson v. Wilson,* 95 Am. Dec., 197 (36 Cal., 447); *Estate of Deaver,* 106 Am. St., 375 (126 Iowa, 70).

The Court says in the California case: "How is the wife to (599) avail herself of the use of the property, or place it in the category of her separate estate, unless she can recover it from the debtor? The debtor claims that the statute of limitations is running against her. How is she to avoid the bar, if she cannot sue, and the debtor will not pay without suit? There is no provision to prevent the statute running in such case. . . . Section 7 of the practice act authorizes the wife to sue alone 'when the action concerns her separate property,' and also 'when the action is between herself and her hubsand.' There is no limitation as to the kind of actions that may be maintained 'between herself and her husband'; and section 395, as amended in 1865-66, authorizes the husband and wife to testify on their own behalf, or on the behalf of each other, as witnesses in actions between themselves, except in actions of divorce. This provision contemplates that there may be actions between husband and wife other than those relating to divorces. What are they, unless relating to rights of property? Disputes with respect to property may arise between them when the separate existence of the wife, and a separate right of property, is recognized at law, as in this State, as well as other matters; and when they do arise there is as great necessity for a judicial determination of the questions as when they arise between other parties. A litigation of the kind between hus-

band and wife may be unseemly and abhorrent to our ideas of propriety, but a litigation in one form can be no more so than in another, and no more so than the necessity itself which gives rise to the litigation. The present policy of the law is to recognize the separate legal and civil existence of the wife, and separate rights of property, and the very recognition by the law of such separate existence, and rights at law as well as in equity, to hold and enjoy separate property, involves a necessity for opening the doors of the judicial tribunals to her, in order that the rights guaranteed to her may be protected and enforced"; and in the Iowa case: "No exception in behalf of married women, of actions against their husbands, is found in the statute of limitations. It provides that 'actions may be brought within the times herein limited respectively, after their causes accrue, and not afterwards, except (600) when otherwise specially declared. . . . Those founded on written contracts . . . within ten years'; Code, sec. 3447. As all exceptions not 'otherwise specially declared' are excluded, we are not permitted to insert any, even though we might think that, owing to the relation of the husband and wife, she should be relieved from the necessity of pressing her claims against her husband in order to keep them alive. That was a matter for legislative consideration, and does not constitute a reason for refusal by the courts to give effect to a specific statute to the contrary. . . . The cases cited from States where the common law prevails—that the husband may not sue the wife—are not in point, and those resting on statutes somewhat similar to ours do not meet our approval."

Wilkes v. Allen, 131 N. C., 280, is not in conflict with this view, as it was decided before the disability of marriage was removed.

If, however, the rule was otherwise, and ordinarily the statute of limitations would not run in favor of the husband upon a contract with his wife, it appears in this case that the statute had begun to run before the wife became the owner of the note and mortgage, and as said in *Causey v. Snow,* 122 N. C., 329: "The statute of limitations has begun to run before she received it, and her coverture did not stop it."

The appellant further contends that, although the right of action on the note is barred, there was no limitation as to the power of sale prior to the Revisal of 1905; *Menzel v. Hinton,* 132 N. C., 660; that this became a part of the contract, and that the act of the Legislature, Revisal, 1044, declaring that the power of sale in a mortgage shall be inoperative when the right of action to foreclose is barred, impairs the obligation of the contract and is unconstitutional and void.

The statute undoubtedly purports to deal with existing contracts, because it says: "Whenever an action to foreclose any such mortgage or

deed of trust is now barred by the statute of limitations the authority to execute the power of sale contained therein shall be barred on 1 January, 1907."

Did the Legisature have this power? (601)

It is true that laws in force at the time a contract is made become a part of the contract, but this does not prevent a change in the remedy.

The rule, with its limitations, is well stated in Cooley Const. Lim., 402 *et seq.*, as follows: "Citizens have no vested right in the existing general laws of the State which can preclude their amendment by repeal, and there is no implied promise on the part of the State to protect its citizens against incidental injury occasioned by changes in the law. . . . The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the oligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other; hence any law which in its operations amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution. It is the civil obligation of contracts which (the Constitution) is designed to reach; that is, the obligation which is recognized by, and results from, the law of the State in which it is made. . . . Such being the obligation of a contract, it is obvious that the rights of the parties in respect to it are liable to be affected in many ways by changes in the laws which it could not have been the intention of the constitutional provision to preclude. 'There are few laws which govern the general policy of a State, or the government of its citizens, in their intercourse with each other or with strangers, which may not in some way or other affect the contracts which they have entered into or may thereafter form. For what are laws of evidence, or which concern remedies, frauds, and perjuries, laws of (602) registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern-keepers, and a multitude of others which crowd the codes of every State, but laws which may affect the validity,

construction, or duration, or discharge of contracts?' But the changes in these laws are not regarded as necessarily affecting the obligation of contracts. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract; and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made. It has accordingly been held that laws changing remedies for the enforcement of legal contracts, or abolishing one remedy where two or more existed, may be perfectly valid, even though the new or the remaining remedy be less convenient than that which was abolished, or less prompt and speedy."

The Supreme Court of the United States, in *Terry v. Anderson,* 95 U. S., 628, sustained a statute as reasonable which gave only nine months and seventeen days within which to enforce a claim, and said, upon the question now before us: "This Court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. *Hawkins v. Barney,* 5 Pet., 457; *Jackson v. Lampshire,* 3 Pet., 280; *Sohn v. Waterson,* 17 Wall., 596, 21 I. Ed., 475; *Sturges v. Crowninshield,* 4 Wheat., 122. And it is difficult to see why, if the Legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of actions or modes of remedy, it is well set-
(603) tled that the Legislature may change them at its discretion, provided adequate means of enforcing the right remain. We have had occasion to consider this subject at the present term, in *Tennessee v. Sneed,* not yet reported *(post).* In all such cases the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the Legislature is primarily the judge, and we cannot overrule the decision of that department of the Government, unless a palpable error has been committed. In judging of that, we must place ourselves in the position of the legislators and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts."

This case was approved in *Koshkonong v. Burton,* 104 U. S., 675, and in *Turner v. New York,* 168 U. S., 94, the Court saying in the last case: "It is well settled that a statute shortening the period of limita-

tion is within the constitutional power of the Legislature, provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect."

The same doctrine has been announced by our Court: "It is settled beyond controversy that while the Legislature has the power to extend or reduce the time in which an action may be brought, this is subject to the restriction that when the limitation is shortened 'a reasonable time must be given for the commencement of an action before the statute works a bar.' *Strickland v. Draughan,* 91 N. C., 103, and cases there cited; Cooley Const. Lim., 450 (8 Ed.), and cases there cited." *Nichols v. R. R.,* 120 N. C., 497.

The right to sell under the power did not expire under the statute for more than five years after its enactment, which was an ample protection of the rights of the parties.

Affirmed.

Cited: La Roque v. Kennedy, 161 N. C., 461.

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(604)

D. F. WOOTEN, TRUSTEE, v. J. F. TAYLOR.

(Filed 23 October, 1912.)

1. Deeds and Conveyances—Mortgages—Consideration—Good Faith—Assignment for Creditors.

The principle that a mortgage of practically all of a grantor's property to secure a preëxisting debt should, under certain circumstances, be treated as an assignment, and subject to the provisions of law in reference to that class of conveyances, does not obtain where the transaction is *bona fide,* was intended as a mortgage, and it appears that the property greatly exceeds in value the amount of the mortgage debt; that it was made in good faith, and a substantial part of the consideration, *i. e.,* $400 of the consideration of $700, then presently moved between the parties.

2. Same—Debtor and Creditor—Preëxisting Debt—Unlawful Preference—Interpretation of Statutes.

The provisions of chapter 918, sec. 2, Laws 1909, repealing section 968 of the Revisal, construed with amendments to sections 967, 969, 970, and 972, thereof, relating to assignments for the benefit of creditors and prohibiting discrimination among them, extends to all cases where "property has been transferred or conveyed within four months next preceding the registration of the deed of trust or assignment, in consideration of the payment of a preëxisting debt, where the grantee or transferee of such

property knew, or had reasonable grounds to believe, that the grantor or assignor was insolvent at the time of making such conveyance or transfer": *Held*, the four months period mentioned in the statute is to be counted, as therein stated, from the time the transfer or conveyance was made, and not from the time of its registration, as provided in the present Federal bankrupt act, and the mortgage, in this case, having antedated for more than four months the general assignment, and the grantee having no notice of the grantor's insolvency, the claim is not an unlawful preference according to the provisions of our law.

3. Same—Consideration Present in Part—Four Months Period.

An assignor for the benefit of his general creditors theretofore had executed a chattel mortgage which substantially conveyed all of his assets to the net value of $1,289.58, to secure a debt of $700 upon the consideration of $200 cash then advanced, and the mortgagee's indorsement to the bank, then made, of a note for $500, $300 of which was a debt for which the mortgagee was already an indorser for the mortgagor. The mortgagee paid the notes on which he was an indorser, and in an action brought by the trustee in the deed of general assignment for the benefit of creditors to have the creditors prorate with the mortgagee, it is *Held*, that as to the cash consideration of $200 and the $200 for which the mortgagee indorsed at the time of making the mortgage, they being an obligation presently incurred, there was no unlawful preference given by the transaction; and that as to the $300 for which the mortgagor was already an indorser, the mortgage or conveyance having been given more than four months before the execution of the general assignment without knowledge of the mortgagee of the mortgagor's insolvency, it did not come within the meaning of the statutes and was not an unlawful preference. Revisal, secs. 967, 968, 970, 972.

4. Deeds and Conveyances—Assignment for Creditors—Mortgages—Unlawful Preference.

A deed of general assignment for the benefit of creditors, by expressly making a prior mortgage of the grantor's property, wherein an unlawful preference is given, subject thereto, will not, of itself, prevent a recovery of the property conveyed in the mortgage by the trustee in the deed in trust for the general creditors. Revisal, sec. 968.

(605) APPEAL by plaintiff from *Allen, J.*, at June Term, 1912, of LENOIR.

The facts relevant to the question presented, embodied in the judgment, are as follows:

First. That on 27 July, 1910, the said J. F. Hartsfield executed a chattel mortgage on the property described in the complaint, being all of his property except $50 or $75 worth of accounts, mostly insolvent.

Second. That on 21 December, 1910, the said Hartsfield made assignment to the plaintiff, D. F. Wooten, conveying all of said property for the benefit of his creditors, subject to said mortgage mentioned in the next preceding findings of fact.

Third. That the said chattel mortgage was not recorded until 22 December, 1910, just one-half hour before the registration of the deed of assignment.

Fourth. That the said J. F. Taylor, the mortgagee in said mortgage, did not know or have any reason to believe that the said J. F. Hartsfield was insolvent at the time of the execution of the said chattel mortgage, but he did have reason so to believe at the time of (606) the filing of the chattel mortgage for registration on 22 December, 1910.

Fifth. That the creditors at whose instance this action is brought have filed their claims with the plaintiff assignee as such assignee and the Clerk of the Superior Court of Lenoir County, and have demanded that said assignee hold all of said property to be paid pro rata to creditors, including defendant's claim.

Sixth. That the consideration of said chattel mortgage was (1) $200, cash loaned said Hartsfield by said Taylor prior to the date of the mortgage; (2) $500, for which the defendant Taylor was and became liable to the First National Bank of Kinston at the time of the execution of said chattel mortgage, by indorsement of the note of said J. F. Hartsfield for money loaned the said Hartsfield, of which said amount $300 had been theretofore loaned said Hartsfield by said bank on the indorsement of said Taylor, and of which amount $200 was loaned said Hartsfield by said bank on the indorsement of said Taylor at the time of the execution of the said chattel mortgage, the said note so indorsed by said Taylor at the time of the execution of the chattel mortgage, including the amount of the said note previously indorsed by him, and also said amounts of money loaned to said Hartsfield at the time of the execution of the note executed contemporaneously with the execution of the said chattel mortgage.

Seventh. That subsequent to the execution of the deed of assignment and prior to the institution of this action, to wit, on 2 February, 1912, the defendant Taylor paid to the First National Bank of Kinston the amount of the said indebtedness of said Hartsfield to said bank, which indebtedness he had duly indorsed as hereinbefore stated in the next preceding findings of fact, the amount so paid to said bank by said Taylor on said indorsement being $504.

Eighth. That the amount due under said chattel mortgage by said Hartsfield to the defendant Taylor, including the money loaned him by the defendant and the money paid by the defendant to the First National Bank of Kinston on the notes of said Hartsfield, which the defendant had indorsed as aforesaid, is $504, with interest from 2 February 1912, and $200 with interest from 11 March, 1911. (607)

And upon such facts the court adjudged that the defendant had a superior lien on the assets, to the amount secured by his mortgage, and that the plaintiff trustee pay same out of the funds in his hands, realized from sale of the assignee's property and which were subject to defendant's claim. To this judgment plaintiff excepted and appealed.

George V. Cowper, W. D. Pollock, and G. G. Moore for plaintiff.
Rouse & Land for defendant.

HOKE, J. By the statutes of 1909, ch. 918, important changes were made in our law of assignments, Revisal, secs. 967, 968, *et seq.* These changes, appearing in Pell's Supplement, vol. 3, pp. 46-47, are as follows:

967. (Repealed, and the following enacted in its stead:) "Upon the execution of any voluntary deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once, and no such deed of trust or deed of assignment shall contain any preferences of one creditor over another, except as hereinafter stated."

968. (Amended by adding at the end of section the following:) "And it shall be the duty of said trustee to recover, for the benefit of the estate, property which may have been conveyed by the grantor or assignor in fraud of his creditors, or which may have been conveyed or transferred by the grantor or assignor for the purpose of giving a preference. A preference, under this section, shall be deemed to have been given when property has been transferred or conveyed within four months next preceding the registration of the deed of trust or deed of assignment in consideration of the payment of a preëxisting debt, when the grantee or transferee of such property knew or had reasonable ground to believe that the grantor or assignor was insolvent at the time of making such conveyance or transfer."

(608) 969. (Amended by adding at the end of section the following:) "*Provided,* that upon the written petition of one-fourth of the number of the creditors of the grantor or assignor whose claims aggregate more than 50 per cent of the total indebtedness of the said grantor or assignor, the clerk of the Superior Court of the county in which said deed of trust or deed of assignment is registered, upon a notice of not more than ten days to said trustee of said petition, shall remove said trustee and appoint some competent person to execute the provisions of such deed of trust or deed of assignment."

970. (Amended by striking out the words "such insolvent" in the first and second lines of said section 970, and by adding in lieu thereof the word "any.")

972. (Amended by adding to the end thereof the following:) "The trustee, after paying the necessary costs of the administration of the trust, shall pay as speedily as possible (1) all debts which are a lien upon any of the trust property in his hands, to the extent of the net proceeds of the property upon which such debt is a lien; (2) wages due to workmen, clerks, traveling or city salesmen or servants which have been earned within three months before registration of said deed of trust or deed of assignment, and (3) all other debts equally ratable."

A perusal of these amendments will disclose that, except in the two cases mentioned, (1) specific liens to the value of the property subject thereto; (2) wages due to workmen, clerks, etc., etc., all discrimination among creditors is forbidden, and that this inhibitive regulation applies, not only to all preferences attempted and contained in the deed itself, but is extended to all cases where "property has been *transferred* or *conveyed* within four months next preceding the registration of the deed of trust or assignment, in consideration of the payment of a preëxisting debt, where the grantee or transferee of such property knew or had reasonable ground to believe that the grantor or assignor was insolvent at the time of making such conveyance or transfer." In the present case, defendant, holding a chattel mortgage which conveyed substantially all of the assets admitted in the pleadings, to amount to $1,289.58, net, asks that his debt be paid in full, claiming that it comes directly within the first provied for by the statute, (609) "Debts which are a lien on the trust property to the extent of the net proceeds thereof, etc." And it may be well to note that there is no allegation challenging the *bona fides* of defendant's claim except as affected by the statute, nor is the integrity of our registration laws, in their ordinary operation, in any way involved, as the mortgage was registered prior to the deed of assignment. Plaintiff contends, however, that defendant's indebtedness should share pro rata, (1) because the mortgage itself is only an assignment, and, as such, the claim is subject to pro rata distribution; (2) that the same constitutes an unlawful preference within the meaning of the act, because the time by which its validity must be determined should date from its registration and not from its execution.

On the first proposition there are several decisions in this State to the effect that, where an insolvent grantor executes a chattel mortgage to secure a preëxisting debt, and same conveys practically all the property owned by him, it is proper that such an instrument, under certain circumstances, should be treated as an assignment and subject to the provisions of law in reference to that class of conveyances. *Odom v. Clark,* 146 N. C., 553; *Brown v. Nimocks,* 124 N. C., 417; *Bank v. Gilmer,* 116 N. C., 684. To hold otherwise, said *Associate Justice*

Avery, in the last-mentioned case, "would be to nullify the act." All of these authorities, however, recognize that, notwithstanding this legislation, a *boia fide* chattel mortgage may be made, and we are clearly of opinion that the principle of these decisions should not prevail on the facts of this case, where it appears that the conveyance, in the form of a chattel mortgage, on property greatly exceeding in value the amount of the debt, was made in good faith, was intended by the parties as such, and for a substantial part of the consideration, $400 out of $700, then presently moving between them.

And the second proposition must also be resolved against the plaintiff. On this subject, as stated, the statute, as now amended, provides that an unlawful preference exists when property has been transferred or conveyed by an insolvent assignor, within four months next preceding registration of the assignment, to secure a preëxisting debt, (610) and when the grantee or transferee of such property knew or had reasonable ground to believe that the grantor was insolvent at the time of making such *conveyance* or *transfer,* and from this it appears that to destroy a lien given in good faith, on the ground that the same constitutes an unlawful preference, the transfer or conveyance must be for (1) an antecedent debt; (2) the property must have been transferred within four months next preceding registration of the assignment; (3) when grantee had knowledge or notice of insolvency.

On the question of a preëxisting debt, the court finds that the consideration of defendant's mortgage was for $200, cash then advanced, and an indorsement to the bank, then made, for $500, $200 of which was an obligation then created and $300 was a debt for which Taylor, the mortgagee, was already an indorser. On these facts, the chattel mortgage, to the amount of $400, the obligation then created, was not for a preëxisting indebtedness, and, to that extent in any event, would be collectible as a valid lien under the statute. *In re Farmer Supply Co.,* 170 Fed., 502; *In re Wolf,* 98 Fed., 84. Remington on Bankruptcy, sec. 1328. Inasmuch, however, as $300 of the consideration had been already incurred to Taylor by reason of a prior indorsement (Remington Bankruptcy, sec. 644), the question as to this $300 will depend upon the correct construction of the statute, as to the time from which the four months is to be estimated. Does the four months mentioned begin from the time when the instrument is executed or when the same is registered? The statute, as heretofore stated, provides that an unlawful preference should be deemed to exist when property has been *transferred or conveyed* within the four months; and the section closes: "and when the grantee knew or had notice of the insolvency at the time of *making* such conveyance or transfer." Thus the *making* of the transfer or conveyance is the time expressly fixed by the statute, and there is nothing

in the law that justifies the Court in adding the words suggested and required to sustain plaintiff's position: "That for the purposes of the statute, the registration of the instrument shall be considered the time of making."

It was contended for the plaintiff that our Legislature, in en- (611) acting these amendments, evidently designed to make our law of assignments correspond with the bankruptcy act, in this matter of preferences, and that the Federal Law, in instruments of this character, makes the time of registration the determinative date, and that this was the prevailing construction of the Federal courts, even prior to the amendment of 1903 to the bankruptcy law, and by which the registration was, in express terms, made the correct date. *Godwin v. Bank,* 145 N. C., pp. 320-330; vol. 32, Statutes at Large, part 1, ch. 487. We are inclined to the opinion that prior to the amendment referred to, the weight of authority in the Federal decisions was against plaintiff's position on this question. Remington on Bankruptcy, vol. 3, sec. 1375, p. 804, in which the author says: "But the true rule, before the amendment of 1903, was contrary, namely, that if the actual transfer took place before the four months period, it was good, notwithstanding the recording or registering of the transfer occurred within the four-months period."

The better considered decisions before the amendment, holding the opposing view, rested their case chiefly on that provision in the present bankruptcy act which made the period of four months date from the registration, in reference to the act of bankruptcy, where it consisted of a transfer with intent to defraud or with purpose of securing a preference. See *In re Klingaman,* 101 Fed., 691. There is no provision of a similar kind as an aid to such a construction of our statute on assignments; on the contrary, its provision in regard to prohibited preferences more nearly resembles the bankruptcy act of 1867, ch. 8, Loveland on Bankruptcy, (2d Ed.), 1240, in which the section as to these preferences was uniformly construed to date from the actual execution or making of the transfer, and not from the registration. 101 Fed., *supra,* citing *Gibson v. Warden,* 81 U. S., 244; *Sawyer v. Turpin,* 91 U. S., 144.

On the facts stated, the mortgage, securing defendant's debt, was executed more than four months before the registration of the assignment, and when the claimant had no knowledge or notice of the assignor's insolvency, and the execution of the instrument and not the (612) registration being, in our opinion, the correct period to date from, the claim of defendant is not an unlawful preference, within the provisions of our law, and his Honor made the correct ruling in directing that the same be paid in full. We have not been inadvertent to the fact that the assignment directly recognizes the validity of defendant's

mortgage and, in express terms, is made subject to it, nor to the authorities which hold that in such case the trustee, under the assignment, is bound by the lien of the mortgage and the same must be considered the prior claim. *Bank v. Vass,* 130 N. C., 590, and other cases. The principle of these decisions may still prevail, in proper cases (see *Piano Co. v. Spruill,* 150 N. C., 168), but, in the case of general assignments, by express provision of the statute, a stipulation of that kind will not avail to prevent recovery by the trustee, where there has been an unlawful preference.

There is no error, and the judgment directing payment of defendant's claim in full is

Affirmed.

JAMES PENDER, RECEIVER OF THE EDGECOMBE HARDWARE COMPANY, v. W. L. SPEIGHT, F. J. MURDOCK, T. W. RIDDICK, AND F. G. DAVIS.

(Filed 25 September, 1912.)

1. Sales—Merchandise in Bulk—Statutes—Constitutional Law.

Chapter 623, Laws 1907, being "An act to prohibit the sale of merchandise in bulk in fraud of creditors," is not unconstitutional or void as an unwarranted limitation of the right to sell and dispose of property.

2. Corporations—Directors—Advantages—Trusts and Trustees—Creditors—Shareholders.

It is the duty of the directors of a corporation, as trustees of its property for the benefit of its creditors and shareholders, to administer the trust for the mutual benefit of the parties interested, and for them to receive therein an advantage to themselves not common to all is a plain breach of the trust imposed.

3. Corporations—Shareholders—Retiring Stock—Debtor and Creditor.

An agreement made by the shareholders of a corporation, between themselves, to retire any if its stock before settling with the corporation's creditors, is void as against the rights of the unpaid creditors.

4. Corporations—Directors—Insolvency — Knowledge Implied — Debtor and Creditor — Trusts and Trustees — Advantages — Credit — Sale of Entire Assets.

The law charges the directors of a corporation with actual knowledge of its financial condition, and holds them liable for damages sustained by stockholders and creditors by reason of their negligence, fraud, or deceit; and where a corporation is insolvent, and the directors retire certain portions of their shares of stock therein and receive therefor credits on obligations due by them to the corporation, and sell the entire assets by resolution passed, to one of them, participating therein, at a reduced

price, the transaction is void on its face, as against creditors and other shareholders, notwithstanding the directors were unaware of its insolvency.

APPEAL by defendant from *Carter, J.*, at June Term, 1912, of (613) EDGECOMBE.

The plaintiff moved for judgment upon the admissions in the pleadings. The court gave judgment that the plaintiff recover of the defendants Speight and Murdock all the stock of goods, etc., described in the complaint, and further, that the plaintiff recover of the defendant Murdock the sum of $1,000, with interest from 9 January, 1912, and that the cause be retained for further orders. The defendants appealed.

W. O. Howard, H. A. Gilliam, and J. M. Norfleet for plaintiff.
G. M. T. Fountain & Son for defendants.

BROWN J. It appears from the admissions in the complaint and answer that the Edgecombe Hardware Company was a corporation with a capital stock of $6,000; that the defendant Speight was the president, Riddick the vice president, and Murdock secretary, and all were directors; that on 9 January, 1912, the said corporation was insolvent; that on 27 March, 1912, the next and last meeting of the directors, the entire stock of goods, furniture, and fixtures and all the property of (614) the corporation were sold to the defendant Murdock for $4,144.70, purporting to be 60 per cent of their actual value, and this was done by resolution of the directors, the said Murdock being present and participating.

It further appears that the said directors passed a resolution on 9 January, 1912, to retire a portion of the capital stock of this insolvent corporation, and in pursuance thereof the defendant Speight surrendered ten shares of the capital stock, standing in the name of Ethel Speight, and credited his account with $1,000, he then owing the Hardware Company $1,161; that F. G. Davis, on said date, surrendered five shares of the capital stock held by him, and caused the account of F. G. Davis and wife, Addie, which amounted to over $600, to be credited with the sum of $317.63; and that on said date the defendant Murdock surrendered ten shares of the capital stock held by him, and received therefor $1,000 in cash.

These are the salient facts admitted in the pleadings.

We will first consider the judgment of the court for the recovery of the stock of goods. It is not pretended that the defendants made any pretense to comply with the provisions of chapter 623, Laws 1907, entitled "An act to prohibit the sale of merchandise in bulk in fraud of creditors."

The learned counsel for the defendant argued with much earnestness that the said act was unconstitutional and void as an unwarranted limitation of the right to sell and dispose of property. We think this point has been decided adversely to him by the Supreme Court of the United States in *Lemieux v. Young,* 211 U. S., 489, in which a statute very similar to ours was upheld. The States of Mississippi, Michigan, Washington, Indiana, Nebraska have statutes similar to ours which have been sustained by the highest courts of these States.

But it is not necessary to consider the statute in this case. The conduct of the defendants was such as to render the sale to one of the directors of the company absolutely void under the general principles of law. In this case the bargainor and the bargainee were officers and directors of the company, and they knew that the company was heavily in
(615) debt, and that they were disposing of its entire property, without reference to the interest of creditors or stockholders, at 60 per cent of its actual value.

Directors of a corporation are trustees of the property of the corporation for the benefit of the corporate creditors, as well as shareholders. It is their duty to administer the trust assumed by them, not for their own profit, but for the mutual benefit of all parties interested; and when such directors receive an advantage to themselves not common to all, they are guilty of a plain breach of trust. 1 Beach Pr. Corp., sec. 241; 2 Story Eq. Jur., sec. 1252; *Drury v. Cross,* 7 Wall., 299; *Hill v. Lumber Co.,* 113 N. C., 172; Harvey's Rights of Minority Stockholders, 13; and *McIver v. Hardware Co.,* 144 N. C., 485. In the *Hill case* it was held that a confession of judgment by an insolvent corporation in favor of a director who is a creditor, and upon a debt theretofore existing, is void as against other creditors.

It is said in behalf of these defendants that they did not know on 9 January, 1912, that the corporation was insolvent. The sale of the goods was made on 27 March, 1912, when it is perfectly patent from the defendants' answer that they knew that the corporation could not pay its debts, and the means that they were devising for paying off the indebtedness of the company was to sell out its entire assets at 60 per cent in the dollar to one of their number.

The answer discloses the fact that even on 9 January, 1912, these defendants knew that the corporation was not in a healthy condition, and that it was about to expire from inanition. The treatment which these financial doctors undertook to give to the patient soon put an end to it. They were evidently physicians of the old school and, as said by the counsel for the plaintiff, believed in curing disease by purging and bleeding instead of nourishment. After this drastic treatment, insolvency naturally followed.

The defendants were evidently not educated in the modern school of high finance, and the crudeness of their methods would have made a priest of that school blush. They went at the thing in a very direct manner, and appropriated to their own use without any (616) scruples the entire property of the corporation, whose interests they had undertaken to guard.

But it is not necessary that they should admit knowledge of insolvency. The law charges them with actual knowledge of the financial condition of the corporation (*Solomon v. Bates,* 118 N. C., 311), and holds them liable for damages sustained by stockholders and creditors by reason of their negligence, fraud, or deceit.

The defendant Murdock appeals because his Honor gave judgment against him for $1,000, the cash he had taken out of the treasury of the company in payment for his apparently worthless stock. The resolution to retire the stock of an insolvent corporation and to take money out of its treasury for that purpose was a very novel method of sustaining the credit of the corporation, to say the least. But as this money found its way from a depleted treasury into the pockets of the directors, the motive for passing the resolution at the January meeting is very apparent.

An insolvent corporation cannot buy in its own stock, and if it becomes insolvent after such purchase, the stockholder is held liable to the creditor for the purchase money received by him. *Heggie v. Building and Loan Assn.,* 107 N. C., 581.

It is generally held that a corporation cannot settle with its members by the application of assets to the retirement of their stock until it has first discharged all of its liabilities, and any agreement looking to such arrangement among its shareholders is void as to creditors. It will be the duty of the receiver to proceed against the other directors and stockholders who have undertaken to retire their stock by having it credited on their debts to the corporation. Such transaction is fraudulent and void on its face, and cannot be sustained.

The judgment of the Superior Court is

Affirmed.

Cited: Whitlock v. Alexander, 160 N. C., 468; *Whitlock v. Alexander, ib* , 482; *Anthony v. Jeffress,* 172 N. C., 379.

(617)

T. J. STANCILL v. O. L. JOYNER.

(Filed 25 September, 1912.)

Injunction—Drainage Ditch—Upper Proprietor—Easement—Adverse Possession—Ponding Water.

Averments in the complaint and affidavits of plaintiff to enjoin the defendant, a lower proprietor, from stopping up or threatening to stop up a drainage ditch running through the plaintiff's lands, are sufficient for a restraining order to be granted to the hearing, which tend to show that the plaintiff and those under whom he claims have, for thirty years, held and exercised the right of drainage through the ditch, specifying its dimensions, and has acquired and holds a right of easement therein over the defendant's lands; that the defendant is threatening and attempting to dam the ditch at a point immediately on or within a few feet of the dividing line, which will cause the water to pond back upon the plaintiff's land to the injury of his lands and crops. *Tise v. Whitaker*, 144 N. C., 510; *Cobb v. Clegg*, 137 N. C., 153, cited and applied.

APPEAL from order rendered by *Whedbee, J.*, at chambers, in Greenville, PITT County, 26 July, 1912, on return to a temporary restraining order. The restraining order was continued to the hearing, and the defendant excepted and appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE HOKE.

W. F. Evans for plaintiff.
Albion Dunn for defendant.

HOKE, J. In *Tise v. Whitaker*, 144 N. C., 510, the Court said: "It is the rule with us that in actions of this character, the main purpose of which is to obtain a permanent injunction, if the evidence raises serious question as to the existence of facts which make for plaintiff's right, and sufficient to establish it, a preliminary restraining order will be continued to the hearing. *Hyatt v. DeHart*, 140 N. C., 270; *Harrington v. Rawls*, 131 N. C., 39; *Whitaker v. Hill*, 96 N. C., 2; *Marshall v. Commissioners*, 89 N. C., 103."

(618) The verified complaint and affidavits on part of plaintiff in the present case tend to show that plaintiff and defendant are owners of adjoining tracts of land and that plaintiff, the proprietor of the upper tract, and those under whom he claims, for thirty years have held and exercised the right of drainage over the lands of defendant through a certain ditch of specified dimensions, and that plaintiff has acquired and holds an easement over said lands: "That said ditch is cut and constructed along the natural water flow, and is the only way

through and along which the lands of the plaintiff can be successfully drained, and that the lands of the plaintiff are now, and have been for more than thirty years, drained through and along said ditch; and that the plaintiff has been for twenty years, and is now, keeping up and maintaining said ditch through his own lands, and also from where the ditch crosses the dividing line between the plaintiff and defendant, on through the lands of defendant, about 130 yards, to a point where said ditch empties into another ditch.

"6. That the defendant is threatening and attempting to dam, close up, and obstruct said ditch, above referred to, at a point immediately on or within a few feet of the dividing line between the lands of the plaintiff and defendant, for the purpose of preventing and hindering the flow of water through said ditch.

"7. That if the defendant is permitted to dam, fill up, or obstruct said ditch, as set out in the sixth paragraph of this complaint, it will stop the flow of the water from the lands of the plaintiff, and thereby causing the water, which has heretofore drained off through said ditch, to back up and stand upon the land of the plaintiff, and will thereby render said lands unfit for cultivation and will cause said lands of the plaintiff to become water-sobbed and soured, and will thereby greatly injure said lands, and the plaintiff will thereby be irreparably damaged." The answer and affidavits on the part of the defendant controvert many of the essential features of plaintiff's complaint and the affidavits tending to support it, and material issues are raised as to the ultimate rights of the parties. As the cause goes back for further investigation, we do not consider it desirable to make more extended reference to the facts in evidence, but are of opinion that these facts clearly bring (619) the controversy within the principle of the case referred to and others of like import, notably the well-considered case of *Cobb v. Clegg*, 137 N. C., 153. The judgment continuing the restraining order to the hearing is therefore

Affirmed.

Cited: *Herndon v. R. R.*, 161 N. C., 654; *Sutton v. Sutton, ib.*, 667; *Guano Co. v. Lumber Co.*, 168 N. C., 339; *Little v. Efird*, 170 N. C., 189; *Cobb v. R. R.*, 172 N. C., 61.

J. L. ELKS v. NORTH STATE INSURANCE COMPANY.

(Filed 25 September, 1912.)

1. Contracts—Agreement to Lend Money—Contemplated Writing.

When it appears that the parties are negotiating to see if they can agree upon the terms of a contemplated contract to be put in writing, it is necessary for the contract to be written and executed to be binding.

2. Contracts—Consideration — Mutual Agreements — Definite Offer—Acceptance.

For the acceptance of an offer to become a contract between the parties it is necessary that the offer be definite and certain, or capable of being made so, in order that the acceptance impose legal obligations on both parties for its fulfillment.

3. Same—Incomplete Agreement.

When a contract is sought to be established by conversations and correspondence between the parties, the whole must be considered, and although certain parts taken alone appear to constitute a binding agreement, it will not be established should it appear that there were further terms contemplated by the parties, essential to its completion, wherein they failed to agree.

4. Same—Damages—Insurance—Offer to Lend Money—Corporate Action.

In an action against a life insurance company for damages for failure to comply with its alleged contract to loan money to the plaintiff on mortgage security, it appeared that applications for loans were to be passed upon by the defendant's finance committee, both as to the security offered and the conditions of the company's funds to make loans when applied for. The legal department of the company approved the mortgage papers to secure the loan, and advised the applicant, through the local agent of the company, that the loan would be made, which the committee finally determined could not be done owing to the amount of the company's premium receipts and other causes: *Held*, that as it required the approval of the finance committee, which was not given, there was no binding promise, expressed or implied, the acceptance of which would bind the company under a contract or agreement to make the loan, and that the transactions were merely incompleted negotiations.

5. Contracts—Offer to Lend Money—Incomplete as to Duration—Evidence—Damages—Nonsuit.

In an action for damages for failure of the defendant to comply with its contract to lend money to the plaintiff, there must be evidence tending to show that the agreement had been made definite as to the maturity of the loan as well as to the amount, or a judgment of nonsuit in the defendant's favor will be granted.

(620(APPEAL by plaintiff from *Foushee, J.*, at the March Term, 1912, of PITT.

This is an action to recover damages for breach of an alleged contract to lend the plaintiff $1,000.

The plaintiff offered evidence tending to prove that he held a life policy in the defendant company, and that in 1910 he applied to the defendant to lend him $1,000; that he told J. F. Stokes, an agent of the defendant, who had authority to solicit insurance and to collect premiums, but no authority to make loans or take aplications therefor, that he wanted some money, and that Stokes said he could get some; that most of the corespondence in reference to the loans was between the said Stokes and the defendant; that the security named for the loan by the plaintiff was a mortgage on real estate; that before loans were made by the defendant, it was required by its by-laws that the title to the property offered as security should be passed on by its attorney and the loan approved by its finance committee; that prior to a written aplication for the money, the general manager of the defendant said to Stokes, in reference to the loan to the plaintiff: "Go take his application and get up his papers, and if his security is all right, we will lend it to him right away"; that in a few days thereafter a written aplication for the money and an abstract of the title to the real estate offered as security were forwarded to the defendant; that soon thereafter the said Stokes went to the home office of the defendant and had a conversation with the president and general counsel of the defendant, whose duty (621) it was to pass on the title, and asked him about the loan to the plaintiff, and he replied that he thought the loan was made; that the papers and everything left his office several days prior to that time and all had been approved, and that the loan had been approved; that the said Stokes told the plaintiff of his conversation with the general manager and the president, but he was not directed to do so by either; that the plaintiff told the said Stokes that he wanted to pay some debts, to rebuild his mill, and to aid in cultivating his farm with the money, and that Stokes communicated this to the general manager; that by reason of his failure to get the money, he was not able to pay his debts and his credit was impaired; that his mill washed out and the yield of his crops was decreased.

The application was not introduced in evidence, and there is nothing to indicate the terms of the loan or the time when it was to be payable, nor is there any evidence that the plaintiff was not able to borrow the money elsewhere on the same security. There was much correspondence between the parties, and soon after it closed the plaintiff borrowed $1,200 on the security offered to the defendant.

The defendant, through its general manager, wrote the said Stokes the following letters in regard to the loan, the contents of which were communicated to the plaintiff, the parts of the letters not bearing on this controversy being omitted:

KINSTON, N. C., 14 February, 1910.

I have your favor of the 10th inst., inclosing abstracts of the Elks property, and write to say that I will push this through as rapidly as possible. Will turn it over to our finance committee to-day. If the security is all right—that is to say, satisfactory to them—I think we ought to be able to get it through within a week or ten days.

KINSTON, N. C., 2 March, 1910.

Replying to your favor of the 1st inst., concerning the Elks loan, I beg to say that the investigation and examination of title and prepar-
(622) ation of papers, etc., has been about completed, I think. The fact is, that I have been away from the home office so much that I have been unable to give it personal attention; and the further fact, is that I have to leave to-night to attend Gaston court. I will not be able to return until the last of this week, and during the first two days of next week will be quite busy with the directors' meeting and the stockholders' meeting. Immediately after that I will endeavor to get this matter closed up quickly, and think I can safely promise to do so.

KINSTON, N. C., 24 June, 1910.

Our executive committee has decided to grant Mr. Corey an extension to the first of December. This extension, and the extension of a much larger loan which was to have been repaid, has made it out of the question for us to effect any new loans at the present time. However, I will say to you that we are endeavoring to be in shape to take care of the Elks matter in the not far distant future. It is impossible for me to tell you at just what time this can be done, but I assure you that it shall be done at the earliest possible moment.

Regretting very much that there should ever have been any delay or misunderstanding about this matter, and with kindest regards and best wishes, I remain,

KINSTON, N. C., 27 June, 1910.

Now, as to your position with reference to the Elks matter, I beg to say that while the income is exceedingly slim during the summer months, I shall watch it every day, and at the very first possible opportunity I shall see that the Elks matter is closed up and the money sent to him.

KINSTON, N. C., 9 September, 1910.

Replying to your favor of the 7th inst., in which you make inquiry as to whether or not we will be able to handle the Elks loan by 1 October, I beg to advise that it now appears impossible for us to do this by 1 October. Collections have been very dull during the summer, and so has

business generally, while our outgo has been considerably larger than usual in every direction. As you say, collections are looking up very sharply now, but I have no idea they will be sufficient to (623) justify me in promising to handle the Elks loan by 1 October. I wish I could do so. You can rest assured that both the Elks and the May loans will be taken up at the very first available opportunity—that is, so far as I am at liberty to make a promise in the matter.

KINSTON, N. C., 2 November, 1910.

Replying to your favor of 2d inst., *in re* loan to Mr. Elks, I am very sorry that I failed to write you promptly to the effect that our committee would not take any except regular action in this matter.

You will recall that I promised you that, in so far as I could control the matter, the loan to Mr. Elks should be the first one made. That is as far as I can go now, except to express the hope that this matter will not have to "hang fire" very much longer.

KINSTON, N. C., 3 December, 1910.

Replying to your favor of the 30th ult., in which you inclose abstract of title of lands of Mr. Z. T. Evans, I beg to say that I have submitted this, and the Elks and May loans also, and am directed to say to you that the company will be compelled to decline making these loans, because of expenditures that have been decided upon in connection with the extension of the company's business, and the Intermediate Department particularly.

At the conclusion of the evidence, his Honor, being of opinion that the plaintiff had failed to prove a contract, entered a judgment of nonsuit, and the plaintiff excepted and appealed.

Julius Brown and S. J. Everett for plaintiff.
Rouse & Land for defendant.

ALLEN, J. This appeal presents one question for our decision, and that is, whether the evidence introduced by the plaintiff, construed most favorably for him, establishes a contract between him and the defendant.

Before considering the evidence, it is well to have in mind some of the elements that enter into a valid contract, so that we may see if the plaintiff has met the requirements of the law.

It is elementary that it is necessary that the minds of the (624) parties meet upon a definite proposition. "There is no contract unless the parties thereto assent, and they must assent to the same thing,

in the same sense. A contract requires the assent of the parties to an agreement, and this agreement must be obligatory, and, as we have seen, the obligation must, in general, be mutual." 1 Par. Con., 475.

If the alleged contract is made by conversations and correspondence, the whole must be considered, and although certain parts taken alone appear to constitute a binding agreement, if the whole correspondence and negotiations show that there were other terms contemplated by both parties, as essential to the proposed contract, on which they fail to agree, there is no contract. *Hussey v. Horne-Payne,* 4 App. Cases, 312.

The leading opinion in this case was written by *Lord Cairns,* and *Lord Selborne,* concurring, sums up the conclusion of the Court as follows: "The observation has often been made that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement."

If the minds of the parties meet upon a proposition, which is sufficiently definite to be enforced, the contract is complete, although it is in the contemplation of the parties that it shall be reduced to writing as a memorial or evidence of the contract; but if it appears that the parties are merely negotiating to see if they can agree upon terms, and that the writing is to be the contract, then there is no contract until the writing is executed. *Winn v. Bull,* 7 Ch. D., 31; *Pratt v. R. R.,* 21 N. Y., 308; *Steam Co. v. Swift,* 41 Am. St., 553 (86 Me., 248); *Rankin v. Mitchem,* 141 N. C., 280.

(625) In the case from Maine, the authorities, English and American, are reviewed, and the Court says: "From these expressions of courts and jurists, it is quite clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signatures, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words; if the written draft is viewed by the parties merely as a covenant memorial or record of their previous contract, its absence does not affect the binding force of the contract; if,

however, it is viewed as the consummation of the negatiation, there is no contract until the written draft is finally signed. In determining which view is entertained in any particular case, several circumstances may be helpful, as: whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to, during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract."

Contracts are usually made by an offer by one party and an acceptance by the other; and it is in this way, the plaintiff contends, a contract was completed between him and the defendant.

When an offer and acceptance are relied on to make a contract, "The offer must be one which is intended of itself to create legal relations on acceptance. It must not be an offer intended merely to open negotiations which will ultimately result in a contract, or intended to call forth an offer in legal form from the party to whom it is addressed." 1 Page on Contracts, sec. 26.

"The offer, even if intended to create legal relations, must be (626) so complete that upon acceptance an agreement is formed which contains all the terms necessary to determine whether the contract has been performed or not. An offer in which the price is not fixed, and yet is so specified that it is evidence that the parties did not intend merely whatever should be a reasonable compensation, is not definite enough." 1 Page on Contracts, sec. 27.

"The offer must not merely be complete in terms, but the terms must be sufficiently definite to enable the court to determine ultimately whether the contract has been performed or not. If no breach of the contract could be assigned which could be measured by any test of damages from the contract, it has been said to be too indefinite to be enforcible, and this vice is usually due to the form of the offer." 1 Page on Contracts, sec. 28.

The same principle is declared in *Tanning Co. v. Telegraph Co.*, 143 N. C., 378, in which *Justice Brown,* speaking for the Court, says: "The offer must be distinct as such, and not merely an invitation to enter into negotiations upon a certain basis. *Wire Works v. Sorrell,* 142 Mass., 442; *Beaupre v. Telegraph Co.,* 21 Minn., 155; 24 Am. & Eng. Ency., 1029, and cases cited. Again, the offer must specify the specific quantity to be furnished, as a mere acceptance of an indefinite offer will not create a binding contract. *McCaw Manufacturing Co. v.*

Felder, 115 Ga., 408; 24 Am. & Eng. Ency., 1030, note 1, and cases cited. 'The offer must be one which is intended of itself to create legal relations on acceptance. It must not be an offer merely to open negotiations which will ultimately result in a contract.' 1 Page on Contracts, sec. 26, and cases cited; Clark on Contracts, sec. 29."

If the minds of the parties have met, and the terms have been agreed to, it does not always follow that a contract is complete and such a one as can be enforced, although not illegal, as the law demands that the terms shall be definite and certain, or capable of being made so. *Silverhorne v. Fowle,* 49 N. C., 363; *Spragins v. White,* 108 N. C., 453; *Thomas v. Shooting Club,* 123 N. C., 287; *Price v. Price,* 133 N. C., 515.

(627) In the first of these cases it was held that a contract to tow a raft of timber was void on account of indefiniteness, which provided that the raft was *"to be ready when corn was done,"* and in the last the Court says: "That an agreement may be valid, it is necessary that the parties use language sufficiently clear for it to be understood with reasonable certainty what they mean; and if an agreement is so vague that it is not possible to gather from it the intention of the parties, it is void, for neither the court nor the jury can make an agreement for the parties."

Having determined the elements entering into a completed contract under conditions existing between the plaintiff and the defendant, let us see if the plaintiff has met the requirements of the law.

We are of opinion he has not.

(1) When all the evidence is considered, including the correspondence, it amounts to no more than negotiations for a contract, and the conduct of the plaintiff shows that he so understood it. He claims now that the finance committee of the defendant approved his application, and that this made the contract complete; but he made no such claim when the contents of the letters set out in the evidence were communicated to him.

(2) No promise on the part of the defendant, express or implied, to lend the plaintiff $1,000 is proven. The approval by the finance committee, if made, was not such. It is merely a safeguard adopted by the defendant as preliminary to a loan. The attorney passes upon the title and the committee examines the security and the conditions of the finances, and if the reports of both are favorable, the defendant makes the loan.

(3) The agreement, as contended for by the plaintiff, shows that the transaction was not completed, and that other terms were to be agreed to, or it is so indefinite that it cannot be enforced.

The plaintiff says he offered to borrow $1,000 of the defendant, and that the defendant accepted his offer. It is agreed that a note and mort-

gage were to be executed by the plaintiff to consummate the contract, but he tendered neither to the defendant. The reason he did not is obvious. He did not know how to write the note and mortgage, and no lawyer could have prepared them, because stipulations (628) necessary to a complete contract had not been discussed or agreed to, to wit, the time the loan was to run. It is certain the plaintiff did not intend to borrow $1,000 payable one day after date, because he says he needed the money to use in payments of debts, in repairing a mill, and in cultivating crops, and if not payable one day after date when was it to be due? Suppose the defendant had said: "Prepare your note and mortgage, and I will lend you the money payable in two months," or three months, or six months; is it not certain that the plaintiff had the right to say: "I do not want the money on such short time, and have not promised to take it"; and if the plaintiff had said the note must become due one year or two years from date, that the defendant could have declined to lend on such terms, because it had not promised to do so?

If so, terms which were necessary to complete the contract had not been agreed to.

The right of action on contracts to lend money is considered in *Coles v. Lumber Co.*, 150 N. C., 188, but the discussion there is not material in this case, as the Court was then dealing with the measure of damages, and not with the question whether a contract had been made.

We are of opinion that no contract has been established, and that the judgment of nonsuit was properly entered.

Affirmed.

Cited: Steel Co. v. Copeland, ante, 560; *Baynes v. Harris,* 160 N. C., 309; *Wilson v. Scarboro,* 163 N. C., 388; *Wooten v. Drug Co.,* 169 N. C., 68.

M. C. BRASWELL ET ALS. v. PAMLICO INSURANCE AND BANKING COMPANY, H. L STATON, L. L. STATON, ET ALS.

(Filed 25 September, 1912.)

1. Corporations—Officers—Fraud—Debtor and Creditor—Parties.

An action by a creditor or stockholder will lie against the officers, including the directors of a corporation, for losses resulting from bare fraud or negligence, without his having first applied to the corporation to bring the action.

2. Corporations—Directors—Management—Best Judgment—Liability.

The directors of a corporation are only required to exercise ordinary diligence, intelligence, and judgment in the management of corporate business, and are not liable for losses arising from their mistakes, or from the mistakes of subordinate officers therein made.

3. Banks—Corporations—Voting of Shares—Officers—Control—Fraud—Evidence.

Evidence tending to show that the defendants were officers of a certain bank which had rightfully acquired shares of stock in a manufacturing company; that the company owed the bank in a large sum; that the shares owned by the bank were voted by the defendant, the cashier of the bank, uniformly with that owned by him and the other defendants, officers of the bank, so as to control the policy of the company over plaintiff's vote as a shareholder therein, is insufficient to be submitted to the jury upon the question of fraudulent conduct on the part of the bank's officers in thus controlling the policy of the corporation, or upon their neglect of the interests of the bank.

4. Same—Offer to Buy.

In an action brought against the officers of a bank for voting shares of stock in a manufacturing company uniformly with their own, so as to control the policy of the company against the vote of the plaintiff stockholder therein, there was evidence tending to show that a certain shareholder was endeavoring to acquire a controlling interest, and that he approached the cashier of the bank and asked that the bank make a proposition to sell him its shares; that he was willing to pay par, but that he did not so inform the cashier: *Held*, not sufficient upon the question as to whether the officers of the bank acted fraudulently, solely in their own interest and to the prejudice of the corporation in retaining the stock held by the bank and continuing to vote it with their own shares.

(629) APPEAL by plaintiffs from *Carter, J.*, at April Term, 1912, of EDGECOMBE.

Civil action. From the judgment of nonsuit, plaintiffs appeal.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE BROWN.

Bunn & Spruill, Jacob Battle for plaintiffs.
G. M. T. Fountain & Son, M. C. Staton for defendants.

BROWN, J. Complaint in this case embodies several alleged causes of action, and asks for quite a variety of relief, and might strictly (630) be regarded as multifarious. As the plaintiffs, however, have abandoned all their causes of action but one, it is not necessary that we should consider the character of the complaint, especially as no such point is made by the defendant. We merely advert to it in order that it may not be regarded as a precedent.

The cause of action upon which the plaintiffs now rely is founded in tort and is based upon the allegation that the defendants Staton, Zoeller, and Cobb, officers and directors of the defendant bank, were guilty of fraud and negligence in the conduct of the business of the bank.

It is settled that an action can be brought by a creditor or stockholder against the officers, including directors, of a corporation, for losses resulting from their fraud or negligence, without having first applied to the corporation to bring such action. *Soloman v. Bates,* 118 N. C., 311; *White v. Kincaid,* 149 N. C., 415.

In furtherance of this allegation the plaintiffs offer to submit these issues:

1. Did the defendant corporation, under the control of the individual defendants, purchase, or continue to hold, the one hundred and seventy-five shares of Tarboro Cotton Factory stock for their own personal ends and to the prejudice of the corporation?

2. If so, what damage has the corporation sustained?

We are of opinion, upon a review of the evidence, that his Honor properly sustained the motion to nonsuit. It appears that the defendants were stockholders in the Tarboro Cotton Factory, owning one hundred and fifty shares together, and that the defendant bank owned one hundred and seventy-five shares, which had been hypothecated by one Nash as collateral security for a debt of $12,000, upon which he had made default in payment.

It also appears that the bank had acquired this stock in consideration of said debt, and that at the stockholders' meeting of the cotton factory this stock was generally voted by Mr. Cobb as cashier of the bank, who voted uniformly with the Statons, and they could not control the policy of the factory without voting the shares of the bank. It appears furthermore that the Tarboro Cotton Factory owed the bank (631) $35,000.

It is contended that the defendants refused to sell these shares to H. C. Bridgers because they desired to retain them in order to protect their individual interests in the cotton factory, and that in so doing they were guilty of a fraud. We are unable to see anything in the evidence to support such contention. Bridgers was endeavoring to get sole control of the cotton factory. He testifies that he approached Cobb with a view to buying the bank's shares, and asked him to name a figure at which they would sell their holdings, and that Cobb replied that he would not name a figure unless Bridgers would agree to take the holdings of all the Statons in addition.

Bridgers does not say that he made Cobb any offer, but only asked him to name a figure. He states, however, that he was willing to pay par for the stock at that time. There is no evidence that Bridges ever

made a definite proposition to the board of directors to purchase the stock, and there is nothing to warrant the assumption that the directors were actuated by any sinister purpose.

Inasmuch as the cotton factory owed the bank $35,000, the directors may have thought that it was the part of wisdom to retain control of the management of the factory, and not to put it absolutely in the hands of Bridgers. We see nothing in this which suggests a fraudulent purpose or a negligent disregard of the interests of the bank. Assuming that the sequel showed that the directors made a mistake, they are not infallible, and are not held liable for honest mistakes made in the exercise of their authority. 2 Cook on Corporations, pp. 2071-2.

Directors of corporations are not guarantors that they will make no mistake in the management of the corporate business. They do not insure the corporation against loss arising either from their own honest mistakes or from the mistakes of subordinate officers. They are required to exercise reasonable care and business judgment, but nothing further than this. They generally serve without pay, and usually, by reason of their interest in the company, have a direct concern in its welfare.
(632) The law requires them to do no more than exercise ordinary diligence, intelligence, and judgment in the management of the corporate business. *Briggs v. Spaulding,* 141 U. S., 132; 3 Cook on Corporations, sec. 703; *Soloman v. Bates, supra.*

The judgment of the Superior Court is

Affirmed.

W. H. HARRINGTON v. TOWN OF GREENVILLE.

(Filed 25 September, 1912.)

1. Cities and Towns—Governmental Duties—Negligence.

Unless the right of action is given by statute, a municipal corporation may not be held civilly liable to individuals for "neglect to perform or negligence in performing" duties which are governmental in their nature, which generally include all duties existent or imposed upon them by law solely for the public benefit.

2. Same—Fire Departments.

The maintenance and operation by a municipality of a fire department for the benefit of the public are duties of a governmental character, and, in the absence of a statute to that effect, a recovery may not be had for the negligent acts or omission of its officers or agents therein which cause damage to its citizens from fires.

3. Same—Inspection of Buildings.

The general powers conferred on municipalities by section 2929, Revisal, and other sections thereof, and the powers to regulate, inspect, and condemn buildings, Revisal, sec. 2981 *et seq.*, are governmental in their character; and for negligent default therein on the part of a municipality and its officers or agents no action lies, none having been given by statute.

4. Cities and Towns—Governmental Duties—Water Plants—Business for Profit—Negligence—Damages.

While a municipality engaged in a business enterprise for profit may be held liable in damages for an injury negligently inflicted, responsibility extends only to those burdens and liabilities incident to the business features of the enterprise; and the principle does not obtain, as in this case, in the negligent operation and maintenance of a water plant or system in connection with its fire department by reason of which the plaintiff sustained damages by fire to his property, as such matters are governmental and solely for the public benefit.

5. Cities and Towns—Fire Department—Dangerous Conditions—Negligence—Nuisance—Damages—Governmental Duties—Demurrer.

A cause of action against a municipality, alleging its negligent failure in permitting a building to remain in a condition to endanger surrounding houses from fire, and that the plaintiff's house was consequently destroyed to his damage, is in effect an action to hold the municipality liable for its negligent failure to abate a nuisance, which is a governmental function, exercised solely for the benefit of the citizens; and it is demurrable.

APPEAL by plaintiff from *Foushee, J.*, at February Term, 1911, (633) of PITT.

Civil action heard on demurrer to the complaint. The material portions of the complaint are as follows:

"That from time to time, for a number of years prior to 23 February, 1910, this plaintiff repeatedly called the attention of the governing body of said town of Greenville and requested them, as members, both personally and in meeting, of said board of aldermen, to examine the dangerous condition of the property known as Kings stables, the buildings of Sam Cherry, and the old Flanagan buggy shops as a source of danger from fire, which buildings were unoccupied and worthless, being mere hulls and fire traps.

"4th. That the plaintiff repeatedly requested said board of aldermen to condemn and have removed said buildings, because they were dangerous as a source of fire, and that the defendant, under its powers, authorities, and duties conferred and imposed upon it by the general law and by special acts of the General Assembly, had full power and authority to condemn and remove the same.

"5th. That the defendant, negligently, disregardful of the interest and rights of its property-holders and residents, permitted said property to stand as fire traps and gambling dens for negroes, to the great jeopardy and peril of adjacent property-owners.

(634) "6th. That as a result of said negligence on the part of the defendant, and permitting said property to stand as a source of fires, owing to its rotten, decayed condition, and dry, accumulated material, on the night of 23 February, 1910, it became the source of a fire which destroyed the adjacent property of this plaintiff to his great damage.

"7th. That as a result of said fire and as a result of an inadequate supply of water with sufficient force and quantity, and an inadequate supply of hose, hydrants, and fire equipments and force, this plaintiff suffered the loss of his above-described property, to wit, one brick stable and one brick store and the contents of the same, consisting of lumber, one buggy and other property, in the sum of $2,000."

The court entered judgment sustaining defendant's demurrer, and the plaintiff excepted and appealed.

Harry Skinner and S. J. Everett for plaintiff.
F. M. Wooten for defendant.

HOKE, J. As we interpret the complaint, plaintiff states and intends to state his grievance in two aspects: (1) That his property was destroyed by reason of negligent failure of the city of Greenville to abate a nuisance which threatened the result; (2) that the injury arose in whole or in part from negligent default in equipment and operation of a fire department maintained by the city for the public benefit; and under our decisions both questions must be resolved against him.

It is well recognized with us that unless a right of action is given by statute, municipal corporations may not be held civilly liable to individuals for "neglect to perform or negligence in performing duties which are governmental in their nature," and including generally all duties existent or imposed upon them by law solely for the public benefit. *McIlhenny v. Wilmington,* 127 N. C., 146; *Moffitt v. Asheville,* 103 N. C., 237; *Hill v. Charlotte,* 72 N. C., 55.

The general power to abate nuisances conferred on municipalities by section 2929 and other sections of the Revisal, and the power to regulate, inspect, and condemn buildings, contained in sections 2981 *et seq.* are clearly governmental in character, and for negligent default on

(635) the part of the city and its officers and agents no action lies, none having been given by the law.

Applying this principle, the well-considered case of *Hull v. Roxboro,* 142 N. C., 453, is an authority directly against the first proposition contended for by plaintiff, and *Peterson v. Wilmington,* 130 N. C., 76, is equally decisive on the second. In *Hull's case* it was held: "A municipal corporation is not civilly liable for the failure to pass ordinances to preserve the public health or otherwise promote the public good nor for any omission to enforce the ordinances enacted under the legislative powers granted in its charter, or to see that they are properly observed by its citizens, or those who may be resident within the corporate limits." And in *Peterson's case:* "That an employee of a fire department of a city cannot recover for injuries caused by a hose reel of the city fire department being *knowingly* allowed to be and remain in unsafe and dangerous condition." The ruling in this last case was made to rest on the principle that in maintaining and operating a fire department for the benefit of the public, the city was engaged in the exercise of governmental duties, and therefore not liable to individuals, unless made so by statute, a position in accord with the general current of authority: *Wild v. Patterson,* 47 N. J. L., 406; *Fisher v. Boston,* 104 Mass., 87; *Jewett v. New Haven,* 38 Conn., 368; *Torbush v. Norwich,* 38 Conn., 225; *Long v. Birmingham,* 161 Ala., 427; *Mayor of New York v. Workman,* 67 Fed., 346.

We are not called on to decide whether the cases of *Coley v. Statesville,* 121 N. C., 301, and *Lewis v. Raleigh,* 77 N. C., 229, are in strict adherence to the principle. We have no disposition to disturb the responsibility as established on the particular facts of those cases and others of similar import, and the liability of such municipalities by reason of defective streets, if in any way inconsistent, is too firmly established to permit of further question.

In more especial reference to the negligence alleged in the proper maintenance of the fire department and the failure of the water-supply for the same, we deem it well to refer to a class of cases which hold that where municipal corporations are engaged in a business (636) enterprise for profit, they will not be considered and dealt with as in the exercise of governmental functions, though their work may inure to some extent to the public benefit, and in such cases the corporation is held subject to the ordinary burdens and liabilities arising in the course of the business, as in *Woodie v. North Wilkesboro,* 159 N. C., 353; *Terrell v. Washington,* 158 N. C., 281; *Harrington v. Wadesboro,* 153 N. C., 437; *Fisher v. New Bern,* 140 N. C., 506.

But this modification of the general principle, if it be such, must be held to extend only to those burdens and liabilities incident to the business features of the enterprise, and does not obtain where, as in this case,

the municipality in the exercise of powers and duties imposed by the law is maintaining and operating a fire department solely for the public benefit.

There is no error, and the judgment sustaining the demurrer must be Affirmed.

Cited: *Goodwin v. Reidsville,* 160 N. C., 412; *Hines v. Rocky Mount,* 162 N. C., 412; *Commrs. v. Henderson,* 163 N. C., 117; *Snider v. High Point,* 168 N. C., 609; *Price v. Trustees,* 172 N. C., 85.

W. N. PRITCHARD v. COMMISSIONERS OF ORANGE COUNTY.

(Filed 25 September, 1912.)

1. Municipal Bonds — Public Roads — Necessary Expenses — Constitutional Law.

A county is authorized to contract an indebtedness for the maintenance of its public roads under the provisions of Revisal, sec. 1318 (27), and such indebtedness being for a necessity, under Art. VII, sec. 7, of our Constitution, it is not required that a special act be passed authorizing it under the provisions of our Constitution, Art. II, sec. 14.

2. Same—Legislative Will.

When a county has issued bonds for the maintenance of its public roads, as authorized by Revisal, sec. 1318 (27), and our Constitution, Art. VII, sec. 7, objection to the validity of the bonds issued under a special act cannot be sustained when it appears that the special statute was complied with both as to the amount and the method, though the act was not passed in conformity with the constitutional mandate of Art. II, sec. 14.

(637) APPEAL by defendant, from ORANGE, from judgment rendered by *Whedbee, J.,* at Durham, 26 August, 1812.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

Manning & Everett for plaintiff.
Frank Nash for defendant.

CLARK, C. J. This is an action, submitted without controversy, to determine the validity of the proposed issue of $250,000 bonds by the county of Orange for the public roads of said county. An election was held 19 March, 1912, in pursuance of chapter 600, Public-local Laws 1911, at which, as required by the terms of said act, a majority of the votes cast approved the issue of said bonds, though not a majority of the qualified voters.

The validity of the bonds is contested upon the ground that the bill which passed its several readings in the Senate in the manner required by Constitution, Art. II, sec. 14, was changed in substantial and material respects on the passage of the bill through the House, and that as amended by the House the bill was not reënacted in the Senate in the manner required by Constitution, Art. II, sec. 14; *Glenn v. Wray,* 126 N. C., 730; *Commissioners v. Stafford,* 138 N. C., 453; *Bank v. Lacy,* 151 N. C., 4; *Russell v. Troy,* 159 N. C., 366.

But we need not consider this ground of objection, because under the Constitution, Art. VII, sec. 7, the county is authorized to contract indebtedness without the vote of the qualified voters when it is for the necessary expenses thereof. *Vaughan v. Commissioners,* 117 N. C., 432. Revisal 1905, sec. 1318, subsec. 27, authorizes county commissioners to borrow money for necessary expenses, and in such case no vote of the people is necessary. *Board of Trustees v. Webb,* 155 N. C., 388.

This Court has repeatedly held that the public roads are a necessary expense. *Board of Trustees v. Webb, supra,* and numerous cases there cited.

It is true that "where the Legislature has interposed its will and plainly declared it; where it has by its act prescribed the limit of expenditure even for a necessary expense for the county, the county commissioners cannot, under the decisions of this Court herein (668) cited, set at naught the legislative will by setting up a general power of contracting debts for necessary expenses, restrained only by the constitutional limitation of taxation." *Burgin v. Smith,* 151 N. C., 568. But here the county commissioners have not attempted to exceed the limitations in the special act of the Legislature, and have consulted the popular will at the ballot box as required by said act, and its terms, approval by a "majority of the votes cast," has been complied with.

The act itself does not come under the requirements of section 14, Article II of the Constitution, and hence, even conceding that the amendments made in the House to the Senate bill were substantial and material, and though the conference report was adopted by each House without conforming to Article II, sec. 14, the act is valid as an act of ordinary legislation. If there had been no such act, the county could have contracted a debt for its necessary expenses without a vote of the people.

The proposed bond issue will therefore be a valid indebtedness of the county of Orange. *Jones v. New Bern,* 152 N. C., 64.

Reversed.

Cited: S. c., 160 N. C., 477; *Hargrove v. Commrs.,* 168 N. C., 627; *Moose v. Commrs.,* 172 N. C., 436.

J. A. WATSON AND L. D. IVEY v. THE NORTH CAROLINA HOME INSURANCE COMPANY.

(Filed 23 October, 1912.)

Insurance, Fire—Policies—Change of Title—Interest—Mortgages—Contracts.

According to the valid provisions of our standard fire insurance policies, a mortgage on property covered by a policy made subsequent to its date of issue is such a change of interest or title in the property as will release the insurer from all liability for damages thereafter incurred. Revisal, sec. 4760.

APPEAL by defendant from *Whedbee, J.*, at October Term, 1911, of CUMBERLAND.

(639) The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE BROWN.

From a judgment for the plaintiff, the defendant appealed.

Lockhart & Dunlap for plaintiff.

Winston & Biggs for defendant.

BROWN, J. Plaintiffs sue to recover upon a standard policy of insurance on the house of plaintiff Ivey issued 19 March, 1908, the same having been destroyed by fire 28 September, 1910. The defendant pleads such a change in the interest and title of the insured in the property subsequent to the policy as avoids it.

It is admitted that Ivey executed a mortgage to a certain bank for $1,500 on this property on 2 February, 1909, and another mortgage thereon 12 June, 1909, to plaintiff Watson, and on 23 February, 1910, for a recited consideration of $2,260, he executed a deed in fee to Watson.

It is stated in the case that while the mortgages are yet uncanceled, nothing is now due on them, and that the deed, although absolute on its face, was in effect given as security for the indebtedness then due by Ivey to Watson.

The policy sued on is standard in form (Revisal, 4760) and contains the usual provision forfeiting the policy in case of a change in the interest or title of the insured in the property without the consent of the company.

We do not think this case is governed by *Jordan v. Insurance Co.*, 151 N. C., 343. In that case we passed on the title of the insured at the date of the contract, and held that an equitable ownership, such as a vendee in possession, constituted sole ownership and fulfilled the terms of the policy. In this case the title of the insured at date of the contract is not in question; but it is the subsequent change in such title and interests that, it is contended, avoids the policy according to its terms.

It must be admitted that the execution of mortgages upon the property for $2,260, subsequent to the policy, greatly decreased the interest of the insured in it, and increased the hazard to the insurer. That such a change in the interest and title of the insured forfeits (640) the policy has been repeatedly and consistently held by this Court.

This was first held in *Sossaman v. Insurance Co.*, 78 N. C., 147, in which, after referring to the adverse view in other States, *Judge Rodman* says: "A different view has been commonly taken in this and in other States. But we were referred to no case in which it was held that giving a mortgage did not work forfeiture where the terms of the condition were as comprehensive as they are in this case." That policy contained a provision similar to the one in the case at bar.

At the same term at which the *Jordan case* was decided we said, in *Modlin v. Insurance Co.*, 151 N. C., 41, that "It is well settled by the decisions of this Court—differing from the courts of some of the States—that the giving of a mortgage effects such a change of title and interest of the assured as avoids the policy when not assented to by the assured in the manner prescribed by the policy." Many other cases hold that in this, as well as other States, the common law prevails, and a mortgage deed passes the legal title at once, defeasible by the subsequent performance of its conditions. *Biggs v. Insurance Co.*, 88 N. C., 141; *Gerringer v. Insurance Co.*, 133 N. C., 407; *Hayes v. Insurance Co.*, 132 N. C., 702; Mordecai's Law Lectures, 534.

Referring to this principle of law in *Weddington v. Insurance Co.*, 141 N. C., 234, *Mr. Justice Walker* says: "The validity of a provision in a policy of insurance against the creating of encumbrances without the consent of the insurer can hardly be contested at this late day. It has now become the settled doctrine of the courts that the facts in regard to title, ownership, encumbrances, and possession of the insured property are all important to be known by the insurer, as the character of the hazard is often affected by these circumstances."

It is useless to multiply authorities upon this subject.

The judgment of the Superior Court is reversed, and upon the case agreed, judgment will be entered for the defendant.

Reversed.

JUSTICE HOKE took no part in the decision of this case.

Cited: Roper v. Ins. Co., 161 N. C., 155; *Cottingham v. Ins. Co.*, 168 N. C., 261.

(641)

R. P. BYRD ET AL. v. MARY COLLINS ET AL.

(Filed 23 October, 1912.)

1. Wills, Lost or Stolen—Evidence of Loss—Diligent Search.

Before proving by parol the contents of a will alleged to have been lost or stolen, it is necessary to show that diligent search has been made in places where there is a possibility it could be found; and in this case, evidence is held insufficient, that the testator had declared he had made a will, deposited it in a certain secret place, and that he has missed it therefrom after certain persons had access to the room wherein it had been deposited, without showing inquiry of any other persons except one of the witnesses to the will, who testified on the trial.

2. Same—Questions of Law.

The sufficiency of the search for a will alleged to have been lost or stolen, to admit of parol evidence of its contents, is a matter of law for the court, depending upon the peculiar circumstances of each case.

APPEAL by plaintiff from *Peebles, J.*, at April Term, 1912, of ROBESON.

This was a proceeding for the partition of certain lands, the petitioners claiming an interest as heirs of Effie Ann Stone. The defendants pleaded sole seizin, alleging that the said Effie Ann Stone made a will devising the land to the defendant J. H. Byrd, and that this will had been lost, or destroyed by some one other than the testatrix.

By consent of all parties, the trial of the partition proceeding was suspended until the defendant could go before the clerk and probate the alleged will. The clerk refused to admit the alleged lost will to probate, and the propounder appealed to the Superior Court, where issues were submitted to the jury as to the execution of the alleged will and its contents and as to whether it had been revoked by the testatrix.

It was in evidence by one of the subscribing witnesses to the will that it had been duly executed as prescribed by law. The other subscribing witness did not testify, and his absence was not accounted for.

The same witness who testified as to the execution of the will also testified as to its contents, and there was no other proof as to the contents.

(642) There was no evidence that any search had been made for the will since the death of the testatrix.

The evidence as to the loss of the will was as follows: "After that she told me that the will was stolen. I was going by her house and she called to me, and she was right near the road, and told me that her will was stolen; and I asked her when it was stolen, and she started to tell me, and one of her nieces who was with her, a girl, came up, and she

stopped talking to me, and she said she didn't want everybody to hear her business, and she said she would come to my house and see me. This might have been six or eight months or a year before she died. She came to my house and told me that her will was taken out of the meat-room. She said she put it in there, in an old coffee-pot. She said the reason she put it in the coffee-pot in her meat-house was because they like to broke in her trunk when she was about to die, and she said after then she put it in her coffee-pot, where she thought nobody would get it; and she said she had John Bams, J. W. Bullock, and Will Bullock to kill her hogs, and said they salted the meat down and put it in her meat-room, and right away she missed her will. After that meat was put in there, she said, a night or two before the will was taken, there was a mighty lambering around the house. Somebody around there was making a noise and all those things, and she said she told them about it, and they told her it was her sister Betsy had come back; and she said when they got the will she heard no more of her sister Betsy; and I asked her who she thought got her will, and she said she thought it was Jim Byrd got it, the one she give her property to. That was what she said. She told him that she had put that will in that room, so if she died that he would know where it was. That was just what she said when she told me these things. She said she didn't know what to do about it. I told her she could make another will or deed to give it to whoever she wanted to. She said if she made another will somebody would take it, and she said she believed her old will would come up, because she said it was when these men put this meat in there she missed her will."

There was other evidence, on behalf of the propounders, of (643) declarations of Effie Ann Stone, to the effect that she had made a will and it had been stolen.

There was no evidence of any inquiry being made of any one for the will.

At the conclusion of the evidence his Honor withdrew all of the evidence as to the contents of the will, because, in his opinion, there was not sufficient evidence of its loss, and the propounders excepted.

The jury answered the issues in favor of the caveators, and from the judgment rendered thereon the propounders appealed.

McNeill & McNeill for plaintiffs.

E. J. Britt and McIntyre, Lawrence & Proctor for defendants.

ALLEN, J. There are several exceptions in the record, but all of them are immaterial, if his Honor ruled correctly in excluding the evidence as to the contents of the lost will, as we think he did.

The testratrix may have been mistaken as to the place where she deposited the will, or, if she was not, and it was taken on the day of the hog killing by one of the three persons who went in the meat-room, it may still be in existence, and there was no evidence of any search of her premises or among her effects or of the premises or effects of either of the three persons, nor was John Bams or J. W. Bullock, two of them, examined as a witness.

The authorities are all to the effect that before parol evidence can be offered to prove the contents of a paper, it must be shown that the most diligent search has been made for the alleged missing instrument.

In *Eura v. Pitman,* 10 N. C., 371, it was said: "To entitle a party to give parol evidence of the contents of a will alleged to be destroyed, where there is not sufficient evidence to warrant the conclusion of its absolute destruction, the party must show that he has made diligent search and inquiry after the will in those places where it would most probably be found if in existence." To the same effect, *Scoggins v. Turner,* 98 N. C., 135.

(644) In 3 Redfield on Wills, page 15: "But it must in all cases be shown that an exhaustive search has been made for such missing will in all places where there is the remotest possibility that it could be found, before any secondary evidence can be received of its contents."

The question here presented was fully considered and the authorities reviewed in *Avery v. Stewart,* 134 N. C., 291. It was held in that case to be error to admit parol evidence of the contents of a paper when a witness had testified, "It is lost; I cannot find it," which is stronger than the evidence in this case, and the Court then applied the rule that, "If the instrument is lost, the party is required to give some evidence that such a paper once existed, though slight evidence is sufficient for this purpose, and that a *bona fide* and diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits such proof. What degree of diligence in the search is necessary it is not easy to define, as each case depends much on its peculiar circumstances; and the question whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents is to be determined by the court and not by the jury. But it seems that in general the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him." 1 Greenleaf Ev., sec. 558 (16 Ed., sec. 563b).

We are of opinion, on the whole record, there is

No error.

Cited: Thompson v. Lumber Co., 168 N. C., 228.

YALE JEWELRY COMPANY v. J. A. JOYNER.

(Filed 9 October, 1912.)

Vendor and Vendee—Sales Upon Commission—Gambling Device—Illegal Consideration—Action in Assumpsit.

One who has consigned goods to another for sale upon commission may recover the unsold consignment and his share of the proceeds of the sale of the goods thereunder from the consignee, irrespective of the question as to whether a gambling device was to be used, and actually used, in the sales thus made, the title of the goods remaining in the consignor; or the plaintiff may maintain his action on the case upon the ground that an *indebitatus* has been created from which an *assumpsit* has arisen.

APPEAL by plaintiff from *Carter, J.*, at August Term, 1912, (645) of LENOIR.

A jury trial was waived, and the court found the facts, which are sufficiently stated in the opinion of MR. JUSTICE BROWN. The Superior Court rendered judgment for defendant, and the plaintiff appealed.

G. V. Cowper for plaintiff.
G. G. Moore for defendant.

BROWN, J. The plaintiff shipped to the defendant a "pull board," together with a quantity of jewelry, razors, etc., on consignment, under a contract by which the title to all the property remained in the plaintiff. The defendant agreed to sell the same for 20 per cent commission, the proceeds of sale to be kept separate from the defendant's other funds, and remitted to the plaintiff, less the commission.

The plaintiff brings this action to recover the unsold merchandise and $50 net proceeds of the sale.

The court gave judgment for the plaintiff for the merchandise and held that the pull board was a species of lottery or gambling device, to facilitate the sale of the goods, and that plaintiff was not entitled to recover the net proceeds of sales in defendant's hands. The plaintiff excepted to the latter ruling.

It is unnecessary more particularly to describe the pull board or to discuss the question as to whether its operation constitutes a lottery or gambling scheme within the definition given in *S. v. Perry*, 154 N. C., 621. We assume, for the sake of argument, that it does.

This is not an action by the plaintiff against a purchaser to recover the purchase of goods obtained by means of the pull board from its agent, the defendant, but an action to recover the goods in specie and the proceeds of sales from the plaintiff's own agent.

(646) Under the contract, neither the title to the goods nor to the proceeds of sale ever vested in the defendant. On the contrary, the contract specifically requires that they be kept separate and apart from the defendant's property.

In our opinion, the plaintiff has as much right to recover the proceeds of sale as the specific goods.

The leading and oldest case on the subject is *Terrant v. Elliott,* 1 Bos. and P., 3, in which it is held that, A having received money from C to the use of B on an illegal contract between B and C, shall not be allowed to set up the illegality of the contract as a defense in an action brought by B for money had and received. In that case *Eyre, C. J.,* said: "The question is, whether he who has received money to another's use on an illegal contract can be allowed to retain it, and that not even at the desire of those who paid it to him. I think he cannot."

In *Farmer v. Russell,* 1 Bas. & P., 296, *Buller, J.,* said: "When it appeared that the agent had received the money to the plaintiff's use, it was immaterial whether the money was paid on a legal or illegal contract."

The principle upon which the plaintiff's right to recover of his agent is recognized rests upon the ground that an *indebitatus* is created, from which an *assumpsit* in law arises, and on that an action on the case may be maintained.

The purchaser had the undoubted right to waive the illegality of the transaction and pay the money, and when once paid to the seller, either directly or to his use to a third person, the money cannot be recalled and the third person cannot be permitted to retain it. *Lemon v. Grasskoff,* 99 Am. Dec., Notes, 62.

A case very similar to this is to be found in Vermont, *Baldwin v. Potter,* 46 Vt., 403, in which it is held that a sales agent must account to his principal for money received in the course of his agency, although the sale as between principal and purchaser be illegal and void.

See, also, *Wilson v. Owen,* 30 Mich., 475; *Woodworth v. Bennett,* 43 N. Y., 275.

(647) Another reason given in some cases is that it is contrary to good policy and morals to permit an agent to retain the property of his principal, although it may be employed in an illegal business under the agent's control.

As is said in 9 Cyc., 558, "No considerations of public policy can justify a lowering of the standard of moral honesty required of persons in those relations."

The general subject is fully discussed in *Electrova Co. v. Insurance Co.,* 156 N. C., 237, and *Cotton Press v. Insurance Co.,* 151 U. S., 368.

There are a large number of cases cited in the notes sustaining these views.

The plaintiff is entitled to judgment upon the facts found for the $50, as well as the goods.

Reversed.

Cited: Owens v. Wright, 161 N. C., 131; *Distilling Co. v. Bank,* 163 N. C., 68.

W. S. RICKS ET AL. v. W. T. WOODWARD AND WIFE.

(Filed 18 September, 1912.)

1. Deeds and Conveyances—Boundaries—Evidence—General Reputation—Remoteness.

Evidence of the correct location of a divisional line between the lands of contesting parties, by general reputation, is sufficient, which tends to show that forty or more years ago it was a cross-fence on certain sides of a field of a named owner of lands; or that it was a line just beyond the stables of the owner of a certain side of the field, it being sufficiently remote and attaching to physical objects "tending to give the land in question a fixed and definite location." *Lamb v. Copeland,* 158 N. C., 136, cited and applied.

2. Same—Less Remote—Corroboration.

When there is competent evidence by general reputation of the divisional line between the lands of contesting parties, sufficiently remote, evidence of this reputation for a period not sufficient (in this case, twenty years), is competent for the purposes of corroboration.

3. Deeds and Conveyances—Boundaries — General Reputation — Evidence—Competent in Part—Objections and Exceptions—Appeal and Error.

A general objection to the testimony of a witness as to the true location of the divisional line between contesting parties, and which is not competent as not being of a time sufficiently remote, is not held for error on appeal, when it appears that the objection was to a general statement of the witness and that said statement contained testimony that was both relevant and competent.

APPEAL by defendant from *Cline, J.,* at Spring Term, 1912, (648) of NORTHAMPTON.

Action to determine boundary line between two tracts of land. There was verdict for plaintiff. Judgment on verdict, and defendant excepted and appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE HOKE.

Mason, Worrell & Long and D. C. Barnes for plaintiff.
Winborne & Winborne for defendant.

HOKE, J. The suit involved the correct location of a divisional line between two adjoining tracts of land in said county, the Barnes tract and the Tyner tract. Under a charge, to which no exceptions were taken, the jury established the line as contended for by the plaintiff, and we find no exceptions on the record which may be allowed for reversible error. In the progress of the trial, evidence was admitted from several witnesses tending to establish a general reputation that the true dividing line was located as claimed by plaintiff. The reception of this evidence was urged for error, the objection being, chiefly, that it was too vague and indefinite; but the record, in our opinion, will not sustain the position.

Speaking to this character of evidence, in *Hemphill v. Hemphill,* 138 N. C., 506, the Court said: "Such evidence has been uniformly received in this State, and the restrictions put upon it by our decisions seem to be that the reputation, whether by parol or otherwise, should have its origin at a time comparatively remote, and always *ante litem motam.* Second, that it should attach itself to some monument (649) of boundary or natural object, or be fortified and supported by evidence of occupation and acquiescence tending to give the land in question some fixed or definite location." Citing *Tate v. Southard,* 8 N. C., 45; *Mendenhall v. Cassells,* 20 N. C., 49; *Dobson v. Finley,* 53 N. C., 496; *Shaffer v. Gaynor,* 117 N. C., 15; *Westfelt v. Adams,* 131 N. C., 379-384. A statement quoted with approval in *Lamb v. Copeland,* 158 N. C., 136.

In the present case, the great bulk of this testimony, and the only portion to which exception was properly taken, was to the effect that so long as forty and fifty years ago there was a general reputation that the dividing line between these two tracts of land was as claimed by plaintiff. One witness, E. S. Vick, saying in this connection: "There was a general reputation when I first knew these matters of the dividing line between the Tyner and Barnes land. I knew that reputation. It was a cross-fence on the south and east side of the Mary Cook field and northwest side of a field on the Tyner land, known as the Vick field." Another, Lee Davis: "There was a general reputation of location of the dividing line between the Barnes and Tyner lands; that by that reputation the line tree was just behind the stables on the Jack field and went to the upper corner of the Jack field fence to a large pine, which was a line tree; this ran along the southeast side of the Jack field." And another, Britt Morgan: "That he is seventy-six years old; that there was a general reputation forty-five years ago as to the dividing line

between the Barnes and Tyner land; was the fence along the Jack field, and there used to be a footpath on a part of this line; the fore and aft tree stood right behind the stable on the Jack field; it was a spruce pine tree, and the line went on down, putting the Jack field on the west and the Tyner land on the east side; went to three corn shuckings in the Jack field for Henry Barnes forty years or more ago," etc. This testimony fully meets the requirements of the principle. It was sufficiently remote and did attach itself to physical objects "tending to give the land in question a fixed and definite location." True, one witness spoke of this reputation as existing to his knowledge twenty years ago," and this, under our decisions, could not properly be considered as coming within the rule heretofore stated. See *Lamb v. Copeland, supra,*
But this, in our opinion, cannot be held for reversible error: (1) (650) Because the objection was made to a more general statement of the witness, in which was included much testimony that was undoubtedly competent. *S. v. Ledford,* 133 N. C., 714. (2) It was permissible, in support and corroboration of the testimony tending to establish the existence of an earlier reputation, which, as we have seen, had been properly received in evidence and was before the jury for consideration on the issue.

No error.

Cited: Carmichael v. Telephone Co., 162 N. C., 337; *Sullivan v. Blount,* 165 N. C., 11; *Corpening v. Westall,* 167 N. C., 686; *R. R. v. Mfg. Co.,* 169 N. C., 169; *Weeks v. Tel. Co., ib.,* 705; *Dunn v. Lumber Co.,* 172 N. C., 137.

FRED C. POISSON ET ALS. v. ELIZABETH M. PETTAWAY ET ALS.

(Filed 3 October, 1912.)

1. Descent and Distribution—Collateral Relations—Wills—Same Estate—Inheritance.

At common law, a devisee who takes the same quality and nature of estate under the will as he would have taken by descent had the testator died intestate, is deemed to take by descent, and under our fourth canon of descent the same construction obtains.

2. Descent and Distribution—Collateral Relations—Inheritance—Blood of the Ancestor.

On failure of lineal descendants, where the inheritance has been transmitted by descent from an ancestor, etc., under the fourth canon of de-

scent, the collateral relations who inherit the estate must be of the blood of the first purchaser, through whatever intermediate devolution by descent, gift, or devise it may have passed, and however remote may be the first ancestor.

APPEAL by defendant from *Carter, J.*, at July Term, 1912, of NEW HANOVER.

From a judgment for plaintiffs, the defendants appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE BROWN.

(651) *B. G. Empie, Louis J. Poisson for plaintiffs.*
H. McClammy, E. K. Bryan for defendant.

BROWN, J. Jehu Poisson purchased the lot in controversy and died in 1873, devising it in fee to his daughter Sarah, who died in 1906, devising it in fee to her brother and only heir at law, James Dickson Poisson. He died in 1910, intestate, seized of the property, never having married, leaving no brother or sister or issue of such.

The plaintiffs are the nearest collateral relatives of James D. and Sarah Poisson, of the blood of their father, Jehu Poisson.

The defendants are equally related to James Dickson and Sarah through their mother, the wife of Jehu Poisson, but are not of the blood of the latter.

The fourth canon of descents reads as follows: "On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise, or settlement from an ancestor, to whom the person thus advanced would in the event of such ancestor's death have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules."

At common law, a devisee who takes the same quality and nature of estate under the will as he would have taken by descent had the testator died intestate, takes by descent, owing to the preference of the common law for the title of descent. Our statute puts a similar devise between such parties on the same footing with the descent.

The only question presented for our consideration is as to whether the heirs at law of James Dickson Poisson must be of the blood of Jehu Poisson, or whether only of the blood of Sarah.

The counsel for the defendant contends that the clause in the canon of descents looks only to the proximate and immediate descent; the counsel for the plaintiff, that it looks to the origin of the title in the first purchaser, and requires that the party claiming as heir should be of

the blood of the first purchaser, through whatever intermediate (652) devolutions by descent, gift, or devise it may have passed, and however remote may be the first ancestor.

Ever since 1842 we think that it has been settled substantially that when an estate goes to a person through a series of descents or settlements, and that person dies without issue, it results back to those of his collateral relations who would be heirs of the ancestor from whom it originally descended, or by whom it was originally settled. *Wilkerson v. Bracken,* 24 N. C., 315.

The question is very fully discussed in that case by *Chief Justice Ruffin,* who says: "Although our attention has not been particularly directed to this point in any previous case, yet it has not been entirely unperceived. The general impression made, at least to my mind, from reading the act, without any special reference to this question, cannot fail to be seen in the opinion delivered in *Burgwyn v. Devereux,* 23 N. C., 583. I take it for granted that an inheritance which has descended, no matter when—and I might have added no matter from whom or from how many—shall descend to the blood of the ancestor from whom it did descend; which, of course, includes the ancestor from whom it first descended."

This seems to have been the impression made on *Judge Henderson's* mind, as plainly expressed, if not fully decided, in *Bell v. Dozier,* 12 N. C., 333.

In a note to the case of *Wilkerson v. Bracken, supra,* is given the report of Judge Gaston from the committee of the House of Commons, 8 December, 1808, reporting the fourth canon of descent as above quoted. In it Judge Gaston says: "The fourth rule has for its principal object the securing to the family of the man by whose industry the property was acquired the enjoyment of such property in preference to those who have no consanguinity with him."

It is true that this identical question was passed upon by the Supreme Court of the United States in *Gardner v. Collins,* 27 U. S., 58, construing a statute of Rhode Island similar to ours. In that case a very elaborate and interesting opinion was delivered by *Mr. Justice Story* and a conclusion reached that the words of the canon (653) meant immediate descent, gift, or devise, and make the immediate ancestor, donor, or devisor sole stock of descent.

A different rule, as we have shown, has prevailed, and now prevails in this State.

Affirmed.

Cited: *Noble v. Williams,* 167 N. C., 113.

J. C. VINSON v. BARTELL WISE ET AL.

(Filed 18 September, 1912.)

1. Estates for Life—Limitations—When Determinable—Contingent Interests.

An estate to W. for life, and to his surviving widow for life, and thereafter to his children, "and after the death of all with no issue then living," with further limitation over: *Held*, the event by which the estate must be determined will be referred to the death of the holders of the life estates, and in their lifetime their children are the devisees of a contingent estate in remainder, to determine in case "all of them die with no issue then living." *Harrell v. Hagan*, 147 N. C., 111, cited and distinguished.

2. Estates, Contingent—Partition of Lands.

Proceedings for partition of lands cannot be maintained when the plaintiff holds only a contingent interest in the lands, determinable on the death of the life tenant, who is still living at the time.

APPEAL by plaintiff from *Cline, J.*, at April Term, 1912, of HERTFORD.

This was an action instituted to sell an interest in an estate or parcel of land for division, heard on demurrer to complaint.

It appeared that J. C. Vinson, plaintiff, having acquired and holding by deed and mesne conveyances the interest of K. R. Wise and his daughter, Emma, the same being a portion of the estate in remainder, subject to the life estate of M. L. Wise, instituted this action against his grantors and the other remaindermen to obtain a sale of the land for
(654) division. The life tenant, M. L. Wise, mother of K. R. Wise, not being a party or in any way seeking relief.

Defendants demurred, assigning for cause, in part, "That plaintiff has no right to maintain the action, in that the interest held by him in the land described in the complaint is not vested, but a contingent interest." The demurrer was sustained on the ground stated, and plaintiff having declined to amend, judgment was entered that the action be dismissed. Plaintiff excepted and appealed.

Winborne & Winborne for plaintiff.
Lloyd J. Lawrence for defendant.

HOKE, J. The land in question, a storehouse and lot in Murfreesboro, N. C., is a part of the property devised by W. N. H. Smith, deceased, in Item 3 of his last will and testament, and the terms of the said devise and the facts material and relevant to the inquiry are as follows:

"1. That William N. H. Smith, late of Wake County in the State of North Carolina, died on 14 November, 1889, leaving a last will and testament, which was duly proved and admitted to record in the Superior Court of said county of Wake.

"2. That Item 3 of said will is as follows: 'The land at Murfreesboro belonging to Major W. Wise, by him conveyed in trust to John C. Laurence and bought by me at the trustee's sale, I give the use of the same remaining to him for life, and to his surviving widow for life, and thereafter to his children, now three in number, and after the death of all with no issue then living, the same in remainder to my children, William and Edward.'

"3. That said Major W. Wise died on 8 July, 1902, leaving him surviving his widow, M. L. Wise, referred to in said Item 3 of said will, and who is still living, and his said three children, K. R. Wise, Bartell Wise, and Eula Wise Smith, wife of the defendant W. W. Smith.

"4 That said Eula Smith, wife of said W. W. Smith, died intestate on 2 January, 1911, leaving her surviving the defendants W. N. H. Smith, Gordon Smith, and Louis Smith, as her only children and (655) heirs at law, and her husband, W. W. Smith.

"5. That said K. R. Wise and Bartell Wise are still living.

"6. That the defendant Emma S. Wise is the only child of K. R. Wise.

"7. That the defendant Bartell Wise has never married.

"8. That the defendants Ed. Chambers Smith and W. W. Smith are the sons of said testator, W. N. H. Smith, and referred to in said Item 3 of said will as his sons William and Edward."

That plaintiff has acquired the interest of said K. R. Wise and his daughter Emma in said store and lot, having purchased the same for full value from A Brinckley and wife, who bought at foreclosure sale under a mortgage executed by said K. R. Wise and his daughter, and under and by virtue of said deeds, claims to be the present owner of one undivided third interest in the property, subject to the life estate of M. L. Wise. The other present holders and claimants of the estate in remainder being parties defendant.

If it be conceded that, under our statutes and the principles of law as they obtain with us, the plaintiff could maintain the present action without joinder of the life tenant and asking for a sale of the land itself, it is very properly admitted by the parties that he can only do so on the position that he is the owner of a vested estate in remainder. The statutes under which he is endeavoring to proceed require this in express terms (Revisal, sec. 1590 and sec. 2508), and unless plaintiff now has a vested interest, or in any event unless some holder of a vested interest is a party, the demurrer was properly sustained.

By the terms of this will and on the death of the testator, K. R. Wise and the other children referred to became the devisees of a contingent estate in remainder, to determine in case "all of them die with no issue then living." *Smith v. Lumber Co.,* 155 N. C., 389; *Richardson v. Richardson,* 152 N. C., 705; *Perrett v. Bird,* 152 N. C., 220; *Bowen v. Hackney,* 136 N. C., 187; *Whitesides v. Cooper,* 115 N. C., 571.

(656) Under numerous decisions of the Court, in a devise of this character and unless a contrary intent appears from the will, the event by which the estate must be determined will be referred, not to the death of the devisor, but the holder of the particular estate itself, and the determinable quality of such an estate or interest will continue to affect it till "the event occurs by which same is to be determined or the estate becomes absolute." *Smith v. Lumber Co., supra; Harrell v. Hagan,* 147 N. C., 111; *Kornegay v. Morris,* 122 N. C., 199; *Williams v. Lewis,* 100 N. C., 142; *Galloway v. Carter,* 100 N. C., 112; *Buchanan v. Buchanan,* 99 N. C., 308. In the case of *Harrell v. Hagan, supra,* this general principle was applied, and it was held that when *either* child died leaving *issue,* that interest became absolute, but that was by reason of a different wording of the contingent clause: "and if *either* or all of the above girls die without leaving a lawful heir," etc. In our case the devise is to the children of Major W. Wise, now three in number, and "in case *all* of them die with no issue *then living,* the same in remainder to return to my children William and Edward," the intent evidently being to pass the estate to this Wise stock if there were issue of that stock to take it when the last child of Major W. Wise, who took as devisee under the will, died, and, if not, the same was to return to members of this own family, to wit, his sons William and Edward.

There is no error, and the judgment dismissing the action is Affirmed.

Cited: James v. Hooker, 172 N. C., 782.

INDEX

NOTE.—The reverse index will be found to embrace the distinctive subheads of the decided points, referring by number to the places where the decisions thereon are indicated, and the cases embracing them are called. It is hoped that in this manner, and by the embodying of the sketch words in *italics* in this index, the practitioner may more readily find whether the point he is looking up has been decided in this volume, and, if so, where.

ABATEMENT. See Actions, 1.

ACKNOWLEDGMENT. See Wills.

ACQUIESCENCE. See Equity.

AMENDMENTS. See Process; Courts; Statutes; Pleadings.

APPEAL AND ERROR. See Harmless Error; Reference; Instructions.

1. *Instructions—Verdict, Directing—Phases of Evidence—Appeal and Error.*—A request for special instruction which asks that the court direct an answer to an issue in a certain way in the event of certain findings of the jury, is properly refused, if it leaves out of consideration certain phases of the evidence which have a material bearing upon the issue. *Harmon v. Contracting Co.*, 22.

2. *Appeal and Error—Matters of Law—Superior Court—Verdict—Weight of Evidence.*—The trial court alone has the power to set aside a verdict if rendered against the weight of the evidence, the province of this Court being confined to the correction of errors of law committed on the trial. *Ibid.*

3. *Attachments—Defense After Judgment—Appeal and Error—Practice.*—The court having erroneously refused to vacate a judgment obtained in proceedings in attachment against a nonresident defendant by publication of summons, the judgment appealed from is ordered to be set aside and the defendant allowed to answer or file other pleadings within a reasonable time, to be fixed by the trial court. The property attached will remain in the custody of the court to await the determination of the action, unless replevied under the provisions of the Revisal, secs. 774, 775. *Page v. McDonald*, 38.

4. *Contempt of Court—Facts Found—Evidence—Appeal and Error.*—The facts found by the trial judge in making a ruling for contempt of court for the disobedience of its restraining order, when supported by evidence, will not be reviewed on appeal. *Lodge v. Gibbs*, 66.

5. *Evidence.*—Evidence excepted to not considered, as new trial is granted in plaintiff's appeal. *Sprinkle v. Sprinkle*, 84.

6. *Tax Sales—Tax Deeds—Payment by Purchaser—Reimbursements—Practice—Tender—Appeal and Error—Costs.*—It appearing that the defendant had paid certain taxes on lands which he had assumed to hold under an invalid tax deed, it is *Held*, that he should be reimbursed that amount of taxes and interest by the plaintiff, as he has relieved the land of a charge which otherwise would have rested

APPEAL AND ERROR—*Continued.*

upon it; and it is ordered that plaintiff pay this amount to defendant or deposit it in court for his benefit, and that the cost of appeal be taxed against the defendant, who had refused the tender thereof. *Rexford v. Phillips*, 213.

7. *Appeal and Error—Exceptions Grouped and Numbered—Exception to Nonsuit—Practice.*—The rule of this Court that exceptions on appeal be grouped and numbered does not apply when there is but one exception, and that taken to a judgment of nonsuit upon the evidence. *Locklear v. Savage*, 236.

8. *Appeal and Error—Record—Evidence in Narrative—Stenographer's Notes.*—Upon an appeal from a judgment of nonsuit, the substance of the evidence should be set out in narrative form, and it is not permissible to set out the entire evidence by question and answer or to send up a transcript of the stenographer's notes. Because of the peculiar nature of the appeal in this case and the questions presented, *Held*, that there was no sufficient departure from the rule of this Court and the statutory provision to call for an affirmance of the judgment without considering the case on appeal. *Ibid.*

9. *Issues, Form of—Court's Discretion—Appeal and Error.*—The form of issues being within the discretion of the trial judge, his decision as to them is not reviewable on appeal, if they are sufficient for the parties to present their contentions, and develop their case, and the verdict will determine their rights and support the judgment. *Garrison v. Machine Co.*, 286.

10. *New Trial—Newly Discovered Evidence—Cumulative Evidence—Appeal and Error.*—The newly discovered evidence upon which a motion for a new trial is based in this case, being mostly cumulative and having very little bearing upon the controlling issue, the motion is denied. *Roller v. McKinney*, 319.

11. *Appeal and Error—Additional Findings—Power of Court—Practice.*—Upon appeal the Supreme Court will not examine the proof and find facts additional to those reported by the referee, and approved by the judge of the lower court. *Williamson v. Bitting*, 321.

12. *Instructions, Confusing—Appeal and Error.*—When the instructions of the court to the jury are erroneous in part, and so blended with those that are proper that the Court cannot tell how the jury was influenced by them in rendering their verdict against the appellant, a a new trial will be awarded. *Anderson v. Meadows*, 404.

13. *Appeal and Error—Executors and Administrators—Bad Faith—Costs—Interpretation of Statutes.*—The motion of plaintiff to tax the defendant administrator with costs of appeal is denied, as he was appelee therein, and nothing appears to the Court to show that he has acted in bad faith, etc. Revisal, sec. 1277. *Thompson v. Smith*, 439.

14. *Judgments—Excusable Neglect—Findings of Facts—Record—Appeal and Error.*—While it is the duty of the trial judge to find the facts upon which he bases his refusal to grant a motion to set aside a judgment for excusable neglect, his not having done so is not held for

APPEAL AND ERROR—*Continued.*

reversible error on this appeal, it appearing from the affidavits of record that the neglect of the appellant was inexcusable. *Hardware Co. v. Buhmann*, 511.

15. *Judgments—Appeal and Error—Findings of Facts—Request of Appellant—Practice.*—It is the duty of the appellant upon the refusal of his motion to set aside a judgment for excusable neglect, to request the judge to find the facts upon which his refusal was based. *Ibid.*

16. *Evidence—Depositions—Available to Both Litigants—Appeal and Error—Record—Prejudice.*—When a party who has taken evidence under the provisions of Revisal, sec. 865, introduces a part of it, *Semble*, that the other parties, by express provision of the statute, may introduce the other part thereof; but no error can be adjudged on appeal when the examination does not appear of record, so that it may be seen whether the excepting party has been prejudiced. *Walker v. Cooper*, 536.

17. *Instruction Specific—Exceptions—Special Request—Procedure.*—When the charge construed as a whole is correct, exceptions that it was not more specific cannot be sustained on appeal, it being the duty of the excepting party to tender instructions covering the desired details. *Ibid.*

18. *Appeal and Error—Evidence—Questions Ruled Out—Expected Answers—Prejudice.*—It must appear on appeal that the objecting party has been prejudiced by the exclusion of evidence; and when questions are ruled out there must be a statement of what the answers of the witness were expected to be, for the appellate court to pass upon whether reversible error had been committed. *Dickerson v. Dail*, 54.

19. *Appeal and Error—Service of Case—Time Allowed—Period Expired—Judgment Affirmed—Practice.*—Under an agreement that appellee have thirty days in which to serve his case on appeal, the time begins to run from the time the court left the bench for adjournment *sine die;* and the service of the case after the time allowed is a nullity; and no error being found on the face of the record proper, the judgment below will be affirmed. *Hardee v. Timberlake*, 552.

20. *Facts Found by Judge—Agreement—Judgment—Mere Statements—Appeal and Error.*—In this case the parties having agreed that the judge should find the facts, it is held that the Court, on appeal, is not bound by a statement found in the judgment, that "the defendants agree that under protest they directed the delivery (of the goods sold to them) at the river landing," it appearing that such was not a finding of fact by the court or an admission by the plaintiff, but a mere statement by the defendants at variance with their own evidence. *State's Prison v. Hoffman*, 565.

21. *Appeal and Error—Right of Trial by Jury—Manner of Trial Judge—Record—Constitutional Law.*—The Supreme Court is confined to what appears in the record, and cannot award a new trial upon the ground assigned, merely that the manner of the judge was such as to deprive the prisoner, convicted of murder, of his right to a trial by jury. *S. v. Jernigan*, 474.

APPEAL AND ERROR—*Continued.*

22. *Appeal and Error—Remarks of Judge—Exceptions, Specific—Practice.*—Exceptions to remarks of the trial judge in a colloquy with counsel, after the charge to the jury had been given, but in their presence, will not be considered on appeal when the objectionable matter relied on is not pointed out. *Ibid.*

23. *Appeal and Error—Objections and Exceptions—Incorrect Record—Practice.*—This Court can only consider the exceptions properly presented in the record, and this rule will not be departed from because the appellant's attorney insists here that the case is not a correct statement of the case and that he was not given an opportunity to note his exceptions. *Ibid.*

APPEARANCE. See *Jurisdiction*, 6.

ARBITRATION AND AWARD.

1. *Arbitration and Award—Agreement in Pais—Enforcement by Judgment.*—Except by statutory provision a court has no power to enter summary judgment on an arbitration and award arising by agreement *in pais* and not an incident to a pending suit. *Peele v. R. R.*, 60.

2. *Same.*—Where suit is pending between the parties, and more especially after issue joined, and there is an agreement to arbitrate, the award to be made a rule of court, the award may be enforced by judgment entered in the cause. *Ibid.*

3. *Same—Fraud—Objection and Exception—Trial by Jury—Practice.*—After an action has been commenced and issue joined, and an agreement to arbitrate has been made by the parties out of court, containing a stipulation that "the award shall be entered as judgment in the cause," the award may be entered and enforced by final process if it is otherwise valid, giving the parties opportunity to except thereto on the ground of fraud, etc., and have the issues thus raised to be determined by a jury. *Ibid.*

4. *Same.*—After suit commenced and issue joined between the parties for damages against a railroad company for alleged negligence in injuring the plaintiff's lands by fire from defendant's passing locomotive, they entered an agreement to arbitrate, out of term, with the stipulation that the defendant should promptly pay "all awards made by the arbitrators, and the same shall be entered as judgment in the cause so as to become binding between the parties." After the award had been rendered and when the cause was called for trial, the defendant filed affidavits tending to impeach it for fraud and partiality on the part of the arbitrators. On the issues thus joined the jury found for the plaintiff. Judgment on the verdict was *Held*, no error. *Ibid.*

5. *Arbitration and Award—Contracts—Seals—Limitation of Actions.*—An agreement to submit a controversy to arbitration is a contract between the parties, and an action thereon, when it is not under seal, in respect to the running of the statute of limitations, is governed by the three-year statute, Revisal, sec. 395. *Sprinkle v. Sprinkle*, 81.

ARBITRATION AND AWARD—*Continued.*

6. *Arbitration and Award—Matters Concluded—Subsequent Action.*—An arbitration and award will not conclude matters not submitted or passed upon therein, and in this case the action is not therefore barred upon the question of whether the plaintiff was authorized under the statute to build a wing dam in the Roanoke River to the damage of the defendant, a lower riparian owner. *Power Co. v. Navigation Co.*, 393,

ASSIGNMENTS OF ERROR. See Appeal and Error; Contracts.

ATTACHMENT.

1. *Attachment—Process—Amendments—Discretion of Courts.*—When a warrant of attachment and summons by publication on a nonresident defendant are returnable to the trial court in term, giving the date, any informality in the process may be cured by amendment, if allowed by the court. Revisal, secs. 507 and 509. *Page v. McDonald*, 38.

2. *Same—Notice.*—The proper publication of summons for a nonresident defendant whose property has been attached gives the defendant notice that he can vacate the warrant, if insufficient, and upon his failure to move to vacate the process, he will not be held to be prejudiced by a subsequent judgment. *Ibid.*

3. *Attachment—Process—Affidavits, Sufficiency of—Interpretation of Statutes.*—Affidavits for publication of the summons and notice of attachment are sufficient when they show that the defendant cannot, after due and diligent search, be found in this State, that he is a nonresident and has property here of which the court has jurisdiction, and that the plaintiff has a cause of action against the defendant arising out of contract by which he expressly promised to pay a specific sum to the plaintiff for services rendered at his request, which sum is still due and owing. Revisal, secs. 759, 442. *Ibid.*

4. *Attachments—Process—Publication—Defense After Judgment—Matter of Right—Court's Discretion—Interpretation of Statutes.*—A nonresident defendant in attachment proceedings, against whom judgment has been rendered under service of summons by publication, and who had not had actual notice of the action until after the judgment had been rendered, may, as a matter of right, upon showing that he has a good and meritorious defense, have the judgment vacated by motion within the statutory period, and he can avail himself of any defense he originally had. *Ibid.*

5. *Attachments—Defense After Judgment—Cause of Action—Questions of Law.*—What is a sufficient cause to permit a nonresident defendant to vacate a judgment obtained by publication of summons in attachment proceedings is a matter of law for the court. *Ibid.*

6. *Attachments—Defense After Judgment—Appeal and Error—Practice.*—The court having erroneously refused to vacate a judgment obtained in proceedings in attachment against a nonresident defendant by publication of summons, the judgment appealed from is ordered to be set aside and the defendant allowed to answer or file other pleadings within a reasonable time, to be fixed by the trial court. The

ATTACHMENT—*Continued.*

property attached will remain in the custody of the court to await the determination of the action, unless replevied under the provisions of the Revisal, secs. 774, 775. *Ibid.*

ATTORNEY AND CLIENT. See Principal and Agent.

Attorney and Client—Trial—Argument Upon Facts and Law—Harmless Error.—While in this case a ruling of the lower court would have been upheld, denying the right of plaintiff's attorney to read the facts of a decision to the jury in applying the principles of law therein laid down, for the reason that the case argued to the jury was an action against the defendant in the case at bar, involving similar questions of fraud, it is *Held* that, upon the record, the decision of the lower court in permitting it will not be disturbed. *Chadwick v. Kirkman*, 261.

ATTORNEY-GENERAL, CONSENT. See Quo Warranto.

BAD FAITH. See Appeal and Error, 21.

BAILMENT.

BANKS AND BANKING.

1. *Banks—Contracts—Deposits as Payment on Debt—Mortgagors—Trusts and Trustees—Equity—Cancellation.*—A customer of a bank being indebted to it under an agreement that his deposits were to be considered as a payment, the indebtedness increasing as the checks exceeded the deposits, made a trust deed as a further collateral to secure his indebtedness in the sum of $5,000 for the period of one year, without agreeing to a novation thereof after that period. At that time the bank held notes secured by collateral for the full indebtedness, which it thereafter canceled. Subsequent deposits of the customer far exceeded the amount of his indebtedness for the time named. Under the principle that "the first money paid in is the first money paid out," the $5,000 indebtedness under the deed of trust was paid, and, in equity, cancellation of the note and mortgage should be decreed. *Reid v. Bank*, 99.

2. *Banks — Corporations—Voting of Shares—Officers—Control—Fraud—Evidence.*—Evidence tending to show that the defendants were officers of a certain bank which had rightfully acquired shares of stock in a manufacturing company; that the company owed the bank in a large sum; that the shares owned by the bank were voted by the defendant, the cashier of the bank, uniformly with that owned by him and the other defendants, officers of the bank, so as to control the policy of the company over plaintiff's vote as a shareholder therein, is insufficient to be submitted to the jury upon the question of fraudulent conduct on the part of the bank's officers in thus controlling the policy of the corporation, or upon their neglect of the interest of the bank. *Braswell v. Bank*, 628.

3. *Same—Offer to Buy.*—In an action brought against the officers of a bank for voting shares of stock in a manufacturing company uniformly with their own, so as to control the policy of the company

BANKS AND BANKING—*Continued.*

against the vote of the plaintiff stockholder therein, there was evidence tending to show that a certain shareholder was endeavoring to acquire a controlling interest, and that he approached the cashier of the bank and asked that the bank make a proposition to sell him its shares; that he was willing to pay par, but that he did not so inform the cashier: *Held*, not sufficient upon the question as to whether the officers of the bank acted fraudulently, solely in their own interest and to the prejudice of the corporation in retaining the stock held by the bank and continuing to vote it with their own shares. *Ibid.*

BILL OF LADING. See Carriers of Goods.

BILLS AND NOTES. See Contracts, 26.

1. *Banks—Certificates of Deposit—Bills and Notes—"Indorsements Guaranteed"—Words and Phrases.*—The indorsement on a certificate of deposit by a forwarding bank, sent to its correspondent bank for collection, reading "indorsements guaranteed," is merely to satisfy the bank issuing the certificates of the genuineness of the indorsements. *Bank v. Trust Co.*, 85.

2. *Banks—Certificates of Deposit—Bills and Notes—Indorsers—Presentment for Payment—Laches—Debtor and Creditor.*—A bank to whom a certificate of deposit had been sent by another bank for collection did not present the certificate of deposit to the payor bank for thirty-six days, but remitted promptly to the forwarding bank; and upon failure of the payor bank to redeem the certificate, demanded the amount thereof of the forwarding bank, and upon payment being refused, brings its action thereon, the defense being that the delay in presentment for payment had released a solvent indorser: *Held*, the delay of the plaintiff bank in presenting the paper for payment released the defendant bank from all obligations thereon, and the plaintiff having paid the certificate, could not, without the consent of the defendant, make itself the creditor of the latter, and recovery was properly denied it. *Ibid.*

CARRIERS OF GOODS.

1. *Carriers of Freight—Negligence—Consignor and Consignee—Payment—Evidence—Damages.*—The plaintiff delivered to the defendant railroad for transportation to its customer fertilizer amounting in price to $1,192 delivered at destination. The only evidence of payment by the customer was to the effect that he gave notes and real estate mortgages to secure his indebtedness, which had not been paid, without evidence that the value of the shipment was included therein. The cars of fertilizers damaged by the defendant's negligence had been sold at public auction for $420, paid for by note which the plaintiff took as collateral to the debt of its customer: *Held*, the evidence did not establish defendant's contention that the plaintiff had been paid for the fertilizer, and therefore could not recover his damages. *Withrow v. R. R.*, 222.

2. *Carriers of Goods—Connecting Lines—Live Stock—Bill of Lading—Execution—Evidence.*—In an action to recover damages against a

CARRIERS OF GOODS—*Continued.*

terminal railroad in a connecting line of carriers for injury to a shipment of live stock, there was evidence tending to show that the consignees had made a written demand upon said carrier and filed therewith the bill of lading purporting to be that of the initial carrier, which bill of lading was shown to a witness for the plaintiff, who testified that it was the one under which the shipment was made: *Held*, sufficient to admit bill of lading as evidence, without the necessity of showing its execution by the initial carrier, and that if the defendant desired to test the competency of the witness to testify or to test his knowledge of the facts, it should have been done by a preliminary examination. *Beville v. R. R.*, 227.

3. *Carriers of Goods—Live Stock—Connecting Lines—Terminal Carriers—Possession—Principal and Agent—Evidence.*—Where there is a nonsuit upon the evidence, in an action against a delivering carrier for damages in transit to live stock shipped over several roads, the possession of the live stock by that carrier, and its conduct and dealings with the consignee with reference to the shipment, were held to be sufficient evidence of the authority of the defendant's agent, upon whom demand had been made, to settle the loss, without the necessity of introducing the bill of lading of the initial carrier under which the shipment was made. *Ibid.*

4. *Carriers of Goods—Connecting Carriers—Live Stock—Delivery in Bad Condition—Presumptions—Burden of Proof.*—When a shipment of live stock is made over connecting lines of carriers, and delivered in bad condition to the consignee, there is a presumption, in an action for damages against the delivering carrier, that the injury occurred on its line, under the principle that, as between the plaintiff and defendant the latter is peculiarly in a position to know the facts, the burden of proof should rest on it. *Ibid.*

CARRIERS OF PASSENGERS.

1. *Carriers of Passengers—Street Railways—Alighting Passengers—Negligence—Evidence—Questions for Jury.*—In an action for damages for a personal injury inflicted by a street railway company on its passenger, evidence is sufficient, upon the question of defendant's negligence, which tends to show that the plaintiff, on boarding the car, showed the conductor her transfer from another car, informed him of her intended stop, and after the stop had been called, and when the car had slowed down, arose from her seat for the purpose of alighting, and was injured by a sudden and unexpected movement of the car; and a judgment of nonsuit should not be allowed. *Reid v. Rees*, 155 N. C., 230, cited and applied. *Thorp v. Traction Co.*, 33.

2. *Carriers of Passengers—Street Railways—Alighting Passengers—Contributory Negligence—Rule of the Prudent Man—Questions for Jury.* It is not negligence *per se* for a passenger on a street car to arise from his seat and go towards the door with the purpose of getting off, when the car is approaching, and has slowed down for, a regular stopping place where he intends to alight; and an instruction in this case was correct which substantially charges the jury that it would

CARRIERS OF PASSENGERS—*Continued.*

not be contributory negligence as a matter of law if the passenger, in so doing, was led to believe, as a person of reasonable care and prudence, that the car was about to stop, or that it had actually stopped, if he was injured in his effort to alight by the car being suddenly moved or jerked forward by the defendant or its employees in charge. *Shaw v. R. R.*, 143 N. C., 312, cited and distinguished. *Ibid.*

3. *Carriers of Passengers—Mileage Books—Exchange Tickets—Contracts —Conditions.*—Railroad companies are under no legal obligation to sell mileage books at a less rate than that fixed for ordinary fare, and a sale of such books forms a contract between the railroad and purchaser which binds the latter to the condition that he exhibit to the conductor his mileage book, together with his exchange ticket, when riding as a passenger. *Mason v. R. R.*, 183.

4. *Same—Status of Passenger—Ejection from Train—Interpretation of Statutes.*—When a purchaser of a mileage book from a railroad company is riding on an exchange ticket, and refuses, without excuse, to show his mileage book, in connection with the ticket, to the conductor on the train, he is not regarded as a passenger, and the conductor has the right to eject him from the train. Revisal, sec. 2629. *Ibid.*

5. *Carriers of Passengers—Mileage Books—Exchange Tickets—Contracts —Consideration.*—When a passenger accepts a mileage book from the carrier at a reduced rate, and has been afforded an opportunity to purchase the ordinary or usual ticket, he enters into a contract with the carrier different from that implied by law upon the purchaser of an ordinary ticket at full rate of fare, and is bound in such cases by the terms of the contract in consideration of the reduced price. *Ibid.*

6. *Carriers of Passengers—Mileage Books—Exchange Tickets—Contracts —Conditions—Knowledge.*—A passenger who has purchased a mileage book from the carrier, and is riding on an exchange ticket, knowing the conditions thereon, is not excused from the fulfillment of a condition that he exhibit the mileage book to the conductor on the train, if demanded. The reasonableness of this condition discussed by BROWN, J. *Ibid.*

7. *Carriers of Passengers—Mileage Books—Exchange Tickets—Conditions —Conductor—Principal and Agent—Waiver.*—*Semble*, it is not optional with the conductor on the train to waive the requirement that a purchaser of a mileage book, riding on an exchange ticket, exhibit the mileage book to him. *Ibid.*

8. *Carriers of Passengers—Mileage Books—Contracts—Retaining Exchange Ticket—Ejection—Damages.*—The plaintiff, claiming damages in his action against the carrier for a wrongful ejection from the train on which he was riding, was shown not to have been a passenger, for the reason that he refused to comply with the condition of his ticket, exchanged for mileage, requiring him to show the mileage book to the conductor: *Held*, the fact that the conductor failed or refused to return to the plaintiff his exchange ticket did not entitle the plaintiff to his passage without complying with his contract. *Ibid.*

CHEROKEE LANDS. See State's Lands.

CITIES AND TOWNS. See Courts.

1. *Cities and Towns—Cotton Weighers—Delivery of Cotton—Bailment—Pleadings—Conversion—Demurrer.*—The delivery of bales of cotton to a cotton weigher appointed under a town ordinance only to weigh the bales is no evidence of bailment either by the town or the weigher appointed by it; and the complaint in an action against them for the value of cotton left thereafter by the owners on the platform, and which was lost without averment of conversion, is demurrable. *Cotton Co. v. Wilson*, 141.

2. *Cities and Towns—Streets and Sidewalks—Obstructions—Negligent Driving—Proximate Cause—Nonsuit.*—In an action against a city for personal injuries caused by plaintiff's being thrown from a vehicle which was overturned at night by one of its wheels striking a stump alleged to have negligently been left by the city on a street near the curbing, it appeared from the evidence of the plaintiff that he knew of the stump and could readily have seen it by an electric light, if he had been attentive to his driving: *Held*, the injury complained of was proximately caused by the inattention of the plaintiff, and a judgment of nonsuit was properly granted. *Owens v. Charlotte*, 332.

3. *Cities and Towns — Waterworks — Overflow—Negligence—Frightened Horses—Proximate Cause.*—When there is evidence tending to show that a city engaged in supplying its citizens with water has failed to provide a water gauge at its pump-house, by which its operator there could tell whether the standpipe, placed at a distance, was overflowing, and that its overflow frightened the horse of a person driving past, causing him injury, which would not otherwise have occurred, it is sufficient upon the question of actionable negligence; the overflowing standpipe, if causing the injury, being the proximate cause. *Woodie v. Wilkesboro*, 353.

4. *Cities and Towns—Waterworks—Business of Supplying Citizens—Governmental Functions.*—An incorporated town or city supplying its own citizens with water, etc., owes the same duties towards its employees and the public as an individual or private corporation under like circumstances, and to the same extent is responsible for its negligent acts, since in operating such public utilities it is exercising a corporate and not a governmental function. *Ibid.*

5. *Cities and Towns—Waterworks—Overflow—Contributory Negligence—Rule of Prudent Man—Questions for Jury.*—There being evidence in this case tending to show that defendant by its negligence in failing to supply its operator at its pumping station with an accurate water gauge, caused water to overflow its standpipe and frightened the horses of the plaintiff to his injury, it is held that the plaintiff was only required, under the circumstances, to exercise that care which a man of ordinary prudence would have used, and that the question of contributory negligence was properly submitted to the jury. *Ibid.*

6. *Cities and Towns—Bond Issues—Street Improvements—Assessments—Direct Obligation.*—A municipal bond providing that it shall constitute a general and direct obligation of the city, and, in addition thereto, is made chargeable to the property abutting upon certain

CITIES AND TOWNS—*Continued.*

streets laid out by ordinances passed by the board of aldermen as permanent improvement districts or sections, is, upon its face, the direct obligation of the city, and the assessment specified an additional security to the bonds. *Charlotte v. Trust Co.*, 388.

7. *Same—Enabling Statute.*—A statute which gives to an incorporated town or city, which has authority to pave its streets as a necessary expense payable out of its general funds, the further authority to tax the cost of the paving against abutting property owners, must be construed as enabling legislation, giving an additional source of revenue and additional security to the bonds. *Ibid.*

8. *Cities and Towns — Bond Issues— Direct Obligation— Assessments — Additional Security—Diversion of Funds.*—When an act empowers a town to issue "street improvement bonds" in ten equal series, each consisting of a like number of bonds, bearing a fixed rate of interest, required to be attested by the mayor and the city clerk, payable to bearer, redeemable by the town at a specified time, and executed with all the formalities of a regular issue of bonds, a requirement that the bonds shall contain such recitals as may be necessary to make them chargeable to the property of the abutting owners of the streets improved will be construed to mean that the assessments of this property are to be devoted by the town to the payment of these particular bonds, and may not be diverted; but this does not affect the general obligation of the city to pay them. *Ibid.*

9. *Cities and Towns—Streets and Sidewalks—Contributory Negligence—Burden of Proof—Ordinary Care—Specific Instructions—Appeal and Error.*—The plaintiff sued the defendant town for damages for an injury received in attempting to cross a ditch alleged to have negligently been left across the sidewalk. The court charged the jury correctly that the burden upon the issue of contributory negligence was upon the defendant to show that the plaintiff had not exercised ordinary care. An exception to the charge, that the court failed to declare and explain the law of contributory negligence, should have been taken by offering a special prayer containing the instructions desired. *Holton v. Morganton*, 432.

10. *Cities and Towns—Streets and Sidewalks—Lighting—Negligence—Discretion—Contracts.*—In an action against an incorporated town and a lighting company for damages to one who was injured by a third person running into him with a horse and buggy, it appeared that he was pushing a hand-cart along the street at the time of the injury, as required by the ordinance; that the street was in good condition; and the only negligence alleged was that an additional electric light should have been placed there: *Held*, (1) the number of lights and their placing was within the discretion of the proper town authorities, for which the town would not be liable, and no liability attached to the lighting company acting under the direction of the town authorities in placing the lights (*Johnson v. Raleigh*, 156 N. C., 269, cited and applied); (2) there was no breach of contract by the lighting company with the city to give the plaintiff a cause of action against the former (*Gorrell v. Water Co.*, 124 N. C., 328, cited and distinguished). *Brady v. Randleman*, 434.

CITIES AND TOWNS—*Continued.*

11. *Railroads— Subscriptions— Deeds and Conveyances— Consideration — Town Charter.*—A provision in a deed to lands given for subscription to stock in a railroad, placed in escrow to be delivered when a line of the railroad, in the course of construction, should locate its depot "on the southern limits" of a named town, the location of the "southern limits of the town" is found by referring to the charter in force at the time of the deed, and not to that named in a subsequent charter. *Bridgers v. Beaman*, 521.

12. *Cities and Towns—Paving Streets.*—A railroad company, in consideration of having a right of way through the streets of a city, contracted with the city, at the time the street was a dirt street, that it would keep and preserve the street in good order for the use of the citizens of the town. It appears that, owing to the increased size of the city and travel over the street, it is necessary that the street should be paved with permanent material to insure the public a reasonable use of it: *Held*, the responsibility of the railroad under its contract extends beyond that of keeping the dirt street in proper condition, and it is its duty to meet the present requirement of paving for the use of the citizens. *New Bern v. R. R.*, 542.

13. *Cities and Towns— Governmental Duties— Negligence,*— Unless the right of action is given by statute, a municipal corporation may not be held civilly liable to individuals for "neglect to perform or negligence in performing" duties which are governmental in their nature, which generally include all duties existent or imposed upon them by law solely for the public benefit. *Harrington v. Greenville*, 632.

14. *Same—Fire Departments.*—The maintenance and operation by a municipality of a fire department for the benefit of the public are duties of a governmental character, and, in the absence of a statute to that effect, a recovery may not be had for the negligent acts or omission of its officers or agents therein which cause damage to its citizens from fires. *Ibid.*

15. *Same—Inspection of Buildings.*—The general powers conferred on municipalities by section 2929, Revisal, and other sections thereof, and the powers to regulate, inspect, and condemn buildings, Revisal, sec. 2081 *et seq.*, are governmental in their character; and for negligent default therein on the part of a municipality and its officers or agents no action lies, none having been given by statute. *Ibid.*

16. *Cities and Towns—Governmental Duties—Water Plants—Business for Profit—Negligence—Damages.*—While a municipality engaged in a business enterprise for profit may be held liable in damages for an injury negligently inflicted, responsibility extends only to those burdens and liabilities incident to the business features of the enterprise; and the principle does not obtain, as in this case, in the negligent operation and maintenance of a water plant or system in connection with its fire department by reason of which the plaintiff sustained damages by fire to his property, as such matters are governmental and solely for the public benefit. *Ibid.*

17. *Cities and Towns—Fire Department—Dangerous Conditions—Negligence — Nuisance — Damages—Governmental Duties—Demurrer.*—A

CITIES AND TOWNS—*Continued.*

cause of action against a municipality, alleging its negligent failure in permitting a building to remain in a condition to endanger surrounding houses from fire, and that the plaintiff's house was consequently destroyed, to his damage, is in effect an action to hold the municipality liable for its negligent failure to abate a nuisance, which is a governmental function, exercised solely for the benefit of the citizens; and it is demurrable. *Ibid.*

CLASS LEGISLATION. See Constitutional Law.

CLOUD ON TITLE. See Equity.

CONDITIONS. See Carriers of Passengers; Deeds and Conveyances.

CONSIDERATION. See Deeds and Conveyances; Contracts; Mortgages; Vendor and Vendee.

CONSTITUTION OF NORTH CAROLINA.

ART.

I, sec. 17. A larger tax may be levied against lumber companies for use of public road than on other vehicles. *Dalton v. Brown*, 175.

II, sec. 14. An amendment to an act to allow issuance of bonds must be passed with "aye" and "no" vote, etc., as well as the original act. *Russell v. Troy*, 366.

IV, sec. 12. Extraterritorial jurisdiction conferred on recorder's court held constitutional. *S. v. Brown*, 467.

IV, sec. 14. Extraterritorial jurisdiction conferred on recorder's court does not contravene this section. *S. v. Brown*, 467.

V, sec. 3. A larger tax may be levied against a lumber company for use of public road than on other vehicles. *Dalton v. Brown*, 175.

VII, sec. 2. County commissioners given control of county affairs. *Bunch v. Commissioners*, 335.

VII, sec. 7, does not apply to issuance of bonds by a graded school district. *Russell v. Troy*, 366.

VII, sec. 7. For bonds issued by county for necessary expenses, this article does not apply. *Pritchard v. Commissioners*, 636.

VII, sec. 14. County commissioners have the power to apply county funds to necessary expenses, in the absence of some public-local law. *Bunch v. Commissioners*, 335.

CONSTITUTIONAL LAW.

1. *Schools, County Farm-life—Racial Distinctions—Separate Schools—Equal Facilities—Interpretation of Statutes—Constitutional Law.*—Public Laws of 1911, ch. 84, providing for the establishment of county farm-life schools, by its provision that only one school of the kind shall be established in any county, does not deprive the local authorities of the power to provide equal facilities for the two races, but means that there shall not be more than one school of this kind for the instruction of both races, in separate buildings, with equal facilities; and is therefore constitutional. *Williams v. Bradford*, 158 N. C., 36, cited and distinguished. *Whitford v. Commissioners*, 160.

CONSTITUTIONAL LAW—*Continued.*

2. *Interpretation of Statutes — Constitutional Law — Presumptions.* — There is a strong presumption in favor of the validity of legislation, and the courts will not declare an act unconstitutional unless it is clearly so, beyond a reasonable doubt. *Ibid.*

3. *Same—Highways—Heavy Hauling—Lumber Companies.*—An act authorizing a levy of a tax of two cents per mile on each 1,000 feet of mill logs, lumber, or other heavy material hauled by "any lumber company, corporation, person or persons engaged in the lumber business" and using the public roads of a certain county, is not the levy of a property tax, which is required to be uniform and *ad valorem*, but a taxing of a particular vocation, which is uniform in its application to that class, is without discrimination therein, and not in contravention of the fourteenth amendment of the Federal Constitution, or of Art. V, sec. 3, and Art. I, sec. 17, of the Constitution of North Carolina. *Dalton v. Brown*, 175.

4. *Same—Reports—Penalty Statutes.*—A valid legislative enactment authorizing the levy of a tax upon those using the public roads of a certain county for hauling mill logs, etc., thereon, of two cents per mile on each 1,000 feet thereof, is not unconstitutional in its requirement that those thus using the roads make a report upon which the proper amount of taxes may be collected, and imposing a penalty of $10 a day for each day they fail to make the report; and it being within the power of the Legislature to require them to make such report, the penalties incurred are enforcible. *Ibid.*

5. *Same—Roads and Highways—"Necessary Expenses."*—The well ordering and maintenance of the public roads of a county are "necessary expenses" within the meaning of our Constitution and statutes, and for this purpose the county commissioners are invested with full power to direct the application of all moneys arising by virtue of chapter 23 of the Revisal, in the absence of some public-local law enacted under Art. VII, sec. 14, of the Constitution, making contrary provision. *Bunch v. Commissioners*, 335.

6. *Same — Road Districts — Taxation — Direct Appropriation — County Funds—Constitutional Law.*—Chapter 567, Laws 1909, purporting to provide for the "constructing and keeping in repair the public roads of Randolph County," was adopted by the county, as the act requires, and was designed to establish a system for working the public roads of the county, to a large extent by the township system, primarily giving the trustees of each township the right to maintain and repair the roads therein, subject to appeal to the county commissioners in proper cases. Where the road extends through two or more townships the power to lay out, alter, or discontinue it remains with the county commissioners, but after action taken, the road is considered as divided in sections, and its control is left with the local boards. The county commissioners are authorized and directed to levy a tax of not less than 8 1/3 cents on the $100 worth of property nor more than 15 cents thereon, the funds to be kept separate and apportioned to the various townships. It is admitted in this case that the amount thus derived was insufficient and that the roads are in a poor condition: *Held*, the Laws of 1909 relating to Randolph County did not

CONSTITUTIONAL LAW—*Continued.*

have the effect of repealing the provisions of section 1379, etc., of the Revisal so as to prevent the county commissioners from expending the general county funds for the maintenance, etc., of the roads of the county. *Ibid.*

7. *Cities and Towns—Bond Issues—Legislative Amendments—Constitutional Law—Vote of the People.*—When an act has been passed by the Legislature authorizing a graded school district to vote on the question of issuing bonds for a graded school in a certain amount, and amended at a subsequent session so as to authorize bonds to a larger amount and to run a longer time, both acts having been passed upon their several readings, with aye and no vote according to Article II, sec. 14, of the Constitution, an issue of bonds under a still later and similar act for a larger amount and upon a greater rate of taxation is invalid *in toto* when the later act is not likewise passed in accordance with the constitutional requirements. Const., Art. VII, sec. 7, does not apply to such districts. *Russell v. Troy*, 366.

8. *Same—Distinct Propositions—Assent of Voters.*—Bonds issued under an act which has not been passed by the Legislature according to the Constitution, Art. II, sec. 14, amending a valid act authorizing a town to submit an issue of bonds for school purposes to its voters, which increases the amount, term, and rate of taxation of the bonds specified in the former act, are invalid even as to the amount authorized to be issued under the valid act, for that amount was only authorized at a less rate of taxation, etc., as to which the voters upon the proposition under the invalid act have not assented. *Ibid.*

9. *Same—Repealing Acts.*—A constitutional act of the Legislature authorizing a town to vote on "twenty-year" school bonds is repealed by a later act, though not passed in accordance with Article II, sec. 14, of the Constitution, which only authorizes the issuance of the bonds for a greater amount and rate of taxation and for a longer term. *Ibid.*

10. *Two Offices—Acceptance—Vacancy—Constitutional Law.*—The acceptance and qualification for one office vacates *eo instanti* an office already filled by the same incumbent. *Midgett v. Gray*, 443.

11. *Same—Acceptance—Qualification—Oath—Estoppel.*—A clerk of the Superior Court, while holding this office, was elected a school committeeman, qualified as such, and after having met with the other committeemen, resigned in writing his position as such to the board of education: *Held*, he was estopped by his resignation to deny that he had accepted the office, or his qualification therein, and the fact that he was not sworn on the Bible will not avail him. *Ibid.*

12. *Recorder's Court—Appeal and Error—Superior Court—Trial by Jury—Constitutional Law.*—When the statute confers jurisdiction on a recorder's court of an incorporated city or town of larceny of goods not exceeding $20 in value, for the first offense, making it a petty misdemeanor punishable by imprisonment in the county jail or on the public roads for not exceeding one year, and provides for an appeal, an indictment by the grand jury of the Superior Court is dispensed with, the right to a jury trial is preserved in that court to be had upon the warrant of the recorder, and the act is constitutional and valid. *S. v. Dunlap*, 491.

CONSTITUTIONAL LAW—*Continued.*

13. *Recorder's Court—Statutory Misdemeanors—Felonies—Constitutional Law.*—A statute is constitutional and valid which makes the offense of larceny of goods of not more than $20 in value, for the first offense, a petty misdemeanor, and confers jurisdiction thereof on a recorder's court of an incorporated city or town, and by the terms of the act makes the offense punishable in the county jail or on the public roads for a period not exceeding a year. *Ibid.*

14. *Cities and Towns—Bond Issues—Bridges—Necessary Expense—Legislative Restrictions—Vote of the People.*—The building of bridges is a part of the necessary municipal expense. Hence an act which authorizes a bond issue in a certain amount "to establish a better sewerage system, etc., and other public improvements," requiring that the question of the issuance of the bonds be first submitted to the qualified voters of the town, includes bridges within its terms, and restricts the issuance of bonds for that purpose within the requirements of the act. *Warsaw v. Malone*, 573.

15. *Mortgages—Power of Sale—Limitation of Actions—Obligations of Contract—Statutes—Remedy—Reasonable Time—Constitutional Law.*—Revisal, sec. 1044, declaring the power of sale contained in a mortgage shall be inoperative when the note it secured is barred by the statute of limitations, is applicable to those contracts which existed at the time of its becoming operative; but, as to those, it only affected an existing remedy, which does not impair the obligations of the contract, when a reasonable time has elapsed thereafter within which the action could have been instituted. *Graves v. Howard*, 594.

16. *Appeal and Error—Right of Trial by Jury—Manner of Trial Judge—Record—Constitutional Law.*—The Supreme Court is confined to what appears in the record, and cannot award a new trial upon the ground assigned, merely that the manner of the judge was such as to deprive the prisoner, convicted of murder, of his right to a trial by jury. *S. v. Jernigan*, 475.

17. *Sales—Merchandise in Bulk—Statutes—Constitutional Law.*—Chapter 623, Laws 1907, being "An act to prohibit the sale of merchandise in bulk in fraud of creditors," is not unconstitutional or void as an unwarranted limitation of the right to sell and dispose of property. *Pender v. Speight*, 612.

18. *Municipal Bonds—Public Roads—Necessary Expense—Constitutional Law.*—A county is authorized to contract an indebtedness for the maintenance of its public roads under the provisions of Revisal, sec. 1318 (27), and such indebtedness being for a necessity, under Art. VII, sec. 7, of our Constitution, it is not required that a special act be passed authorizing it under the provisions of our Constitution, Art. II, sec. 14. *Pritchard v. Commissioners*, 636.

19. *Same—Legislative Will.*—When a county has issued bonds for the maintenance of its public roads, as authorized by Revisal, sec. 1318 (27), and our Constitution, Art. VII, sec. 7, objection to the validity of the bonds issued under a special act cannot be sustained when it appears that the special statute was complied with both as to the amount and the method, though the act was not passed in conformity with the constitutional mandate of Art. II, sec. 14. *Ibid.*

CONTEMPT. See Courts.

CONTINGENT INTERESTS. See Estates.

CONTRACTS. See Equity; Deeds and Conveyances.

1. *Contracts—Independent Contractor—Master and Servant—Respondeat Superior.*—The employer is not liable for the negligence of his independent contractor unless the work contracted to be done is so inherently dangerous that it could not be let out to another without incurring liability for his negligence. *Harmon v. Contracting Co.*, 22.

2. *Same—Duty of Master—Safe Appliances—Safe Place to Work—Supervision.*—When the relation of independent contractor has not been established, both the employer and contractor are liable to an employee of the latter for an injury caused to him by the negligence of another employee of the contractor in doing the work contracted to be done, or by defective machinery or appliances furnished by the contractor, which defect the exercise of ordinary care by him would have removed. *Ibid.*

3. *Contracts — Independent Contractor—Supervision—Direction—Master and Servant—Respondeat Superior.*—When a railroad company contracts with another for the construction of its roadbed, and reserves, under the contract, control and direction over the work through its engineer, with the power of discharging any foreman or employee "who is unskillful or remiss in the performance of the work," the materials, etc., to be furnished under the direction of the railroad company's engineer, the relation of independent contractor is not established, and the rule of *respondeat superior* applies. *Ibid.*

4. *Mental Anguish—Photographer—Lost Films—Contracts—Party in Interest—Notice.*—A photographer lost certain films taken with a kodak of a deceased child shortly before and after her death, which he had received from the aunt of the child, its mother's sister, for development, who informed the agent "to be careful of them, as they were the only films of the little dead girl." There was no suggestion or notice to the photographer that the one delivering the films was acting for her sister, the mother of the child. In an action to recover damages for mental anguish, brought by the mother against the photographer for the negligent loss of the films: *Held*, compensatory damages were not recoverable, as the interest of the plaintiff in the transaction was not disclosed at the time. *Thomason v. Hackney*, 299.

5. *Contracts, Written—Interpretation—Intent.*—The plain intent gathered from a paper-writing will control its construction, and it will not be defeated by any omission to use technical words or expressions if equivalent words are employed for the purpose. *Williamson v. Bitting*, 321.

6. *Contracts of Sale—Cotton—Chose in Action—Assignment—Parties.*—A contract for the sale and delivery of merchantable cotton is a chose in action, assignable, and an assignee thereof must sue in his own name, and not in the name of his assignor. *Vaughan v. Davenport*, 369.

7. *Contracts of Sale—Assignment—Defect of Parties—Power of Courts—Ex Mero Motu—Practice.*—It appearing of record in this case that a

CONTRACTS—*Continued.*

contract for the sale and delivery of merchantable cotton was assigned by the plaintiff, and the defendant, notwithstanding recovery by plaintiff, would still be liable to plaintiff's assignee thereon, and the latter not being a party to the action, the appellate court, upon its own motion, orders a new trial, with leave to the defendant to have plaintiff's assignee made a party so that he will be bound by whatever judgment that may be rendered. *Ibid.*

8. *Contracts — Actions — Temporary Adjustments—Pleas in Bar.*—The agreement entered into between the parties in this case, affecting a temporary adjustment, held not to affect the defendant's rights as a lower riparian owner to the use of the water interfered with by a wing dam built by the plaintiff in the Roanoke River. The decision in this case, *Power Co. v. Navigation Co.*, 152 N. C., 472, affirmed. *Power Co. v. Navigation Co.*, 393.

9. *Contracts—Conditional Warranty.*—A contract for the sale of a lumber dry-kiln to be returned to the vendor upon its failure to do certain work, upon the fulfillment of the vendee of specified conditions relative to giving the vendor the opportunity of remedying defects and causing it to do the work contracted for, when reasonable upon its face, is, in the absence of fraud, enforcible. *Manufacturing Co. v. Lumber Co.*, 507.

10. *Same—Countersign—Damages—Performance of Conditions.*—When in a contract of sale of a lumber dry-kiln it was guaranteed that the kiln would accomplish certain results, and that the material could be returned to the vendor in the failure of the kiln to do so after an opportunity had been afforded the vendor to remedy any defects and cause the kiln to meet the requirements, the vendee cannot maintain a counterclaim for damages in the vendor's suit for the contract price, without proving that he has performed the conditions upon which the guaranty was to have been effective. *Ibid.*

11. *Principal and Agent—Declarations—Evidence of Agent—Contradictions—Discretion of Court.*—The declarations of agent as to an alleged contract made by him for his principal after the event are incompetent as evidence, but may be admitted by the trial judge, in his discretion, subject to the condition that they be thereafter made competent; and in this case they are held competent in contradiction of the evidence of the agent as to the terms of the contract. *Steel v. Copeland*, 556.

12. *Contracts of Sale—Breach—Damages Remote—Continued Offer to Sell —Loss of Profits—Certainty of Admeasurement.*—In an action upon a breach of contract of a manufacturer of wire fencing to furnish a supply merchant with a sufficient quantity of the fencing for his trade during a certain period, it appeared that several car-loads of the wire were necessary for the purpose, and that the vendor had undertaken to send out and distribute among the vendee's customers, according to a list furnished, circulars advertising the merits of that particular fencing; that the vendee told vendor's agent that he would purchase only upon condition that he could get all he wanted; that in consequence of the transaction and the failure and refusal of the vendor to ship the second car-load, he had been prevented from obtaining

CONTRACTS—*Continued.*

his profits, in a certain sum, on sales he would otherwise have made in certain specified transactions: *Held*, (1) vendee was entitled to recover his profits so shown on the second car-load ordered, in any event, as the agreement constituted a continuing offer to sell before the withdrawal of the offer: (2) these profits were reasonably in the contemplation of the parties at the time of making the contract of sale, and the cost and selling price being fixed, were not difficult of ascertainment; and, *semble*, profits shown of this character could be recovered in the failure of the vendor to make further shipments embraced by the contract of sale. *Ibid.*

13. *Contracts—Agreement to Lend Money—Contemplated Writing.*—When it appears that the parties are negotiating to see if they can agree upon the terms of a contemplated contract to be put in writing, it is necessary for the contract to be written and executed to be binding. *Elks v. Insurance Co.*, 619.

14. *Contracts — Consideration — Mutual Agreements — Definite Offer—Acceptance.*—For the acceptance of an offer to become a contract between the parties it is necessary that the offer be definite and certain, or capable of being made so, in order that the acceptance impose legal obligations on both parties for its fulfillment. *Ibid.*

15. *Same—Incomplete Agreement.*—When a contract is sought to be established by conversations and correspondence between the parties, the whole must be considered, and although certain parts taken alone appear to constitute a binding agreement, it will not be established should it appear that there were further terms contemplated by the parties, essential to its completion, wherein they failed to agree. *Ibid.*

16. *Same—Damages—Insurance—Offer to Lend Money—Corporate Action.* In an action against a life insurance company for damages for failure to comply with its alleged contract to loan money to the plaintiff on mortgage security, it appeared that applications for loans were to be passed upon by the defendant's finance committee, both as to the security offered and the conditions of the company's funds to make loans when applied for. The legal department of the company approved the mortgage papers to secure the loan, and advised the applicant, through the local agent of the company, that the loan would be made, which the committee finally determined could not be done, owing to the amount of the company's premium receipts and other causes: *Held*, that as it required the approval of the finnace committee, which was not given, there was no binding promise, expressed or implied, the acceptance of which would bind the company under a contract or agreement to make the loan, and that the transactions were merely incompleted negotiations. *Ibid.*

17. *Contracts—Offer to Lend Money—Incomplete as to Duration—Evidence—Damages—Nonsuit.*—In an action for damages for failure of the defendant to comply with its contract to lend money to the plaintiff, there must be evidence tending to show that the agreement had been made definite as to the maturity of the loan as well as to the amount, or a judgment of nonsuit in the defendant's favor will be granted. *Ibid.*

CORPORATIONS. See Pleadings.

1. *Public-service Corporations — Telephone Companies — Discriminative Rates.*—A telephone company, acting under a *quasi*-public franchise, is a public-service corporation, and as such is subject to public regulation and reasonable control, and is required to afford its service at uniform and reasonable rates and without discrimination among its subscribers and patrons for like service under the same or substantially similar conditions. *Telephone Co. v. Telephone Co.*, 9.

2. *Same—Contracts—Breach—Physical Connection—Rights of Public.*—In the absence of constitutional or statutory requirement, the obligation of a public-service corporation to afford service at reasonable rates, without discrimination, to those who pay the charges and abide by the reasonable regulations of the company, does not extend to the enforcement of one company to make physical connection with another; but after this physical connection has been voluntarily made, under a fair and workable arrangement and guaranteed by contract between the companies, and the continuous line has come to be patronized and established as a great public convenience, such contract shall not, in breach of the agreement, be severed by one of the parties. *Ibid.*

3. *Public-service Corporations — Telephone Companies—Contracts—Vendor and Vendee—Knowledge, Expressed or Implied.*—A purchaser of a telephone company under contract with another to render certain services to the subscribers of the latter at a stipulated price, the contract covenanting to that effect for the successors and assigns of each of the contracting parties, cannot, after taking over the property and entering on the enjoyment of the rights and privileges conferred be allowed to repudiate its obligations and its burdens, when it has purchased with full knowledge of the existence of the contract, or of facts sufficient to put it upon inquiry leading to knowledge. *Ibid.*

4. *Public-service Corporations — Contracts — Rates — Discrimination — Rights of Public—Performance of Duties.*—Public-service corporations, being required to render their service at uniform and reasonable rates and without discrimination, are not allowed to enter, or continue, in the performance of a contract which discriminates among their patrons or which renders them unable to perform the duties imposed upon them by reason of their charter. *Ibid.*

5. *Same—Reasonable Rates—Modification of Contract—Issues.*—Two public-service telephone companies having entered into a contract specifying certain services, at a fixed rental or toll or charge, to be performed by each to the subscribers of the other, and having made a physical connection of the two systems and lived up to the contract for a period of years, one of them sold to another corporation which sought to put an end to the contract upon the ground that it was discriminative among its subscribers, and that the charges for the services to be performed under the contract were insufficient: *Held*, the contract was binding between the parties, but should be annulled, on account of the rights of the public therein, as to which an issue should be submitted, to the extent that they are discriminative among patrons receiving like service under like conditions, or if it is so un-

CORPORATIONS—*Continued.*

reasonable and burdensome as to render a party unable to perform properly the duties under its charter, the parties should be allowed to continue the service under such reasonable rates as they may further agree upon, or which may be sanctioned and approved by the Corporation Commission. *Ibid.*

6. *Public-service Corporations—Contracts—Rights of Parties—Scope of Inquiry.*—In this action to annul a contract made between two public-service telephone companies by a vendee of one of the parties, it is *Held*, if it is found in the lower court that the public rights are not affected, physical connection between the two systems having been made and service continuously rendered thereunder, the mere fact that, as between the individuals concerned, the contract may operate unequally would not justify or permit that the contract in that respect be avoided; and further, that, as affecting the rights of the parties, it be ascertained and determined whether one of them has extended the privileges conferred to persons or telephone systems not embraced in the agreement. *Ibid.*

7. *Corporations—Directors—Advantages—Trusts and Trustees—Creditors—Shareholders.*—It is the duty of the directors of a corporation, as trustees of its property for the benefit of its creditors and shareholders, to administer the trust for the mutual benefit of the parties interested, and for them to receive therein an advantage to themselves not common to all is a plain breach of the trust imposed. *Pender v. Speight*, 612.

8. *Corporations—Shareholders—Retiring Stock—Debtor and Creditor.*—An agreement made by the shareholders of a corporation, between themselves, to retire any of its stock before settling with the corporation's creditors, is void as against the rights of the unpaid creditors. *Ibid.*

9. *Corporations—Directors—Insolvency—Knowledge Implied—Debtor and Creditor—Trusts and Trustees—Advantages—Credit—Sale of Entire Assets.*—The law charges the directors of a corporation with actual knowledge of its financial condition, and holds them liable for damages sustained by stockholders and creditors by reason of their negligence, fraud, or deceit; and where a corporation is insolvent, and the directors retire certain portions of their shares of stock therein and receive therefor credits on obligations due by them to the corporation, and sell the entire assets by resolution passed, to one of them, participating therein, at a reduced price, the transaction is void on its face, as against creditors and other shareholders, notwithstanding the directors were unaware of its insolvency. *Ibid.*

10. *Corporations—Officers—Fraud—Debtor and Creditor—Parties.*—An action by a creditor or stockholder will lie against the officers, including the directors of a corporation, for losses resulting from bare fraud or negligence, without his having first applied to the corporation to bring the action. *Braswell v. Bank*, 628.

11. *Corporations — Directors—Management—Best Judgment—Liability.*—The directors of a corporation are only required to exercise ordinary

CORPORATIONS—*Continued.*

diligence, intelligence, and judgment in the management of corporate business, and are not liable for losses arising from their mistakes, or from the mistakes of subordinate officers therein made. *Ibid.*

COST. See Appeal and Error.

COTTON WEIGHERS. See Cities and Towns.

COUNTERCLAIM. See Practice.

COUNTY COMMISSIONERS. See Roads and Highways.

1. *County Commissioners—Bridges, Delay in Building—Negligence—Discretion.*—Damages for injuries received in crossing a creek in a conveyance, in an action alleging the crossing to have been dangerous, and caused by the negligence of the county commissioners in not having a bridge over it erected under their contract in a reasonable time, are not recoverable, the matters complained of being discretionary with the commissioners, and not reviewable in the courts. *Templeton v. Beard*, 63.

2. *County Commissioners—Negligence—Individual Responsibility—Corruption and Malice—Pleadings—Evidence.*—To recover individually of county commissioners for their acts or omissions as such, involving an exercise of discretionary powers, it is necessary to allege and prove that they acted or failed to act "corruptly or of malice," and that principle is not affected by the fact that in other and many instances they act ministerially. *Ibid.*

3. *County Commissioners—Penalty—Jurisdiction—Justice of the Peace—Appeal.*—An action against a county commissioner for the penalty of $200 prescribed by Revisal, sec. 3590, for neglecting to perform the duties required of him, and to be paid to the party suing therefor, etc., is *ex contractu*, and is originally cognizable in a court of the justice of the peace, and hence is not open to a party seeking its recovery originally in the Superior Court. *Ibid.*

4. *County Commissioners—Control of County Affairs—Constitutional Law—Interpretation of Statutes.*—Under the Constitution and Public Laws of North Carolina the board of county commissioners are generally given supervision and control of governmental matters in the several counties. Constitution, Art. VII, sec. 2; Revisal, sec. 1318 *et seq. Bunch v. Commissioners*, 335.

COURTS. See Equity; Judgments.

1. *Contempt of Court—Service of Process—Knowledge.*—It is not necessary to show legal service of a restraining order to attach a party for contempt for its violation, for it is sufficient to prove circumstances from which it can be reasonably inferred that the respondents had knowledge of the fact that the order had been issued.

2. *Same—Evidence Sufficient.*—The expressed intent of respondent, in proceedings for contempt of an order of court, to run a merry-go-round, in spite of a restraining order, with evidence that the order had been issued on the day previous to its running in violation thereof; and on that day the respondent had an interview with his attorney, who was

COURTS—*Continued.*

present in the clerk's office when the order was filed, and immediately thereafter a bill of sale to a third party was made, alleged to be fictitious, who ran the merry-go-round at the time complained of; that the order was read to respondent's wife, a copy of which she refused to receive, and which evidently thereafter, and before the commission of the offense by the vendee, the respondent had seen, a copy also having been left with his vendee; that the parties were traveling together in an amusement troupe, etc., is sufficient to sustain the findings of the trial court upon which the conviction for contempt was entered. *Ibid.*

3. *Contempt of Court—Disavowed Intent—Evidence—Conviction.*—The mere sworn disavowal of any intention on the part of one attached for contempt of an order of court is not sufficient for him to demand his discharge, when from his acts or conduct it may be seen that he was guilty thereof. *Weston v. Lumber Co.*, 158 N. C., 270, cited and applied. *Ibid.*

4. *Courts—Judicial Notice—Highways—Heavy Hauling—Lumber Companies.*—The courts will take judicial notice of the fact that lumber companies and others engaged in the lumber business do greater injury to the public roads used by them than is done by the ordinary use. *Dalton v. Brown*, 175.

5. *Power of Courts—Process—Amendments—Change of Cause.*—The court has no power to convert a pending action that cannot be maintained into a new or different action by amendment of process or pleadings. *Bennett v. R. R.*, 345.

6. *Same—Wrongful Death—Executors and Administrators—Interpretation of Statutes.*—In an action to recover for the wrongful death of another (Revisal, sec. 59), brought by the wife individually, the court has no power to allow an amendment to the summons so as to change the action into one by her in an administrative capacity. *Ibid.*

7. *Justices of the Peace—Title to Lands—Jurisdiction—Judgment—Superior Court—Estoppel.*—A judgment of a justice of the peace in a summary action of ejectment wherein the title to the lands is controverted by the answer does not estop the plaintiff, in his action theretofore brought in the Superior Court, to convert the deed to the lands in question into a mortgage on the ground of fraud. The proceedings before the justice are void upon their face, in view of the title therein set up by the defendant, and in the absence of any adjudication of tenancy by the justice; and the judgment of the Superior Court, having assumed jurisdiction over the whole subject-matter, is final. *Culbreth v. Hall*, 588.

8. *Cities and Towns—Recorder's Court—Criminal Action—Extraterritorial Jurisdiction—Constitutional Law.*—A legislative enactment creating a municipal court for an incorporated city or town, and conferring thereon jurisdiction in a territory extending one mile beyond its corporate limits, over criminal cases concurrently cognizable in a justice's court, is valid (State Constitution, Art. IV, sec. 12); and does not contravene Article IV, sec. 14, of the Constitution, providing for special courts for the trial of misdemeanors in cities and towns. *S. v. Doster*, 157 N. C., 634, cited and distinguished. *S. v. Brown*, 467.

COVENANTS. See Deeds and Conveyances.

DAMAGES.

Deeds and Conveyances — Contracts — Equity — Rescission — Unreasonable Delay—Damages—Actions at Law.—A purchaser of lands, having lost his right to have his deed rescinded for fraud because of his vendor's misrepresenting that he was the owner of the fee when he only had a life estate therein, subsequently acquired the remainder: *Held*, his measure of damages under the facts of this case is the amount paid by him to make his title in fee, as it was represented to him to be. *Van Gilder v. Bullen*, 291.

DEBTOR AND CREDITOR. See Bills and Notes; Partnership; Statute of Frauds; Trusts and Trustees; Corporations.

1. *Assignment for Creditors—Debtor and Creditor—Preëxisting Debt—Unlawful Preference—Interpretation of Statutes.*—The provisions of chapter 918, sec. 2, Laws 1909, repealing section 968 of the Revisal, construed with amendments to sections 967, 969, 970, and 972 thereof, relating to assignments for the benefit of creditors and prohibiting discrimination among them, extends to all cases where "property has been transferred or conveyed within four months next preceding the registration of the deed of trust or assignment, in consideration of the payment of a preëxisting debt, where the grantee or transferee of such property knew, or had reasonable grounds to believe, that the grantor or assignor was insolvent at the time of making such conveyance or transfer": *Held*, the four months period mentioned in the statute is to be counted, as therein stated, from the time the transfer or conveyance was made, and not from the time of its registration, as provided in the present Federal bankrupt act, and the mortgage, in this case, having antedated for more than four months the general assignment, and the grantee having no notice of the grantor's insolvency, the claim is not an unlawful preference according to the provisions of our law. *Wooten v. Taylor*, 604.

2. *Same—Consideration Present in Part—Four Months Period.*—An assignor for the benefit of his general creditors theretofore had executed a chattel mortgage which substantially conveyed all of his assets to the net value of $1,289.58, to secure a debt of $700 upon the consideration of $200 cash then advanced, and the mortgagee's indorsement to the bank, then made, of a note for $500, $300 of which was a debt for which the mortgagee was already an indorser for the mortgagor. The mortgagee paid the notes on which he was an indorser, and in an action brought by the trustee in the deed of general assignment for the benefit of creditors to have the creditors prorate with the mortgagee, it is *Held*, that as to the cash consideration of $200 and the $200 for which the mortgagee indorsed at the time of making the mortgage, they being an obligation presently incurred, there was no unlawful preference given by the transaction; and that as to the $300 for which the mortgagee was already an indorser, the mortgage or conveyance having been given more than four months before the execution of the general assignment without knowledge of the mortgagee of the mortgagor's insolvency, it did not come within the meaning of the statutes and was not an unlawful preference. Revisal, secs. 967, 968, 970, 972. *Ibid.*

DECLARATIONS. See Principal and Agent.

DEEDS AND CONVEYANCES. See Escrow; Sales; Contracts.

1. *Deeds and Conveyances—Time of Delivery—Control of Grantor.*—In order to make a valid delivery of a deed the grantor must part with the possession of the deed, with all power or control over it at the time of delivery. *Weaver v. Weaver*, 18.

2. *Same—Instructions to Deliver.*—A deed made by a father to a son, reserving a life estate, and given to another for safe keeping, with the understanding that the grantor retained control over it, with power of cancellation, *Held*, not to be a valid delivery, though the grantor may have instructed the delivery to be made after his death if he had not taken it up or canceled it. *Ibid.*

3. *Deeds and Conveyances—Time of Delivery—Control of Grantor—Possession by Grantee—Presumptions—Evidence.*—The presumption of a valid delivery of a deed, reserving a life estate, from the possession in the hands of a third person for the benefit of the grantee, is rebutted by showing that the grantor had retained control over it during his lifetime, with the right of cancellation. *Ibid.*

4. *Deeds and Conveyances—Material Alterations—Questions of Law—Time—Questions for Jury.*—When an alteration in a deed is established it avoids the instrument if it is material, the question of its materiality being one of law, exclusively for the court, to be determined upon whether it affects the identity of the instrument or the rights and obligations of the parties to it, leaving the question of the time when the alteration was made a fact to be determined by the jury. *Ibid.*

5. *Deeds and Conveyances—Alterations—Time—Questions for Jury—Evidence.*—In determining when an erasure or interlineation in an instrument has been made, which involves the question of title at issue, between the parties to the action, the jury should consider, under proper evidence, any difference in ink and handwriting and other relevant circumstances; and if the deed has been withheld from registration, this fact should, in the absence of explanation, have more or less weight with them according to the lapse of time, and viewed in connection with any change made in the condition of the parties to the deed. *Wicker v. Jones*, 102.

6. *Same—Burden of Proof.*—The party claiming title under a deed is entitled to introduce it in evidence, upon proof of its execution, and then the burden of proof is on the party assailing it on account of erasures or interlineations appearing on its face, to satisfy the jury by the greater weight of the evidence that the interlineations or erasures were made after the execution of the deed. *Ibid.*

7. *Deeds and Conveyances—Alterations—Void Conveyances—Strangers to Conveyance—Title.*—When the title to lands is in dispute, a party who is not claiming under a deed which he seeks to have declared invalid for erasures or interlineations cannot avail himself of that position. *Ibid.*

8. *Deeds and Conveyances—Plats—Description—Expert Evidence—Direct Evidence—Harmless Error.*—In an action involving title to lands, a

DEEDS AND CONVEYANCES—*Continued.*

plat was shown a witness, who was a surveyor, and, reading from a deed in the chain of title, the witness was asked, as a surveyor, if he could say whether or not the *locus in quo* lay within certain lines marked on the plat, which made for the defendant's contention. The witness replied in the affirmative, and it is *held*, the evidence is competent; especially as afterwards this witness testified, without objection from the plaintiff, that the deed of the defendant covered the land in controversy. *Ibid.*

9. *Deeds and Conveyances—Plaintiff's Title—Affirmative Judgment—Appeal and Error.*—In an action to recover land the plaintiff must recover upon the strength of his own title, and the judgment rendered upon the verdict in this case is modified to the extent that it adjudicates "that the defendant is the owner and entitled to the possession of the lands," there being nothing admitted by the pleadings or found by the jury which supports this affirmative judgment for defendant. *Ibid.*

10. *Same—Estoppel.*—The judgment in defendant's favor in this action, involving title to lands, is an estoppel upon plaintiff in the further prosecution of an action for the same cause, though it is held that the defendant is not entitled to a judgment that he is the owner and entitled to the possession of the *locus in quo*. *Ibid.*

11. *Deeds and Conveyances—Probate—Presumptions.*—The presumption that the probate of a deed is properly taken arises when the only indorsement thereon is that the parties claiming under it "procured the same to be proved." *Moore v. Quickle*, 129.

12. *Same—Probate Officer—Registration—Regularities Presumed.*—The word "*jurat*," written on a deed by an officer authorized to take probates, means "proved"; and when there is nothing in the form of the probate on the deed in question indicating that it was improperly taken, and there is no evidence to that effect, a presumption arises from the act of the register of deeds in admitting the deed to registration that the probate was by the proper officer and regular, and that proof of that fact was before him. *Ibid.*

13. *Deeds and Conveyances—Sheriff's Deed—Recitals—Execution—Evidence.*—In an action for the possession of land, a recital in a sheriff's deed, in the chain of title of a party litigant, that an execution had been issued on a judgment under which the lands were sold, is not *prima facie* evidence that the execution was issued, in the absence of any proof that after due search the execution could not be found. *Person v. Roberts*, 168.

14. *Same—Official Acts.*—The act of issuing an execution is not that of the sheriff, but of the clerk, and should be proved by the execution itself, or in its absence, if lost, by entries on the record, and if it cannot be so proved and the search for it has been made without avail, the recitation in the sheriff's deed becomes *prima facie* evidence that execution had been issued. *Ibid.*

15. *Appeal and Error—Agreements—Sheriff's Deed—Recitals—Execution—Evidence.*—In his action for possession of certain lands, the plain-

DEEDS AND CONVEYANCES—*Continued.*

tiff introduced a sheriff's deed to the *locus in quo*, in his chain of title, and sought by evidence to estop the defendant as claiming from a common source. The defendant defended upon the ground that there was no evidence that an execution had issued under the judgment. The parties litigant filed an agreement in this Court to the effect that the sheriff's deed "was made under execution" in the case wherein the judgment relied upon was rendered: *Held*, it appeared from the words of the agreement that the execution had issued, and further evidence thereof was unnecessary; but as counsel afterwards agreed that such an admission was not intended by them, the case was decided according to the modified agreement. *Ibid.*

16. *Deeds and Conveyances — Adverse Possession — Common Source — Senior Title—Evidence.*—When in an action for the possession of land both parties claim from a common source of title, the one holding the senior title, nothing else appearing, is entitled to recover. Whether the deeds covered the *locus in quo* is a question for the determination of the jury. *Ibid.*

17. *Deeds and Conveyances—Indorsement on Deed—Evidence.*—An indorsement on a deed which does not refer to the deed and with nothing to show why and by whom or under what authority it was made, is incompetent to alter or change the description of the lands conveyed. *Ibid.*

18. *Deeds and Conveyances—Registration—Notice.*—Actual notice of a prior conveyance of land, however full, cannot supply the notice of registration required by the statute, or affect the validity of a deed subsequently taken, but prior in time of registration. *Burwell v. Chapman*, 209.

19. *Standing Timber—Deeds and Conveyances—Requisites.*—Valid conveyances of the title to standing timber must be sufficient in form to pass realty, and are governed by all the laws relative to the transfer of title to land. *Ibid.*

20. *Deeds and Conveyances — Registration — Possession — Notice.*—Purchasers for value of lands sufficient in form and properly registered are not affected with notice by possession of those claiming under a prior deed, either invalid in form or not registered at the time of the other conveyance. *Ibid.*

21. *Deeds and Conveyances—Standing Timber—Waste—Consideration—Reconveyance—Registration—Notice—Equity.*—A reconveyance of the same standing timber between the same parties expressing a consideration of $1 and a release of the grantor "from all claims for damages on account of waste" which had been committed in violation of the restrictions of the first deed, is for a valuable consideration, and the grantees therein do not take subject to any equities of purchasers under a prior acquired and subsequently registered deed, given by their grantor. *Ibid.*

22. *Deeds and Conveyances—Fraud—Misrepresentations in Values—Caveat Emptor.*—While in proper instances the doctrine of *caveat emptor* applies to transactions in lands, relief will be afforded when it is

DEEDS AND CONVEYANCES—*Continued.*

shown that the buyer of real estate in a town where he was unacquainted with such values reasonably relied upon a false representation of an expert therein, in a sale made by him, that the owner had recently bought the property at $3,500, when in point of fact he had only paid $2,750 for it, and it is fairly to be inferred that the false representation was made with the intent to deceive the purchaser and induce him to believe he was making a good trade. *Stewart v. Realty Co.*, 230.

23. *Same—Rescission—Damages—Election of Purchaser.*—When misrepresentations of values are made in the sale of lands with a fraudulent purpose, calculated to and which reasonably did deceive the purchaser, and were relied on and acted upon by him, it will avoid the conveyance, or leave the purchaser to his redress in damages unless by his conduct he has waived the latter remedy by electing to avoid the transaction. *Ibid.*

24. *Deeds and Conveyances—Principal and Agent—Acceptance of Benefits. —Waiver.*—The owner of lands who has accepted the benefits of a sale thereof induced by the fraudulent representation of his sales agent, acting within the apparent scope of his authority, is bound by the transaction, and the doctrine of *respondeat superior* applies. *Ibid.*

25. *Deeds and Conveyances—Values—Misrepresentations—Fraud—Caveat Emptor—Measure of Damages.*—When it is shown that a vendor of lands has fraudulently made a sale thereof by representing that he had recently paid $3,500 for the property, when in point of fact he had only paid $2,750 for it, and this formed an inducement to the transaction, the measure of damages is the difference between $2,750, the price the owner had actually paid, and $3,500, the price he represented he had paid, without regard to the actual value of the property, unless by his conduct the purchaser has elected to rescind the conveyances. *Ibid.*

26. *Same—Rescission—Waiver—Measure of Damages.*—The plaintiff purchased of the defendant certain lands and gave his note secured by mortgage thereon for the purchase price. Thereafter he demanded cancellation of the note and mortgage and offered a deed reconveying the lands, upon the grounds of "misrepresentation and deception," and then brought his action alleging fraud in the transaction: *Held*, the demand of plaintiff was a waiver of his right to recover damages upon the question of values, and having elected to rescind the transaction, he would only be permitted to recover any money actually paid upon it, and interest thereon. *Ibid.*

27. *Deeds and Conveyances—Fraud—Election—Waiver, Effect of.*—An election by the purchaser to rescind a fraudulent sale of land, when once made, with knowledge of the facts, between coexisting remedial rights, which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding, based upon any remedial right inconsistent with that asserted by the election. *Ibid.*

28. *Deeds and Conveyances—Fraud—Evidence Rendered Competent—Testimony, How Construed.*—In regard to a sale of lands alleged by

DEEDS AND CONVEYANCES—*Continued.*

plaintiff to have been procured by fraud, a witness was permitted, over defendant's objection, to testify that on a certain occasion "he found there was a crooked sale on hand," referring to the transaction complained of, and concerning which he had already testified fully and directly as to the entire facts, tending to establish deliberate fraud on the part of the defendant: *Held*, no reversible error. *Chadwick v. Kirkman*, 259.

29. *Deeds and Conveyances—Contracts—Equity—Fraud—Rescission—Unreasonable Delay.*—Upon the principle that a party seeking to rescind a contract for fraud in its procurement must promptly act upon the discovery of the fraud, it is held that equity will not afford relief to a purchaser of lands in his action to rescind his deed for fraud when he has waited for two years without indicating his purpose to do so. *Van Gilder v. Bullen*, 291.

30. *Same—Acquiescence.*—A purchaser of lands seeking equitable relief upon the ground that the sale had been procured by the fraudulent misrepresentation of the vendor that he owned the fee, whereas he only owned a life estate therein, by acquiring the remainder indicates that he intended to perfect his title and abide by his contract. *Ibid.*

31. *Deeds and Conveyances—Contracts—Mortgages—Life Estates—Acquisition of Fee—Feeding Estoppel—Decree of Foreclosure—Equity.*—A purchaser who acquired only a life estate in lands under a deed purporting to convey the fee, wherein there was a provision under which he assumed a certain existing mortgage indebtedness against the land, afterwards acquired by purchase the remainder in fee. In proceeding to foreclose the mortgage, after the death of the life tenant; *Held*, (1) the life estate, having fallen in, was not subject to foreclosure sale; (2) the purchaser had the right to perfect his title by acquiring the remainder by purchase; and (3) the doctrine of feeding an estoppel does not apply to the subsequent acquisition of the remainder, so as to subject it to an order of sale or a decree of foreclosure. *Ibid.*

32. *Deeds and Conveyances — Title — Common Source — Superior Title—Equity—Estates—Remainders.*—The doctrine that when both parties to a controversy are claiming under a common source of title to the lands in dispute they may not deny the title of the person under whom they both claim, does not prevent one of them from showing that he has acquired a better title, as, in this case, that the common source held only a life estate, which had fallen in, and that he is entitled to possession under a deed from the remainderman. *Ibid.*

33. *Deeds and Conveyances — Calls— Adjoining Lines — Evidence.*—When the line of another tract of land is definitely called for as one of the termini in a grant or deed, and this line is fixed and established, it will control a call by course and distance, whether such line is marked or unmarked. *Lumber Co. v. Hutton*, 445.

34. *Contracts—Rights of Way—Deeds and Conveyances—Payment—Accepting Check—Explanation—Evidence.*—Pending negotiations with defendant for the defendant to have the right of way for a lumber or logging road over his land, the plaintiff received a draft of a con-

DEEDS AND CONVEYANCES—*Continued.*

tract from defendant's attorney for a right of way for five years, together with his check for $275 to pay for it. The plaintiff returned the contract, refusing to grant the right of way for a longer period of time than one year for that sum, with privilege of renewing for another year at the same price, but indorsed the check and received the money for it. The defendant's attorney returned the contract to the plaintiff, instructing him to make such changes as he pleased, which plaintiff changed to a one-year period, with the privilege of renewal, returned it to the attorney, who delivered it to the defendant, who entered upon the land and occupied the right of way: *Held*, (1) plaintiff's indorsing the check was not sufficient to convey a right of way or other interest in his land; (2) not admitting plaintiff's evidence tending to explain his indorsement of the check, *i. e.*, that he did so to await further negotiations, and not as in payment for a five-year period, was error. *Leach v. Lumber Co.*, 532.

35. *Rights of Way—Deeds and Conveyances—Acceptance—Terms and Conditions—Contracts—Evidence.*—By accepting a conveyance of a right of way over lands, and by entering thereon and occupying the lands for the purpose named, the grantee is bound by the terms and conditions of the deed; and, in this case, the question as to whether there was a contract entered into between the parties depends upon whether there was such an acceptance by the grantee.—*Ibid.*

36. *Deeds and Conveyances—Rightful Entry—Willful Trespass—Exemplary Damages—Measure of Damages—Contracts—Payment—Accounting.*—One who has entered upon the lands of another under contract with him for a right of way, but under a misunderstanding of its terms, is not a willful trespasser, and cannot be held liable for exemplary damages, but for the value of the right of way and its use for the time of its occupation, and for any real injury that the land may have sustained in consequence; and the owner will be held to account for any moneys he may have received by virtue of the occupancy, with interest. *Ibid.*

37. *Deeds and Conveyances—Standing Timber—Warranty—Less Quantity of Timber—Contracts.*—A deed for standing timber upon lands described by metes and bounds and as containing 140 acres, without warranty as to the quantity of timber thereon, cannot be construed as a contract to sell a greater quantity of timber than was actually growing thereon. *Hardison v. Dunn*, 579.

38. *Deeds and Conveyances—Standing Timber—Payments as to Quantity Cut—Conditions—Measure of Damage.*—In an action to recover a greater quantity of timber growing upon certain described lands under an averment that a greater quantity had been purchased than the land contained, the deed provided that the vendee was to pay $2,000 before any of the timber should be cut, $2,000 when 600,000 feet had been cut not later than a certain date, and $2,000 when 600,000 feet more had been cut not later than a certain further date. The vendee made the two first payments but there was evidence that only 387,000 feet of timber remained on the land. A judgment rendered upon the pleadings for the last payment of $2,000, *Held*, erroneous, the last

DEEDS AND CONVEYANCES—*Continued.*

payment being one upon the condition that 600,000 feet should first be cut, and as all the timber had been cut before the expiration of the period allowed, only such quantity as remained beyond that settled for under the second payment could be recovered, according to the contract price, by the defendant upon his counterclaim. *Ibid.*

39. *Deeds and Conveyances—Fraud—Mortgages—Evidence—Nonsuit.*—In an action to convert a deed into a mortgage on the ground of fraud in its procurement, there was evidence tending to show that the plaintiff was an illiterate colored woman, working for the defendant as a "washerwoman"; that she had purchased the land in question with the understanding that the defendant would lend her the balance of the purchase price, to be secured by a mortgage thereon, and that the deed was written by a notary public, the defendant's son, who also probated it, and was signed by the plaintiff upon being misled to believe that it was the mortgage agreed upon; that the plaintiff remained in possession for twelve months without any demand for rent, and listed the lands for taxes and claimed it as her own; *Held*, a motion for a nonsuit was properly denied. *Culbreth v. Hall*, 588.

40. *Deeds and Conveyances—Evidence Dehors—Fraud—Burden of Proof.*—In an action to convert a deed into a mortgage on the ground of fraud in its procurement: *Held*, in this case, the plaintiff's possession without demand upon her for rent, and the gross inadequacy of the price, were inconsistent with the defendant's claim of absolute ownership, and is evidence *dehors* the deed; if such evidence was required. *Ibid.*

41. *Justices of the Peace—Title to Lands—Jurisdiction—Judgment—Superior Court—Estoppel.*—A judgment of a justice of the peace in a summary action of ejectment wherein the title to the lands is controverted by the answer does not estop the plaintiff, in his action theretofore brought in the Superior Court, to convert the deed to the lands in question into a mortgage on the ground of fraud. The proceedings before the justice are void upon their face, in view of the title therein set up by the defendant, and in the absence of any adjudication of tenancy by the justice; and the judgment of the Superior Court, having assumed jurisdiction over the whole subject-matter, is final. *Ibid.*

42. *Deeds and Conveyances—Fraud—Mortgages—Liens—Rents and Profits—Measure of Damages.*—The plaintiff being successful in her action to convert a deed into a mortgage to secure a loan for the purchase of land, wherein the right of redemption is found to exist, is entitled to recover the entire estate in the property, subject to the amount of the lien and interest, upon which amount the rents and profits for the period of her wrongful "ouster" are to be credited. *Ibid.*

43. *Deeds and Conveyances—Boundaries—Evidence—General Reputation—Remoteness.*—Evidence of the correct location of a divisional line between the lands of contesting parties, by general reputation, is sufficient, which tends to show that forty or more years ago it was a cross-fence on certain sides of a field of a named owner of lands; or that it was a line just beyond the stables of the owner of a certain

DEEDS AND CONVEYANCES—*Continued.*

side of the field, it being sufficiently remote and attaching to physical objects "tending to give the land in question a fixed and definite location." *Lamb v. Copeland*, 158 N. C., 136, cited and applied. *Ricks v. Woodard*, 647.

44. *Same—Less Remote—Corroboration.*—When there is competent evidence by general reputation of the divisional line between the lands of contesting parties, sufficiently remote, evidence of this reputation for a period not sufficient (in this case, twenty years), is competent for the purposes of corroboration. *Ibid.*

DEMURRER.

1. *Pleadings—Plea in Bar—Former Action—Answer—Joinder—Demurrer —Practice.*—A defendant may demur to a complaint from which it appears that another action is pending between the same parties for the same cause, Revisal, sec. 475 (3); and when it does not so appear, the objection may be taken by answer to the merits, joined with a plea in bar. Revisal, 477. *Cook v. Cook*, 46.

2. *Same—Appeal and Error—Harmless Error.*—In an action for divorce the answer set up a plea in abatement that an action was then pending between the same parties for the same cause, and further answered to the merits: *Held*, error for the trial judge to require the defendant to withdraw his answer to the merits before considering his plea in abatement, but harmless when it appears on appeal that his plea was bad. *Ibid.*

3. *Pleadings—Misjoinder of Parties—Demurrer.*—A demurrer to a complaint for a misjoinder of a party plaintiff, on the ground that he is without interest in the suit, is bad. *Withrow v. R. R.*, 222.

4. *Same—Harmless Error.*—It is not held for reversible error when a demurrer to a complaint for a misjoinder of parties is not sustained, it appearing that the party demurring, under an instruction from the court, obtained full relief by the verdict of the jury. *Ibid.*

5. *Pleadings—Partnership—Corporation—Evidence—Demurrer —Waiver.* When suit is brought in the name of a partnership, objection that it does not appear whether the plaintiff is a partnership or a corporation is deemed to be waived unless taken advantage of by a written demurrer or answer, and comes too late upon demurrer to the evidence. *Brewer v. Abernathy*, 283.

6. *Evidence—Motions—Demurrer—Practice.*—Defendant's motion, in this case, for judgment upon the entire evidence is regarded as a motion of nonsuit under the statute, and comes too late after verdict. *Vaughan v. Davenport*, 369.

DESCENT AND DISTRIBUTION.

1. *Descent and Distribution—Collateral Relations—Wills—Same Estate—Inheritance.*—At common law, a devisee who takes the same quality and nature of estate under the will as he would have taken by descent had the testator died intestate, is deemed to take by descent, and under our fourth canon of descent the same construction obtains. *Poisson v. Pettaway*, 650.

DESCENT AND DISTRIBUTION—*Continued.*

2. *Descent and Distribution—Collateral Relations—Inheritance—Blood of the Ancestor.*—On failure of lineal descendants, where the inheritance has been transmitted by descent from an ancestor, etc., under the fourth canon of descent, the collateral relations who inherit the estate must be of the blood of the first purchaser, through whatever intermediate devolution by descent, gift, or devise it may have passed, and however remote may be the first ancestor. *Ibid.*

DIRECTORS. See Corporations.

DISCRIMINATION. See Corporations; Constitutional Law.

DIVERSION OF FUNDS. See Bond Issues.

DIVORCE.

1. *Divorce—Cross-action—Affirmative Relief—Jurisdictional Affidavits—Practice.*—While a defendant in an action for divorce may, by cross-action or petition, obtain a divorce on his own account, he must file an affidavit required by statute in such causes in order to confer jurisdiction on the court. *Cook v. Cook*, 46.

2. *Divorce—Cross-action—Affirmative Relief—Counterclaim—Practice.*—The dcotrine that a party sued is not required, as a rule, to set up a counterclaim existent in his favor, but allowed to assert it in a different or a subsequent action, applies to a defense set up in an action of divorce, unaffected by the fact that the status of the parties is necessarily therein involved. *Ibid.*

3. *Same—Former Action—Abatement—Same Cause—Independent Action.* The wife, being party defendant in an action commenced by the husband for a divorce, answered denying the facts relied upon by plaintiff, but without asking affirmative relief, and without making the affidavit required in actions for divorce. In another jurisdiction she subsequently brought an independent action for divorce for abandonment, in which the defendant moved to vacate upon the ground of the pendency of the former action for divorce brought by him: *Held*, the present plaintiff is not the actor in the former suit, and the relief sought by her is not the same as that involved in the other issue and is not altogether dependent upon the same state of facts, and the pendency of the husband's action for divorce is not a bar to that of his wife subsequently brought. *Ibid.*

4. *Divorce—Pleadings—Verification—Waiver.*—An objection that a complaint, in an action for divorce, has not been verified in accordance with Revisal, sec. 1569, is jurisdictional. *Grant v. Grant*, 528.

5. *Divorce—Pleadings—Verification—Amendments—Courts.*—When the verification of the complaint in an action for divorce avers the truth of the matters therein in the usual form, and then sets forth the statutory requirements as to levity and collusion, etc., and especially when the complaint alleges no facts on information and belief, the verification will not be held as fatally defective; but, if otherwise, it may be remedied by an amendment allowed by the court which complies with the statute. *Ibid.*

DONEE. See Wills.

DOWER.

1. *Dower—Petition—Demurrer.*—The allegations of a petition for dower will be taken as true upon demurrer. *Phifer v. Giles*, 142.

2. *Wills—Power of Sale—Reconversion—Dower—Petition—Demurrer.*—The petition of a widow for dower in her husband's interest in lands devised to him by his father set forth sufficient allegation that her husband and other devisees under the will had elected by their acts to reconvert the lands remaining in the hands of the testator's trustee, after he had met the requirements of the trust imposed by a partial sale of the trust estate consisting of real and personal property; *Held*, the petition upon its face set forth facts sufficient to entitle her to her dower in her husband's part of the lands, and that a demurrer to the petition was bad. *Ibid.*

DRAINAGE. See Jurisdiction.

DRAINAGE DISTRICTS.

1. *Drainage Districts—Remedy—Interpretation of Statutes.*—The provisions of Revisal, sec. 4026, are necessary for the cultivation and improvement of lowlands required to be drained, and should be construed to carry into effect the beneficent purposes of the act, when practicable. *Forest v. R. R.*, 547.

2. *Drainage Districts—Words and Phrases—Ditches—Canals—Interpretation of Statutes.*—Revisal, sec. 4026, should be construed in connection with the other sections of the chapter wherein it is found, relating to the drainage of lowlands, and therein the terms "ditch" and "canal" are used indiscriminately to designate an artificial drain. *Ibid.*

3. *Same.*—An artificial drain in some places from 3 to 5 feet wide and from 2 to 5 feet deep, made for the purpose of cultivating and improving lowlands by draining them, is a canal within the meaning of section 4026 of the Revisal. *Ibid.*

4. *Drainage Districts—Canals—Maintenance—Original Construction—Interpretation of Statutes.*—It is not necessary that the owner of lands lying along a drainage canal, within the meaning of Revisal, sec. 4026, shall have contributed to its original construction to make him liable to assessments for its maintenance under the provisions of the statute. *Ibid.*

5. *Drainage Districts—Owners of Land—Easements—Railroads—Interpretation of Statutes.*—While a railroad company may not be the absolute owner of lands in fee, they have the proprietorship and control of those constituting its rights of way; and when these lands are benefited by a canal which comes within the meaning of Revisal, sec. 4026, the provisions of the statute relative to the maintenance of the canal apply. *Ibid.*

EASEMENTS.

1. *Private Ways — Lands of Another — Adverse Possession.*—While the right to a private way over the lands of another may be acquired by

EASEMENTS—*Continued.*

a continuous adverse use for twenty years, a mere user for the required period is not sufficient to confer the right. *Snowden v. Bell*, 497.

2. *Same—Claim of Right—Notice.*—In order to acquire a private way over the lands of another by adverse user or possession, it is necessary to show that the true owner had notice of the claim as one of right by direct evidence or circumstances tending to prove it. *Ibid.*

3. *Private Ways—Lands of Another—Adverse Possession—Limitations of Actions—Evidence—Questions for Jury—Instructions.*—When there is evidence that the use or possession of a private way over the lands of another is consistent with the contention of the true owner that it was not hostile and adverse, but permissive, with further evidence of notice to him that it was under a claim of right, for twenty years or more, the jury should decide the question of adverse user, and it is error for the trial judge to instruct the jury to answer the issue for the one claiming the right, if they believed the evidence. *Ibid.*

4. *Private Ways—Lands of Another—Conflicting Evidence—Findings—Inferences—Questions for Jury.*—When a fact is to be proven by circumstantial evidence, the finding of the jury is not dependent altogether upon belief in the truth of the evidence; for the jurors must not only believe the witnesses, but must draw from their testimony the inferences from the facts proven. *Ibid.*

5. *Private Ways—Lands of Another—Conflicting Evidence—Adverse User—Instructions—Directions.*—Upon conflicting evidence as to the right of a private way over the lands of another by adverse user or possession, the trial judge should explain to the jury the meaning of the term "adverse user," and instruct them to answer the issue in the affirmative if they found, by the greater weight of the evidence, there had been such user for twenty years, and otherwise, to answer the issue in the negative. *Ibid.*

EJECTMENT.

Landlord and Tenant—Mortgagor in Possession—Demand—Ejectment—Justice's Court—Jurisdiction.—The landlord and tenant act does not apply to a mortgagor who is allowed to remain in possession, and on demand, after default, refuses to surrender possession; and its provisions cannot be extended by any contrivance so as to give to the mortgagee the benefit of summary proceedings in ejectment, in a court of a justice of the peace. *Culbreth v. Hall*, 589.

ELECTIONS. See Wills; Fraud and Mistake.

1. *Elections, Contested—Referee—Findings of Fact—Evidence—Evidential Matters—Appeal and Error.*—When by consent an order is entered by the court in an action involving title to office, that a certain named referee shall hear and determine the controversy, his finding of facts to be final, and he has filed his report finding the votes cast in certain precincts, resulting in the election of one of them, stating what weight he had given to certain testimony, the issues are those of fact, and his statements as to the weight he has given certain phases of the testimony leading to his final conclusion are not re-

ELECTIONS—*Continued.*

viewable; and it is not material that he states he has grave doubts as to the competency of certain evidence which he has admitted and considered. *Jones v. Flynt*, 87.

2. *Elections — Board of Canvassers—Returns—Evidence—Prima Facie Case—Interpretation of Statutes.*—The finding by the board of canvassers as to the number of votes received by a contestant in an election is *prima facie* correct. Revisal, sec. 4356. *Ibid.*

3. *Elections, Contested—Referee—Election Returns—Findings—Evidence.* The referee to whom has been referred the determination of facts in an action between contesting parties in an election has the power to determine which of several election returns, in evidence, is the original; and when the referee has identified, in his findings, the original, it will be deemed *prima facie* correct. *Ibid.*

4. *Elections, Contested—Referee—Findings—Objections and Exceptions—Evidence—Principal Issue—Appeal and Error.*—An objection to the report of a referee, who was to find the facts relative to a contested election, for failure to find what occurred when the votes were counted out on the night of the election, is not well taken, as these incidents are merely evidentiary on the principal issue of the number of votes cast for the relator and defendant, the referee acting as a jury with power to find the facts, and it being his duty to weigh the evidence and to determine on which side it preponderated, and to pass on the credibility of the witnesses. *Ibid.*

5. *Elections, Contested—Returns Telephoned—Called by Another—Evidence.*—In an action involving the correct number of votes cast for each of the parties in a contested election, evidence of a witness, that at a certain precinct, on the night of the election, he had another to read from a report the number of votes cast there for one of the contestants, as he telephoned the report in, is incompetent, the one who read the list for the purpose of telephoning not having been examined as a witness, and there being no evidence that it was correctly read. *Hart v. R. R.*, 144 N. C., 91, cited and distinguished. *Ibid.*

EQUITY. See Jurisdiction; Injunction.

1. *Equity—Cloud on Title—Description—Right of Action.*—As the defendant's deed, in any event, covers a part of the lands described in plaintiff's deed, the right of plaintiff to maintain an action to remove a cloud from his title upon the ground that, according to the plaintiff, the defendant's lines are outside of his deed, is not presented. *Bank v. Whilden*, 280.

2. *Deeds and Conveyances — Contracts—Equity—Rescission—Unreasonable Delay—Damages—Actions at Law.*—A purchaser of lands, having lost his right to have his deed rescinded for fraud because of his vendor's misrepresenting that he was the owner of the fee when he only had a life estate therein, subsequently acquired the remainder: *Held*, his measure of damages under the facts of this case is the amount paid by him to make his title in fee, as it was represented to him to be. *Van Gilder v. Bullen*, 291.

ESCROW. See Deeds and Conveyances.

1. *Deeds in Escrow—Title—Suits—Equity—Practice.*—Until the performance of the conditions of a deed to lands held in escrow the title remains in the grantor to the extent that ordinary actions for the protection of the property and preservation of the title may be brought by him. *Board of Education v. Development Co.*, 162.

2. *Deeds in Escrow—Suits—Cloud on Title—Equity—Interpretation of Statutes—Relief.*—When the conditions of a delivery of a deed placed in escrow have been performed pending suit, and the grantor, grantee, and adverse claimants are all before the court, *semble*, in proceedings to remove a cloud upon the title to lands, if the parties so desire, the cause may be proceeded with, it being in the nature of an equitable proceeding and the scope of the relief being somewhat enlarged and extended by statute. Revisal, sec. 1589. *Ibid.*

3. *Same.*—During the progress of the trial of a suit brought by a county board of education to remove a cloud upon the title to one acre of its land to be used for school purposes, and claimed by the defendants as a part of their lands, it appeared that the plaintiff had executed a deed to the defendants and placed it in escrow for delivery when the defendants executed to the plaintiff a deed for the one acre claimed by and to be selected by it, and which had not been done at the time of the trial: *Held*, the plaintiff was entitled to proceed with its suit. *Ibid.*

ESTATES. See Equity.

1. *Estates—Husband and Wife—Limitations Over to Heirs of Wife—Rule in Shelley's Case—Deeds and Conveyances.*—An estate to a husband and wife, with limitation over to the heirs of the latter, conveys the fee simple to the wife under the rule in *Shelley's case*, subject to the life estate of the husband; and a deed made by both the husband and wife of all of their estate in the lands conveys the fee simple. The rule in *Shelley's case* discussed by WALKER, J. *Cotton v. Moseley*, 1.

2. *Estates for Life—Limitations—When Determinable—Contingent Interests.*—An estate to W. for life, and to his surviving widow for life, and thereafter to his children, "and after the death of all with no issue then living" with further limitation over: *Held*, the event by which the estate must be determined will be referred to the death of the holders of the life estates, and in their lifetime their children are the devisees of a contingent estate in remainder, to determine in case "all of them die with no issue then living." *Harrell v. Hagan*, 147 N. C., 111, cited and distinguished. *Vinson v. Wise*, 653.

ESTOPPEL. See Contracts.

EVIDENCE. See Instructions; Intoxicating Liquors; Appeal and Error; Questions for Jury; Reference; Presumptions; Nonsuit.

EXCUSABLE NEGLECT. See Judgments.

EXECUTION. See Deeds, Railroads and Negligence.

EXECUTORS AND ADMINISTRATORS. See Appeal and Error.

1. *Negligence—Wrongful Death—Executors and Administrators—Interpretation of Statutes—Parties.*—The right to maintain an action for

EXECUTORS AND ADMINISTRATORS—*Continued.*

a negligent killing of a human being is regulated solely by statute, and must be brought by the personal representative, etc., of the deceased. Revisal, sec. 59. *Bennett v. R. R.*, 345.

2. *Power of Courts—Amendments—Wrongful Death—Executors and Administrators—Interpretation of Statutes.*—In an action to recover for the wrongful death of another (Revisal, sec. 59), brought by the wife individually, the court has no power to allow an amendment to the summons so as to change the action into one by her in an administrative capacity. *Ibid.*

3. *Exectuors and Administrators—Interest Chargeable.*—In this case it was decided that the account of the plaintiff, administrator, should "be reformed to charge him with interest from the date of filing the report on so much of the amount which is now adjudged to be due by him at that date, on which interest is not calculated in the judgment below": *Held*, the interest should be calculated from the time the administrator filed his report, on the amount finally adjudged to be due, and not from the time the referee in the case filed his report. *Overman v. Lanier*, 437.

FEDERAL QUESTIONS. See Statutes.

FELONIES. See Constitutional Law.

FRANCHISE. See Contracts.

FRAUD. See Judgments; Equity; Statute of Frauds; Deeds and Conveyances.

FRAUD AND MISTAKE.

1. *Wills—Caveat—Fraud—Undue Influence—Issues.*—In proceedings to caveat a will, upon the ground of mental incapacity and fraud or undue influence, an issue as to whether the paper-writing was the last will and testament of the deceased is sufficient, and a separate issue as to the fraud, undue influence, or mental incapacity is not necessary. *Ibid.*

2. *Bills and Notes—Indorsee—Fraud—Burden of Proof—Immaterial Findings—Verdict—Power of Court.*—In an action attacking the validity of a note for fraud in the procurement by the payee and its indorsee, alleged by the plaintiff to be a holder with notice, the burden is on the holder to show that he was purchaser for value before maturity and without knowledge or notice of the impeaching facts, shown to have existed, and *Held*, in this case, that it was not error for the trial judge to set aside or disregard a finding of the jury upon that issue, there being no evidence tending to show that the holder was an indorsee of that character, the allegation being simply that he had "taken over" the note. *Chadwick v. Kirkman*, 259.

3. *Judgments—Execution Sales—Fraud—Burden of Proof.*—In an action to set aside a judgment and sale for fraud in procuring title to lands, the burden is upon the plaintiff to establish the fraud complained of by the greater weight of the evidence. *Gross v. McBrayer*, 372.

GOVERNMENTAL FUNCTIONS. See Cities and Towns.

GUARDIAN AND WARD. See Wills.

HABEAS CORPUS.

1. *Habeas Corpus—Motions—Pendente Lite—Practice—Appeal and Error —Costs.*—The order, in this case, of the lower court upon motion made *pendente lite* for the custody of the minor children of the parties, etc., is set aside without discussion of the findings of fact, as such might prejudice the case in its further stages, leaving the moving party to renew her motion for alimony and counsel fees *pendente lite* at any time at chambers, or at a regular term of court, should the trial be delayed. The costs are equally taxed between the parties. *Fleming v. Fleming*, 440.

2. *Habeas Corpus—Jurisdiction—Competent Court—Judgments—Second Appeal—Rehearing—Practice.*—The writ of *habeas corpus* cannot be used in the nature of a writ of error, and will not be considered on appeal when it appears that the petitioner is in custody by virtue of the judgment of a competent court appearing to be regularly entered. (Revisal, sec. 1822, 2), which has been affirmed by the Supreme Court on a former appeal. *S. v. Dunn*, 470.

3. *Habeas Corpus—Competent Court—Judgment—Illegal Evidence—Intoxicating Liquors—Sale—Courts—Jurisdiction.*—An indictment and judgment against the prisoner for an illegal sale of spirituous liquors alleged to have been based upon illegal evidence authorized by an unconstitutional statute, may not be passed upon in *habeas corpus* proceedings, for such would be to permit one Superior Court judge to examine into the proceedings before another judge, upon parol evidence, and review his action. *Ibid.*

HARMLESS ERROR. See Appeal and Error.

HOMICIDE.

1. *Homicide—Dying Declarations—Res Gestæ—Evidence.*—Upon the trial of the husband for the homicide of his wife, there was evidence tending to show that the deceased was in a delicate condition, and had bruises upon her arms, back, and abdomen, and a wound or rupture of the inside lining of her womb, and that her death resulted from a small clot of blood in the right ventricle of her heart which the wounds and bruises, alleged to have been inflicted by her husband, would have produced. Deceased had said that she would die: *Held*, it was competent as a dying declaration, to prove that the deceased said, immediately preceding her death, that she expected to die, and at the same time stated that her husband had beaten her to death. *S. v. Laughter*, 488.

2. *Homicide—Evidence—Conviction of Less Offense—Instructions—Harmless Error.*—A prisoner convicted of a less offense than the evidence discloses, if found by the jury to be the facts, cannot be heard to complain of an instruction which precludes from their consideration a finding for the greater offense. *S. v. Casey*, 472.

3. *Homicide—Evidence—Conviction of Less Offense—Solicitor's Request—Harmless Error.*—The prisoner on trial for a capital felony cannot be heard to complain of error on the part of the State in asking for

HOMICIDE—*Continued.*

a conviction of a less offense than murder in the first degree, when from the evidence the verdict should be murder in the first degree, or an acquittal. *S. v. Casey*, 474.

HUSBAND AND WIFE. See Estates; Parties.

1. *Husband and Wife—Jus Accrescendi—Deeds and Conveyances—Interpretation—Intent—Tenants in Common—Second Wife—Dower.*—In construing a deed to a husband and wife as a whole, to arrive at its intent, it is held that in a conveyance of land to them, "each a one-half interest," creates a tenancy in common, and the right of survivorship does not apply; and when the wife is dead, the husband remarries and then dies, leaving a widow, the widow is only entitled to dower in the undivided one-half interest in the lands. *Eason v. Eason*, 534.

2. *Husband and Wife—Wife's Separate Property—Limitation of Actions—Mortgages—Foreclosure—Wife's Disability—Interpretation of Statutes.*—A married woman holds her separate real and personal property free from any debts, obligations, or engagements of her husband, according to the provisions of our Constitution and the Revisal, sec. 2093; and since chapter 78, Laws of 1899, removes the disability of marriage, and Revisal, sec. 408, allows a wife to maintain an action without the joinder of her husband when it concerns her separate property, and against her husband when it is between the husband and wife, and there being no exception in favor of the wife when she holds a claim against him, the statute of limitation will run against a note thus held by her. *Graves v. Howard*, 594.

3. *Husband and Wife—Limitations of Actions—Once Commenced.*—When the statute of limitations has begun to run on a note, and afterwards the wife of the debtor becomes the owner, the fact that the husband has become the debtor to his wife thereon will not repel the bar, and the time of her ownership will be counted. *Ibid.*

INDEPENDENT CONTRACTOR. See Master and Servant.

INDICTMENT.

Recorder's Courts — Statutory Misdemeanors — Second Offense — Indictment—Presumptions.—When the Legislature had conferred original, exclusive jurisdiction upon a recorder's court of an incorporated city or town, of larceny of goods not exceeding $20 in value, for the first offense committed, making it a petty misdemeanor, punishable by imprisonment in the county jail or on the public roads not exceeding a longer period than a year, and a conviction is had thereunder, it is presumed, upon the failure of the warrant to charge a second offense, that the conviction was for the petty misdemeanor within the terms of the statute. *S. v. Dunlap*, 491.

INFANTS. See Parties.

1. *Infants—Necessaries—Father's Wrongful Conduct—Emancipation of Son—Father's Liability.*—A father is responsible for necessaries furnished his son when he has wrongfully driven him from home and forced him to earn his own living; for though the father's act may

INFANTS—*Continued.*

have emancipated his son to the extent of depriving him of his right to the earnings of the son, it does not extend to his responsibility for necessaries furnished the son arising from conditions brought about by his own wrong. *Hunycutt v. Thompson*, 29.

2. *Same—Funeral Expenses.*—The responsibility of a father for necessaries furnished his son, whom he has driven from home and forced to make his own living, extends to funeral expenses of the son, necessarily incurred, which the father had not authorized. *Ibid.*

INJUNCTION.

Injunction — Drainage Ditch — Upper Proprietor — Easement — Adverse Possession—Ponding Water.—Averments in the complaint and affidavits of plaintiff to enjoin the defendant, a lower proprietor, from stopping up or threatening to stop up a drainage ditch running through the plaintiff's lands, are sufficient for a restraining order to be granted to the hearing, which tend to show that the plaintiff and those under whom he claims have, for thirty years, held and exercised the right of drainage through the ditch, specifying its dimensions, and has acquired and holds a right of easement therein over the defendant's lands; that the defendant is threatening and attempting to dam the ditch at a point immediately on, or within a few feet of the dividing line, which will cause the water to pond back upon the plaintiff's land to the injury to his lands and crops. *Tise v. Whitaker*, 144 N. C., 510; *Cobb v. Clegg*, 137 N. C., 153, cited and applied. *Stancill v. Joyner*, 617.

IN PARI DELICTO. See Actions.

INSURANCE.

1. *Insurance, Fire — Corporations — Receivers — Policies—Nonalienation Clause — Forfeitures—Title—Interest—Possession—Interpretation of Statutes.*—A receiver of a corporation holds the title to the corporate property, under Revisal, sec. 1224, as the agent of the court for the beneficial owner, in no wise changing the interest of the owner in the property; and hence, when a policy of fire insurance has been taken out by a corporation and subsequent to the appointment of a receiver a loss occurs, the benefits under the policy are not forfeited under the nonalienation clause in the policy contract. *Pants Co. v. Insurance Co.*, 78.

2. *Liability Insurance—Evidence of Indemnity—Prejudicial Questions—Correction—Presumptions—Courts—Discretion.*—It is not a relevant circumstance, in an action for damages for personal injuries negligently inflicted, whether or not the defendant's liability is protected under an insurance policy; and if plaintiff has asked a question of this character in bad faith, before the jury has been impaneled, and which likely operated to defendant's prejudice, a recovery against him should not be allowed to stand. The presumption, however, is that the court below properly corrected any prejudice which may have been produced and that intelligent jurors rejected it; and therefore the matter is largely left in his discretion. *Featherstone v. Cotton*, 429.

INSURANCE—*Continued.*

3. *Contracts — Incomplete Agreement — Damages — Insurance—Offer to Lend Money—Corporate Action.*—In an action against a life insurance company for damages for failure to comply with its alleged contract to loan money to the plaintiff on mortgage security, it appeared that applications for loans were to be passed upon by the defendant's finance committee, both as to the security offered and the conditions of the company's funds to make loans when applied for. The legal department of the company approved the mortgage papers to secure the loan, and advised the applicant, through the local agent of the company, that the loan would be made, which the committee finally determined could not be done owing to the amount of the company's premium receipts and other causes: *Held*, that as it required the approval of the finance committee, which was not given, there was no binding promise, expressed or implied, the acceptance of which would bind the company under a contract or agreement to make the loan, and that the transactions were merely incompleted negotiations. *Elks v. Insurance Co.*, 619.

4. *Insurance, Fire—Policies—Change of Title—Interest—Mortgages—Contracts.*—According to the valid provisions of our standard fire insurance policies, a mortgage on property covered by a policy made subsequent to its date of issue is such a change of interest or title in the property as will release the insurer from all liability for damages thereafter incurred. Revisal, sec. 4760. *Watson v. Insurance Co.*, 638.

INTOXICATING LIQUORS.

1. *Spirituous Liquor—Possession—Evidence—Prima Facie Case—Rebuttal—Questions for Jury.*—Chapter 21, Laws of 1908, making it unlawful for persons other than licensed druggists to keep on hand spirituous, etc., liquors, in Richmond County, also provides that, with the exception of druggists, the possession of more than a quart thereof is *prima facie* evidence of guilt. Evidence is sufficient for conviction, under this statute, which tends to show that four half-pint bottles of whiskey were found concealed in the defendant's pool-room, and that 58 ounces thereof were found under his pool table in a bucket; and it was competent to show by a witness that he had found this whiskey in the bucket, which he poured into a bottle and produced at the trial, in rebuttal of defendant's evidence that the contents of the bucket was not whiskey. *S. v. Mostella*, 459.

2. *Spirituous Liquor—Possession—Prima Facie Case—Unlawful Sales—Time Not of the Essence—Instructions—"Reasonable Doubt."*—Upon the trial for an unlawful sale of whiskey in Richmond County under a special legislative enactment, making the possession of more than a quart *prima facie* evidence of guilt, the time of the possession is not of the essence, and the date laid in the bill is ordinarily not considered as restrictive or controlling on the question of proof; and the charge of the court is not held for reversible error in this case in that respect, or on the question as to reasonable doubt. *Ibid.*

3. *Intoxicating Liquors—Unlawful Sales—Indictment—Several Counts—General Verdict—Appeal and Error.*—The defendant was convicted under a general verdict of guilty upon an indictment charging these

INTOXICATING LIQUORS—*Continued.*

counts: (1) of unlawfully engaging in the business of retail liquor dealer; (2) of selling the liquor by the small measure; (3) of selling it for gain; and having moved to quash the bill of indictment and in arrest of judgment, he renewed his motion on appeal: *Held*, the motion to quash because of the general verdict should be denied. *S. v. Avery*, 495.

4. *Federal Questions—Objections and Exceptions—Practice—Intoxicating Liquors—Sales—Presumptions—Statutes.*—When a Federal question arises it must be presented by an exception taken at the trial upon the merits, and be reviewed on appeal in that case. *Semble*, that under chapter 20, Laws of 1905, making the possession of more than two gallons of whiskey *prima facie* evidence of the illegal sale, no Federal question can arise. *S. v. Dunn*, 470.

ISSUES. See Appeal and Error.

1. *Contracts—Reasonable Rates—Modification of Contract—Issues.*—Two public-service telephone companies having entered into a contract specifying certain services, at a fixed rental or toll or charge, to be performed by each to the subscribers of the other, and having made a physical connection of the two systems and lived up to the contract for a period of years, one of them sold to another corporation, which sought to put an end to the contract upon the ground that it was discriminative among its subscribers, and that the charges for the services to be performed under the contract were insufficient: *Held*, the contract was binding between the parties, but should be annulled, on account of the rights of the public therein, as to which an issue should be submitted, to the extent that they are discriminative among parties receiving like service under like conditions, or if it is so unreasonable and burdensome as to render a party unable to perform properly the duties under its charter, the parties should be allowed to continue the service under such reasonable rates as they may further agree upon, or which may be sanctioned and approved by the Corporation Commission. *Telephone Co. v. Telephone Co.*, 9.

2. *Wills—Caveat—Fraud—Undue Influence—Issues.*—In proceedings to caveat a will, upon the ground of mental incapacity and fraud or undue influence, an issue as to whether the paper-writing was the last will and testament of the deceased is sufficient, and a separate issue as to the fraud, undue influence, or mental incapacity is not necessary. *In re Fowler*, 203.

3. *Issues, Form of—Court's Discretion—Appeal and Error.*—The form of issues being within the discretion of the trial judge, his decision as to them is not reviewable on appeal, if they are sufficient for the parties to present their contentions, and develop their case, and the verdict will determine their rights and support the judgment. *Garrison v. Machine Co.*, 285.

4. *Issues—Immaterial—Judgment—Harmless Error.*—In this action an issue as to the fraudulent procurement by defendant of the contract becomes immaterial, as the verdict is sufficient upon the other issues to support the judgment rendered. *Ibid.*

5. *Issues Sufficient—Appeal and Error.*—Issues are sufficient when they embrace all matters in dispute and afford an opportunity for the

ISSUES—*Continued.*

parties to present and develop their contentions, and, when answered, are sufficient to determine the rights of the litigants and to support the judgment. *Gross v. McBrayer*, 372.

6. *Issues—Misleading—Pleadings.*—Issues should be framed from the pleadings, and those in this case are not commended. *Westfelt v. Adams*, 409.

7. *Issues Sufficient.*—The issues in this case held sufficient. *Garrison v. Williams*, 425.

JUDGMENT. See Attachment; Estoppel.

1. *Arbitration and Award—Agreement in Pais—Enforcement by Judgment.*—Except by statutory provision a court has no power to enter summary judgment on an arbitration and award arising by agreement *in pais* and not an incident to a pending suit. *Peele v. R. R.*, 60.

2. *Same.*—Where suit is pending between the parties, and more especially after issue joined, and there is an agreement to arbitrate, the award to be made a rule of court, the award may be enforced by judgment entered in the cause. *Ibid.*

3. *Same—Fraud—Objection and Exception—Trial by Jury—Practice.*—After an action has been commenced and issue joined, and an agreement to arbitrate has been made by the parties out of court, containing a stipulation that "the award shall be entered as judgment in the cause," the award may be entered and enforced by final process if it is otherwise valid, giving the parties opportunity to except thereto on the ground of fraud, etc., and have the issues thus raised to be determined by a jury. *Ibid.*

4. *Same.*—After suit commenced and issue joined between the parties for damages against a railroad company for alleged negligence in injuring the plaintiff's lands by fire from defendant's passing locomotive, they entered an agreement to arbitrate out of term, with the stipulation that the defendant should promptly pay "all awards made by the arbitrators, and the same shall be entered as judgment in the cause so as to become binding between the parties." After the award had been rendered and when the cause was called for trial, the defendant filed affidavits tending to impeach it for fraud and partiality on the part of the arbitrators. On the issues thus joined the jury found for the plaintiff. Judgment on the verdict was *Held*, no error. *Ibid.*

5. *Wills—Caveat—Infants—Adverse Interests—Consent Judgment—Process.*—Where, in proceedings to caveat a will, the interests of minor children are involved, who are not properly represented, the issue of *devisavit vel non* cannot be answered by consent of the parties to the action, so as to bind the infants. *Holt v. Ziglar*, 272.

6. *Same—Consent Judgment—Fraud and Collusion—Questions of Law.*—When it appears in proceedings to caveat a will that the parents of infants, who held an adverse interest to them, were appointed guardians *ad litem*, and who with their attorney and by their pleadings and testimony consented to an answer to the issue of *devisavit vel non* in their own favor, the decree accordingly rendered in an interval between the trial of criminal cases at the term is collusive and fraudulent as to the infants, and cannot bind them. *Ibid.*

JUDGMENT—*Continued.*

7. *Issues—Immaterial—Judgment—Harmless Error.*—In this action an issue as to the fraudulent procurement by defendant of the contract becomes immaterial, as the verdict is sufficient upon the other issues to support the judgment rendered. *Garrison v. Machine Co.*, 285.

8. *Telegraphs—Jurisdiction—Torts—Stare Decisis.*—The doctrine of *stare decisis* does not apply when the former decisions are clearly found to be erroneous and contrary to our declared public policy; and in this case it is held that the former decisions of our Court upon the mental anguish doctrine, measuring the damages as if arising in contract, if applicable, will not control in an action brought in tort for the failure of a telegraph company to use proper efforts in the delivery of a message here which had been received for transmission in another jurisdiction where damages of this character are not recoverable. *Penn v. Telegraph Co.*, 306.

9. *Railroads—Right of Way—Damages—Judgment—Interest—Interpretation of Statutes.*—A judgment in the owner's favor, in the assessment of damages for lands taken for a right of way by a railroad company, bears interest by express provision of the statute. Revisal, sec. 1954. *Abernathy v. R. R.*, 340.

10. *Facts Found by Judge—Agreement—Judgment—Mere Statements—Appeal and Error.*—In this case the parties having agreed that the judge should find the facts, it is held that the court, on appeal, is not bound by a statement found in the judgment, that "the defendants agree that under protest they directed the delivery (of the goods sold to them) at the river landing," it appearing that such was not a finding of fact by the court or an admission by the plaintiff, but a mere statement by the defendants at variance with their own evidence. *State's Prison v. Hoffman*, 565.

JURISDICTION. See Courts.

1. *Married Women — Contracts — Necessaries—Support of Family—Justices' Courts—Jurisdiction—Equity.*—A recovery may be had against a married woman, as if she were a *feme sole*, in a justice of the peace court for a debt incurred by her for her necessary personal expenses, or for the support of the family, by plain implication from the language of the Revisal, sec. 2094; and the doctrine requiring a suit of an equitable nature to bind her separate property has no application in such instances. *Robinson v. Jarrett*, 165.

2. *Courts—Justices of the Peace—Contracts—Damages—Jurisdiction—Remitting Excess—Interpretation of Statutes.*—A plaintiff may sue on contract in the courts of a justice of the peace when the damages for its breach exceed the sum of $200, by remitting so much of the principal of the demand that is in excess of that sum. Revisal, sec. 1421. *Brock v. Scott*, 513.

3. *Same—Superior Courts—Nonsuit—Pleadings—Former Action.*—When a plaintiff has remitted the excess of $200 of his damages arising from a breach of contract in his action brought before a justice of the peace, so as to confer jurisdiction on that court (Revisal, 1421), and has obtained a judgment from which the defendant has appealed to the Superior Court, he may prosecute his action in the Superior Court,

JURISDICTION—*Continued.*

and take a voluntary nonsuit in his former action before the pleadings are filed in the second action, or it came on for trial; and the plea of the pendency of the former action is bad. *Ibid.*

4. *Courts—Jurisdiction—Contracts—Justices of the Peace—Damages—Remitting Excess.*—The amount of damages demanded by a plaintiff in good faith determines the jurisdiction of the Superior Court, and not the amount of recovery; and the fact that he has remitted damages in excess of $200 in his action on contract sued on in the court of a justice of the peace does not necessarily oust the jurisdiction of the Superior Court in an action brought on the same contract there. *Ibid.*

5. *Same—Waiver.*—The plaintiff having remitted the amount of damages arising on contract in excess of $200, so as to confer jurisdiction on the court of a justice of the peace, and having taken a voluntary nonsuit in the justice's court, on defendant's appeal is deemed to have waived the excess so remitted in his action on the same contract brought in the Superior Court, and his recovery is limited to the amount sued for in the justice's court. *Ibid.*

6. *Special Appearance—Jurisdiction—General Appearance.*—A special appearance may only be entered for the purpose of moving to dismiss for want of jurisdiction, and when it is made for the purpose of a motion to remove the cause to another county, the appearance is general, by whatever name the party may designate it. *Grant v. Grant*, 528.

7. *Cities and Towns—Recorder's Court—Criminal Actions—Extraterritorial Jurisdiction—Constitutional Law.*—A legislative enactment creating a municipal court for an incorporated city or town, and conferring thereon jurisdiction in a territory extending one mile beyond its corporate limits, over criminal cases concurrently cognizable in a justice's court, is valid (State Constitution, Art. IV, sec. 12); and does not contravene Article IV, sec. 14, of the Constitution, providing for special courts for the trial of misdemeanors in cities and towns. *S. v. Doster*, 157 N. C., 634, cited and distinguished. *S. v. Brown*, 467.

JURORS.

1. *Jurors — Misconduct — Motions — New Trial—Practice—Appeal and Error.*—A motion to set aside a verdict of the jury for misconduct of a juror must ordinarily be made before the trial court, unless it was not known to the complaining party until after adjournment, and then only on appeal in civil cases. It appearing in this case from the affidavits that a new trial should not be granted, the motion is denied without discussion. *Murdock v. R. R.*, 131.

2. *Jurors — Interest—Corporations—Officers and Employees.*—Stockholders, officers, or employees of an indemnifying company are incompetent to serve on the jury in an action against the indemnified for damages covered by the policy. *Featherstone v. Cotton Mills*, 429.

3. *Jurors—Opinion Formed and Expressed—Motion for New Trial—Delay—Practice.*—A motion to set aside a verdict on the ground that one of the jurors had formed or expressed his opinion, before he

JURORS—*Continued.*

entered the box, that the prisoner was guilty, comes too late after verdict, when this was known to the prisoner before the argument of the case had been completed. *S. v. Watkins*, 480.

4. *Jurors — Opinion Formed or Expressed—Verdict—Motions—Court's Discretion.*—It is discretionary with the trial judge, in the absence of palpable abuse, to set aside a verdict on the ground of a juror having expressed his opinion of the prisoner's guilt before entering the jury box. *Ibid.*

JUS ACCRESCENDI. See Husband and Wife.

JUSTIFICATION. See Murder.

LACHES. See Bills and Notes.

LANDLORD AND TENANT.

Landlord and Tenant—Mortgagor in Possession—Demand—Ejectment—Justice's Court—Jurisdiction.—The landlord and tenant act does not apply to a mortgagor who is allowed to remain in possession, and on demand, after default, refuses to surrender possession; and its provisions cannot be extended by any contrivance so as to give to the mortgagee the benefit of summary proceedings in ejectment, in a court of a justice of the peace. *Culbreth v. Hall*, 589.

LIENS.

1. *Liens—Registration—Lessor and Lessee—Provisions Against Lessor's Liability—Interpretation of Statutes.*—Under a lease of lands, duly recorded, which provided that the lessees were to construct or erect on the leased premises a building at a cost to be not less than a certain sum, which shall be the property of the lessor at the termination of the lease; and that the lessor "shall not be chargeable for any contracts or liabilities, whether arising from negligence or otherwise" of the lessee: *Held*, a lien filed for material furnished the lessee in the construction of the building erected by him is in no wise a claim or lien on the building as against the interest of the lessor, upon the termination of the lease under a forfeiture clause contained therein. *Weathers v. Cox*, 573.

2. *Deeds and Conveyances—Fraud—Mortgages—Liens—Rents and Profits —Measure of Damages.*—The plaintiff being successful in her action to convert a deed into a mortgage to secure a loan for the purchase of land, wherein the right of redemption is found to exist, is entitled to recover the entire estate in the property, subject to the amount of the lien and interest, upon which amount the rents and profits for the period of her wrongful "ouster" are to be credited. *Culbreth v. Hall*, 588.

LIMITATION OF ACTIONS.

1. *Pleadings—Limitation of Actions—Burden of Proof.*—Upon defendant's plea of the statute of limitation in an action upon contract, the burden of proof is upon the plaintiff to show that his cause of action is not barred. *Sprinkle v. Sprinkle*, 81.

LIMITATION OF ACTIONS—*Continued.*

2. *Limitation of Actions—Title—Adverse Possession—Former Action—Evidence—Harmless Error.*—In an action for the possession of lands, evidence is incompetent to show that a former suit, wherein no complaint had been filed, was for the same cause and the same relief as this one, for the purpose of rebutting the defense of title by adverse possession; but its admission was harmless in this case. *Person v. Roberts*, 168.

3. *Railroads—Rights of Way—Damages—Limitation of Actions—Interpretation of Statutes.*—Revisal, sec. 394, in regard to bringing an action against a railroad for damages for a right of way taken by it without condemning the same or acquiring the easement by purchase, is a statute of limitation, and must be specially pleaded by the railroad company, if relied on; and it is not required of the owner to affirmatively show that he has commenced his action within the time specified, as it is not a condition annexed to his cause of action. *Abernathy v. R. R.*, 340.

4. *State's Lands—Entry—Limitations of Actions.*—It appearing in this case that a part of the Cherokee Indian lands, the subject of the controversy, had been sold under the act of 1819, prior to the time of entry and grant under which the plaintiff claimed, it is *Held*, that the plaintiff's right is not barred by the statute of limitation pleaded. *Ritchie v. Fowler*, 132 N. C., 788, distinguished. *Anderson v. Meadows*, 404.

LIS PENDENS.

Pleadings—Lis Pendens—Notice.—A complaint containing the names of the parties, the object of the action to set aside a deed to lands for fraud in its procurement, given when a mortgage to secure the balance of the purchase price of the lands should have been executed, and a description of the lands, is a *lis pendens*, and is notice to a subsequent purchaser without the necessity of filing a separate and formal notice. *Culbreth v. Hall*, 588.

"LOOK AND LISTEN." See Contributory Negligence.

MALICIOUS PROSECUTION.

1. *Malicious Prosecution—Nol. Pros.—Termination of Criminal Action.*—Entering a *nol. pros.* in a criminal action is a sufficient termination thereof within the requirement for bringing an action for malicious prosecution. *Wilkinson v. Wilkinson*, 265.

2. *Malicious Prosecution—Probable Cause—Mixed Facts and Law—Instructions—Questions for Jury.*—The only difference between a general or unqualified *nol. pros.* and one "with leave" is that in the latter case the leave to issue a *capias* upon the same bill is given by the court in advance, instead of upon a special application made afterwards, which may be refused by the court in order to guard the citizens against any abuse of process. *Ibid.*

3. *Malicious Prosecution—Probable Cause—Mixed Facts and Law—Instructions—Questions for Jury.*—The question of probable cause, in an action for malicious prosecution, is a mixed one of law and fact, leaving for the jury to determine from the evidence, as a matter of

MALICIOUS PROSECUTION—*Continued.*

fact, whether the circumstances of the case show the cause to be probable or not probable; but whether, supposing them to be true, they amount to a probable cause, is a question of law for the judge. *Ibid.*

4. *Malicious Prosecution—Measure of Damages—Instructions—Punitive Damages.*—In this action for malicious prosecution it is held that the charge upon the measure of damages, though not as clear and explicit as it should have been, was not erroneous, and that punitive damages can only be allowed upon a finding of particular or actual malice by the jury. *Stanford v. Grocery Co.*, 143 N. C., 419, cited and applied. *Ibid.*

MANDAMUS.

Mandamus—Mandatory Injunction—Equity—Courts—Practice.—In this State, where both legal and equitable jurisdiction is vested in the same court, there is very little difference in its practical results between proceedings in mandamus and by mandatory injunction, the former being permissible when the action is to enforce performance of duties existent for the benefit of the public, and the latter being confined usually to causes of an equitable nature, and in enforcement of rights which solely concern individuals. *Telephone Co. v. Telephone Co.*, 9.

MARRIAGE, RESTRAINT OF. See Wills.

MARRIED WOMEN. See Husband and Wife.

MASTER AND SERVANT. See Contracts; Negligence.

MEASURE OF DAMAGES.

1. *Deeds and Conveyances—Values—Misrepresentations—Fraud—Caveat Emptor—Measure of Damages.*—When it is shown that a vendor of lands has fraudulently made a sale thereof by representing that he had recently paid $3,500 for the property, when in point of fact he had only paid $2,750 for it, and this formed an inducement to the transaction, the measure of damages is the difference between $2,750, the price the owner had actually paid, and $3,500, the price he represented he had paid, without regard to the actual value of the property, unless by his conduct the purchaser has elected to rescind the conveyance. *Stewart v. Realty Co.*, 230.

2. *Same—Rescission—Waiver—Measure of Damages.*—The plaintiff purchased of the defendant certain lands and gave his note secured by mortgage thereon for the purchase price. Thereafter he demanded cancellation of the note and mortgage and offered a deed reconveying the lands, upon the grounds of "misrepresentation and deception," and then brought his action alleging fraud in the transaction: *Held*, the demand of plaintiff was a waiver of his right to recover damages upon the question of values, and having elected to rescind the transaction, he would only be permitted to recover any money actually paid upon it, and interest thereon. *Ibid.*

3. *Contracts—Mortgages—Delivery on Condition—Breach—Innocent Purchaser—Foreclosure—Measure of Damages.*—The purchasers of an

MEASURE OF DAMAGES—*Continued.*

engine gave a note and mortgage on their lands to secure the purchase price, which were transferred before maturity to an innocent purchaser for value, who, upon default in the payment of the note, foreclosed the mortgage by sale. In an action brought by the buyers of the engine against the seller for damages, it was held competent to show by parol evidence that the delivery of the note and mortgage was upon the condition precedent that the engine should prove satisfactory for a certain kind of work, which it could not do; and held, further, in this case, as it was found that the vendor had sold the note and mortgage given by the purchaser of the engine to an innocent holder, in violation of this condition, and the mortgagors could not therefore redeem, the measure of damages was the value of the land sold under the mortgage. *Garrison v. Machine Co.*, 285.

4. *Mental Anguish—Photographer—Lost Films—Measure of Damages—Sentimental Values.*—In an action to recover damages of a photographer for the negligent loss of the only films taken of a child just before and after its death from which a likeness of the child could be had and of which the defendant was notified at the time he received them for development nominal damages and the value of the films are at most recoverable. Whether the jury may, in such instances, consider the "*pretium affectionis*," or the sentimental value of the films, discussed by WALKER, J. *Thomason v. Hackney*, 299.

5. *Master and Servant—Personal Injury—"Probable" Results—Words and Phrases—Expert Evidence—Measure of Damages.*—Upon evidence tending to show that the plaintiff was injured by the defendant while working in a foundry with an imperfect appliance furnished him for the purpose, it is competent for his physician to testify, on the measure of damages, that the character of the wound inflicted was such that an eating cancer was "liable" to ensue, the word "liable" as used by him being in the sense of a "probable" consequence and not speculative; and it was also competent as tending to prove the acute mental suffering caused by the injury. *Alley v. Pipe Co.*, 327.

6. *Railroads—Rights of Way—Damages—Interest—Court's Discretion—Appeal and Error.*—It is within the power of the lower court, in passing upon a report of a referee in an action against a railroad company for the value of an easement in lands, to allow interest on the amount found by him since the actual taking by the railroad company of the owner's land for its right of way, as a part of the damages. *Abernathy v. R. R.*, 340.

7. *Railroads—Rights of Way—Damages—Judgment—Interest—Interpretation of Statutes.*—A judgment in the owner's favor, in the assessment of damages for lands taken for a right of way by a railroad company, bears interest by express provision of the statute. Revisal, sec. 1954 *Ibid.*

8. *Railroads—Rights of Way—Conveyance of Lands—Damages—Interpretation of Statutes—Parties.*—After the owner of lands has commenced his action against a railroad company to recover damages for taking a right of way thereon without compensation, the amount of the damages to be awarded is not affected by the fact that he conveyed a

MEASURE OF DAMAGES—*Continued.*

part of the *locus in quo* to another; and when the purchaser is not a party to the action, his claim upon his vendor in respect to the damages will not be considered. *Ibid.*

9. *Lumber Roads—Timber—Consideration—Contract to Build Railroad —Measure of Damages.*—A lumber company having purchased timber at a price less than its value, in consideration of the benefits to be derived by the vendors from a standard-gauge railroad it contracted to build, is liable in damages to the vendors for the difference between the price paid and the actual value of the timber, upon its failure to build the road it had contracted to build. *Herring v. Lumber Co.*, 382.

10. *Instructions—Construed as a Whole—Contracts—Breach—Measure of Damages.*—The charge of the judge, in this case, upon the measure of defendant's damages upon his counterclaim, alleged to have been received from failure on plaintiff's part to fulfill his part of the contract sued on, construed as a whole, is not held for reversible error, as the jury must have understood that defendant was to be awarded, as damages, the net profit he would have made under the contract upon a finding that plaintiff had failed in his duty to the defendant thereunder, with further pertinent instructions free from error. *Walker v. Cooper*, 536.

11. *Damages—Facts in Mitigation—Evidence—Pleadings.*—For evidence to show facts in mitigation of damages to be competent, the facts must be alleged in the answer. *Dickerson v. Dail*, 541.

12. *Contracts of Sale—Breach—Damages Remote—Continued Offer to Sell —Loss of Profits—Certainty of Admeasurement.*—In an action upon a breach of contract of a manufacturer of wire fencing to furnish a supply merchant with a sufficient quantity of the fencing for his trade during a certain period, it appeared that several car-loads of the wire were necessary for the purpose, and that the vendor had undertaken to send out and distribute among the vendee's customers, according to a list furnished, circulars advertising the merits of that particular fencing; that the vendee told vendor's agent that he would purchase only upon condition that he could get all he wanted; that in consequence of the transaction and the failure and refusal of the vendor to ship the second car-load, he had been prevented from obtaining his profits, in a certain sum, on sales he would otherwise have made in certain specified transactions: *Held*, (1) vendee was entitled to recover his profits so shown on the second car-load ordered, in any event, as the agreement constituted a continuing offer to sell before the withdrawal of the offer; (2) these profits were reasonably in the contemplation of the parties at the time of making the contract of sale, and the cost and selling price being fixed, were not difficult of ascertainment; and, *semble*, profits shown of this character could be recovered in the failure of the vendor to make further shipments embraced by the contract of sale. *Steel Co. v. Copeland*, 556.

13. *Deeds and Conveyances—Standing Timber—Payments as to Quantity Cut—Conditions—Measure of Damages.*—In an action to recover a greater quantity of timber growing upon certain described lands under an averment that a greater quantity had been purchased than the land contained, the deed provided that the vendee was to pay

MEASURE OF DAMAGES—*Continued.*

$2,000 before any of the timber should be cut, $2,000 when 600,000 feet had been cut not later than a certain date, and $2,000 when 600,000 feet more had been cut not later than a certain further date. The vendee made the two first payments, but there was evidence that only 387,000 feet of timber remained on the land. A judgment rendered upon the pleadings for the last payment of $2,000, *Held*, erroneous, the last payment being one upon the condition that 600,000 feet should first be cut, and as all the timber had been cut before the expiration of the period allowed, only such quantity as remained beyond that settled for under the second payment could be recovered, according to the contract price, by the defendant upon his counterclaim. *Hardison v. Dunn*, 579.

14. *Deeds and Conveyances—Fraud—Mortgages—Liens—Rents and Profits —Measure of Damages.*—The plaintiff being successful in her action to convert a deed into a mortgage to secure a loan for the purchase of land, wherein the right of redemption is found to exist, is entitled to recover the entire estate in the property, subject to the amount of the lien and interest, upon which amount the rents and profits for the period of her wrongful "ouster" are to be credited. *Culbreth v. Hall*, 588.

MENTAL ANGUISH. See Telegraphs and Telephones; Contracts.

MILEAGE BOOKS. See Carriers of Passengers.

MORTGAGES. See Partnership; Contracts; Equity; Landlord and Tenant.

1. *Mortgages — Prior Registration — Attaching Creditors.*—It appearing from a paper-writing that the maker intended it for a mortgage of certain personal property devised to him by his father, in the hands of the executors of his father's will, and made to them individually for moneys loaned by them to him: *Held*, that the registration of the mortgage prior to attachments issued by his creditor makes it superior to the creditor's lien, but only on property situated in the county where the mortgage was registered. *Williamson v. Bitting*, 321.

2. *Chattel Mortgages—Form of Registration—Interpretation of Statutes.*— There is no special statutory mode presented for the registration of a chattel mortgage (Revisal, sec. 1040). The provisions of Revisal, sec. 982, relate merely to an inexpensive form of mortgage. *Ibid.*

3. *Mortgages — Proceeds of Sale — Interest — Equity—Distribution—Attaching Creditors.*—Creditors secured by a mortgage, which was registered prior to attachments of other creditors of the mortgagor, when the mortgaged property has been sold under an agreement that the proceeds be held in place of the property and subject to the rights of the parties therein, are entitled to interest on their mortgage debt to be ascertained and paid to them in the final settlement. *Ibid.*

4. *Mortgages—Other Property—Assignments for Creditors.*—A mortgage given by a devisee on the property he is to receive under a will is not an assignment for the benefit of his creditors, in the absence of evidence that he owned no other property. *Ibid.*

MORTGAGES—*Continued.*

5. *Husband and Wife—Wife's Separate Property—Limitation of Actions—Mortgages—Foreclosure—Wife's Disability—Interpretation of Statutes.*—A married woman holds her separate real and personal property free from any debts, obligations, or engagements of her husband, according to the provisions of our Constitution and the Revisal, sec. 2093; and since chapter 78, Laws of 1899, removes the disability of marriage, and Revisal, sec. 408, allows a wife to maintain an action without the joinder of her husband when it concerns her separate property, and against her husband when it is between the husband and wife, and there being no exception in favor of the wife when she holds a claim against him, the statute of limitations will run against a note thus held by her. *Graves v. Howard*, 594.

6. *Contracts, Written — Condition Precedent — Parol Evidence.*—While parol evidence may not, as a rule, contradict the express terms of a written contract, the principle does not extend to the competency of evidence tending to show that the written instrument was to be effective only upon the performance of an unfulfilled condition precedent, as in such a case there never was a valid execution of the contract. *Garrison v. Machine Co.*, 285.

7. *Same — Mortgages — Delivery on Condition—Breach—Innocent Purchaser—Foreclosure—Measure of Damages.*—The purchasers of an engine gave a note and mortgage on their lands to secure the purchase price, which were transferred before maturity to an innocent purchaser for value, who, upon default in the payment of the note, foreclosed the mortgage by sale. In an action brought by the buyers of the engine against the seller for damages, it was held competent to show by parol evidence that the delivery of the note and mortgage was upon the condition precedent that the engine should prove satisfactory for a certain kind of work, which it could not do; and held, further, in this case, as it was found that the vendor had sold the note and mortgage given by the purchasers of the engine, to an innocent holder, in violation of this condition, and the mortgagors could not therefore redeem, the measure of damage was the value of the land sold under the mortgage. *Ibid.*

MOTIONS.

1. *Pleadings—Motion to Strike Out—Impanelment of Jury—Practice.*—A motion to strike out portions of the pleadings comes too late if made after the jury has been impaneled to try the cause, and should be denied. *Roller v. McKinney*, 319.

2. *Justice's Court—Appeal—Docketing—Motion to Dismiss—Practice.*—In an appeal from a judgment of a justice of the peace, the appellant paid the justice his fee for a transcript of the record, and at the next term of the Superior Court, which was held more than ten days after the rendition of the judgment, he inquired of the clerk of the court if the appeal had been sent up, and was mistakenly informed by him that it had not. The appellant, although he knew the case had not been docketed, did not apply for a *recordari*, nor to the justice for another return, nor did he file a verified copy of the return, under leave of the court, but attempted to docket his appeal at a

MOTIONS—*Continued.*

subsequent term: *Held*, that he was in laches, and the appeal was properly dismissed, on motion of appellee, under the ruling in *Peltz v. Bailey*, 157 N. C., 166. *Abell v. Power Co.*, 348.

3. *Evidence—Motions—Demurrer—Practice.*—Defendant's motion, in this case, for judgment upon the entire evidence is regarded as a motion of nonsuit under the statute, and comes too late after verdict. *Vaughan v. Davenport*, 369.

4. *Motion to Quash—Plea in Abatement—Waiver.*—One who fails, with full knowledge of the facts, to file his plea in abatement in apt time will be deemed to have waived his rights thereto. *S. v. Pace*, 462.

5. *Jurors—Opinion Formed and Expressed—Motion for New Trial—Delay—Practice.*—A motion to set aside a verdict on the ground that one of the jurors had formed or expressed his opinion, before he entered the box, that the prisoner was guilty, comes too late after verdict, when this was known to the prisoner before the argument of the case had been completed. *S. v. Watkins*, 480.

MURDER.

1. *Murder—Instructions—Verdict—Harmless Error.*—The prisoner having been acquitted of the charge of murder in the second degree, and found guilty of manslaughter: *Held*, an instruction upon the law of murder in the second degree, if erroneous, was harmless. *S. v. Watkins*, 480.

2. *Murder — Justification—Reasonable Apprehension—Surrounding Circumstances—Questions for Jury.*—Upon a plea of justification upon a trial for murder, the reasonableness of the apprehension of the prisoner that he was about to lose his life or suffer great bodily harm must be passed upon by the jury in view of the evidence and attending circumstances, and not found conclusively from the prisoner's own statement concerning his apprehension thereunder. The charge in this case held correct. *Ibid.*

3. *Murder—Justification—Self-defense—Officer.*—The same rules of law applicable to an individual pleading self-defense on a trial for murder govern when the same plea is interposed by an officer committing a homicide in making an arrest. *Ibid.*

NEGLIGENCE.

1. *Master and Servant—Safe Appliances—Patent Defects—Fellow-servant—Negligence—Evidence.*—The plaintiff was employed by the defendant in the construction of a railroad bed, and there was evidence tending to show that he was injured by the breaking of a rope, patently defective, and used in operating a pile driver with power furnished by a steam engine, and by the improper operation of the pile driver by another employee: *Held*, that the evidence was sufficient, upon the issue of defendant's negligence, to be submitted to the jury, and the rule of the fellow-servant does not apply. Revisal, sec. 2647. *Harmon v. Contracting Co.*, 22.

NEGLIGENCE—*Continued.*

2. *Master and Servant—Duty of Master—Delegation of Duty—Negligence—Respondeat Superior.*—It is the primary duty of the master, for which he cannot escape liability by delegating it to another, to exercise ordinary care in supplying his servant with reasonably safe tools and implements and a reasonably safe place in which to perform his work, and, also, to make such reasonable inspection as a man of ordinary prudence would make under similar conditions and circumstances. *Ibid.*

3. *Master and Servant — Safe Appliances — Negligence—Evidence—Nonsuit.*—Upon evidence tending to show that the master failed to furnish a safe appliance, in general use, to his servant, in this case a shield to protect his servant from flying wood which the servant was directed to cut for fire purposes at a swing cut-off saw, and that this device would have avoided an injury to the servant caused by a piece of wood from the stick he was sawing flying up and striking him, a judgment of nonsuit should not be allowed. *Parker v. Vanderbilt*, 133.

4. *Telegraphs — Messages—Negligence—Delivery—Jurisdiction—Measure of Damages.*—The sendee of a telegram delivered to the telegraph company in another State, where damages for mental anguish were not recoverable, may bring his action in this State in tort for negligent breach of duty occurring here, and recover such as may have naturally resulted from the wrong, that is, such as were reasonably probable under the circumstances existent at the time according to the law, statutory or otherwise, of North Carolina. Cases in which the measure of damages were regulated by rules obtaining on breach of contract discussed and distinguished by HOKE, J., showing that under the circumstances of the case at bar, where recovery in tort is sought, they were inapplicable, and, if otherwise, they were not intended to be controlling. *Penn v. Telegraph Co.*, 306.

5. *Master and Servant—Safe Appliances—Negligence—Delegated Authority.*—It is the duty of the master to furnish the servant reasonably safe appliances with which to do the work, which it cannot delegate to another servant and escape liability. *Alley v. Pipe Co.*, 327.

6. *Same—Res Ipsa Loquitur—Substantial Evidence.*—When one engaged in a foundry, and in the scope of his employment is injured by an explosion of gas which drove the molten metal out of an arbor which he was using, latently defective and made by another employee, who was unskilled in such work, which was known, or should have been known, to the master by the exercise of reasonable care, the negligence of the master in employing, or continuing to employ, the unskillful servant to make cores for the use of other employees in their work is actionable negligence. *Ibid.*

7. *Same — Inexperienced Employee—General Reputation—Expert Evidence.*—Upon the issue of defendant's negligence in employing an unskillful core-maker for making cores to be used in a foundry, with evidence tending to show that plaintiff was injured while handling molten iron with one of them, by reason of a latent defect therein, evidence is competent which tends to show the reputation of the core-maker for inefficiency, by those who are acquainted with it; and, also, the opinions of experts in that line of work as to whether, under the evidence, the cores were properly made. *Ibid.*

NEGLIGENCE—*Continued.*

8. *Cities and Towns—Streets and Sidewalks—Obstructions—Negligent Driving—Proximate Cause—Nonsuit.*—In an action against a city for personal injuries caused by plaintiff's being thrown from a vehicle which was overturned at night by one of its wheels striking a stump alleged to have negligently been left by the city on a street near the curbing, it appeared from the evidence of the plaintiff that he knew of the stump and could readily have seen it by an electric light, if he had been attentive to his driving: *Held*, the injury complained of was proximately caused by the inattention of the plaintiff, and a judgment of nonsuit was properly granted. *Ovens v. Charlotte*, 332.

9. *Negligence—Wrongful Death—Suit by Wife—Parties.*—A wife cannot maintain an action in her individual capacity to recover damages for the negligent killing of her husband. *Bennett v. R. R.*, 345.

10. *Negligence—Wrongful Death—Condition Annexed—Burden of Proof.*—The provision of Revisal, sec. 59, that suit shall be brought within one year from the wrongful killing of another, is a condition annexed to the recovery in an action for damages, and it must be proved by the plaintiff that he is within the time prescribed. It is not required to be pleaded. *Ibid.*

11. *Cities and Towns — Waterworks—Overflow—Negligence—Frightened Horses—Proximate Cause.*—When there is evidence tending to show that a city engaged in supplying its citizens with water has failed to provide a water gauge at its pump-house, by which its operator there could tell whether the standpipe, placed at a distance, was overflowing, and that its overflow frightened the horse of a person driving past, causing him injury, which would not otherwise have occurred, it is sufficient upon the question of actionable negligence; the overflowing standpipe, if causing the injury, being the proximate cause. *Woodie v. Wilkesboro*, 353.

12. *Railroads—Master and Servant—Disobedience of Orders—Proximate Cause—Instructions.*—In an action for damages brought by an employee of a railroad for an injury to his hand received in uncoupling an air-brake between two cars, the evidence upon the issue as to defendant's negligence was conflicting, alone presenting to the jury the question as to whether the uncoupling was done after the train had stopped or while it was in motion, which would be disobedience of the defendant's rules, of which the plaintiff was aware at the time. A charge was held to be erroneous which made no distinction, on the issue of negligence, whether the plaintiff attempted to disconnect the air-brake when the train was at a standstill or while it was in motion, and also in that the court instructed the jury that the defendant was not negligent if the injury was received by plaintiff's act in disobedience of orders, leaving out the question of proximate cause. *Fry v. R. R.*, 357.

13. *Master and Servant—Safe Appliances—Safe Place to Work—Negligence—Evidence—Nonsuit.*—In an action for damages for a personal injury received by the plaintiff while at work in the defendant's pipe foundry, there was evidence tending to show that while plaintiff was endeavoring to fix, at night, under protest to his superior, a badly

NEGLIGENCE—*Continued.*

worn and out of repair machine, for the purpose of cutting a heavy piece of pipe, he gave one of the dies a slight tap with a hammer which had been furnished him for the work, which was an improper one, and caused a small particle of steel to break and fly off from the die or hammer and strike the plaintiff in the eye, inflicting the injury complained of; that there was an insufficiency of light, by reason of two of the three incandescent electric lights at the place being negligently out of fix, leaving only one, which the plaintiff had to hold, causing his eye to be nearer his work, in a position not required had the light been sufficient, and that the injury would not otherwise have been inflicted: *Held*, a permissible inference that the proximate cause of the injury was the failure of the defendant to furnish a proper hammer and to provide adequate lights; that it was sufficient upon the question of actionable negligence, and defendant's motion to nonsuit was properly disallowed. *Young v. Fiber Co.*, 375.

14. *Navigable Waters—Bridges—Construction—Open Spaces—Passing Vessels—Obstructions—Negligence.*—While constructing a bridge over navigable waters, in this case across Albemarle Sound, under the authority of the State and War Department, it is the duty of the builder to have open space sufficient to enable passing vessels to go through, and to keep those spaces free from all obstructions that would endanger them. *Townsend v. Construction Co.*, 503.

15. *Same—Questions for Jury.*—When the evidence tends to show that the builder of a bridge across navigable waters had left an opening for the passage of vessels, and that the plaintiff's vessel was injured while attempting to pass through this opening by coming in contact with a raft of piling material swinging out into the opening, and which had been fastened by a rope to the side of the bridge, it is sufficient, in an action for damages to the vessel, to be submitted to the jury upon the question of defendant's negligence. *Whitehurst v. R. R.*, 156 N. C., 48, cited and distinguished. *Ibid.*

16. *Railroads — Negligence — Helpless on Track—Burden of Proof—Requisites.*—In his action to recover damages of a railroad company, for the negligent killing of his intestate, upon evidence tending to show that he was down and helpless upon the track at the time, the plaintiff must prove: (1) that the deceased was down on the track in an apparently helpless condition; (2) that the engineer could have discovered him in time to have stopped the train before reaching him, by the exercise of ordinary care; (3) that he failed to exercise such care, and as a direct result the deceased was killed. *Henderson v. R. R.*, 581.

17. *Same—Evidence.*—In this action against a railroad company for damages for the negligent killing of plaintiff's intestate, evidence held sufficient which tended to show that about two hours before he was killed he was asleep in a path near the cross-ties of defendant's railroad; that he was wakened and went to a near-by store; remained there a while; went back to the crossing and walked, while drunk and staggering, up the track in the direction where his body was found about two hours afterwards, at a distance of about two miles from the crossing, his head severed and on one side of the track,

NEGLIGENCE—*Continued.*

with his body on the other; that the train gave no signs of warning of its approach, under such conditions as would render the deceased observable to the engineer in time to have stopped his engine and have avoided the injury. *Ibid.*

18. *Railroads — Negligence—Helpless on Track—Statements—Coroner—Evidence.*—In this action against a railroad company for the alleged negligent killing of plaintiff's intestate while he was down on the track in a helpless condition, a statement of the engineer, taken before the coroner, that he saw a man lying on his left side with his hat on his head, so he could not tell whether he was white or black, was properly excluded. *Ibid.*

19. *Cities and Towns — Governmental Duties—Negligence.*—Unless the right of action is given by statute, a municipal corporation may not be held civilly liable to individuals for "neglect to perform or negligence in performing" duties which are governmental in their nature, which generally include all duties existent or imposed upon them by law solely for the public benefit. *Harrington v. Greenville*, 632.

20. *Same—Fire Departments.*—The maintenance and operation by a municipality of a fire department for the benefit of the public are duties of a governmental character, and, in the absence of a statute to that effect, a recovery may not be had for the negligent acts or omission of its officers or agents therein which cause damage to its citizens from fires. *Ibid.*

21. *Same—Inspection of Buildings.*—The general powers conferred on municipalities by section 2929, Revisal, and other sections thereof, and the powers to regulate, inspect, and condemn buildings, Revisal, sec. 2981, *et seq.*, are governmental in their character; and for negligent default therein on the part of a municipality and its officers or agents no action lies, none having been given by statute. *Ibid.*

22. *Cities and Towns—Governmental Duties—Water Plants—Business for Profit—Negligence—Damages.*—While a municipality engaged in a business enterprise for profit may be held liable in damages for an injury negligently inflicted, responsibility extends only to those burdens and liabilities incident to the business features of the enterprise; and the principle does not obtain, as in this case, in the negligent operation and maintenance of a water plant or system in connection with its fire department by reason of which the plaintiff sustained damages by fire to his property, as such matters are governmental and solely for the public benefit. *Ibid.*

23. *Cities and Towns—Fire Department—Dangerous Conditions—Negligence. — Nuisance — Damages—Governmental Duties—Demurrer.*—A cause of action against a municipality, alleging its negligent failure in permitting a building to remain in a condition to endanger surrounding houses from fire, and that the plaintiff's house was consequently destroyed to his damage, is in effect an action to hold the municipality liable for its negligent failure to abate a nuisance, which is a governmental function, exercised solely for the benefit of the citizens; and it is demurrable. *Ibid.*

NEGOTIABLE INSTRUMENTS. See Bills and Notes.

NOLLE PROSEQUI. See Malicious Prosecution.

NONSUIT.

1. *Cities and Towns—Streets and Sidewalks—Obstructions—Negligent Driving—Proximate Cause—Nonsuit.*—In an action against a city for personal injuries caused by plaintiff's being thrown from a vehicle which was overturned at night by one of its wheels striking a stump alleged to have negligently been left by the city on a street near the curbing, it appeared from the evidence of the plaintiff that he knew of the stump and could readily have seen it by an electric light, if he had been attentive to his driving: *Held*, the injury complained of was proximately caused by the inattention of the plaintiff, and a judgment of nonsuit was properly granted. *Ovens v. Charlotte*, 332.

2. *Nonsuit—Evidence, How Considered.*—Upon a motion for nonsuit, under the statute, or for defendant's prayer that on the entire evidence, if believed, the verdict should be for the defendant, the evidence should be construed in the light most favorable for the plaintiff, according to the doctrine announced in *Deppe v. R. R.*, 152 N. C., 79. *Young v. Fiber Co.*, 375.

3. *Master and Servant—Safe Appliances—Safe Place to Work—Negligence—Evidence—Nonsuit.*—In an action for damages for a personal injury received by the plaintiff while at work in the defendant's pipe foundry, there was evidence tending to show that while plaintiff was endeavoring to fix, at night, under protest to his superior, a badly worn and out of repair machine, for the purpose of cutting a heavy piece of pipe, he gave one of the dies a slight tap with a hammer which had been furnished him for the work, which was an improper one, and caused a small particle of steel to break and fly off from the die or hammer and strike the plaintiff in the eye, inflicting the injury complained of; that there was an insufficiency of light, by reason of two of the three incandescent electric lights at the place being negligently out of fix, leaving only one, which the plaintiff had to hold, causing his eye to be nearer his work, in a position not required had the light been sufficient, and that the injury would not otherwise have been inflicted: *Held*, a permissible inference that the proximate cause of the injury was the failure of the defendant to furnish a proper hammer and to provide adequate lights; that it was sufficient upon the question of actionable negligence, and defendant's motion to nonsuit was properly disallowed. *Ibid.*

4. *Same—"Ordinary Tools."*—It being established that the master furnished the servant a hard-tempered steel hammer with which to fix an old, badly worn machine to be used in cutting a heavy iron pipe in his foundry; that the hammer furnished was known to be dangerous for that class of work, a soft-metal hammer being safer for the purpose: *Held*, the master is responsible in damages for an injury proximately caused to the servant by the use of the improper hammer furnished him, and the doctrine of the use by the servant of "ordinary everyday tools and under ordinary everyday conditions" does not apply. *House v. R. R.*, 152 N. C., 397, cited and distinguished. *Ibid.*

NONSUIT—*Continued.*

5. *Nonsuit—Circumstantial Evidence—Province of Courts.*—Upon competent circumstantial evidence, when sufficient to raise more than "a possibility or conjecture" of the fact sought to be proved, it is the duty of the court, upon a motion to nonsuit, to give the evidence the interpretation most favorable to the plaintiff; and the court will not weigh the evidence to see if it is satisfying of the ultimate fact sought to be proved or say which theory arising therefrom should be adopted. *Henderson v. R. R.*, 581.

6. *Contracts—Offer to Lend Money—Incomplete as to Duration—Evidence—Damages—Nonsuit.*—In an action for damages for failure of the defendant to comply with its contract to lend money to the plaintiff, there must be evidence tending to show that the agreement had been made definite as to the maturity of the loan as well as to the amount, or a judgment of nonsuit in the defendant's favor will be granted. *Elks v. Insurance Co.*, 619.

OBSTRUCTIONS. See Cities and Towns; Water and Watercourses.

PARENT AND CHILD.

1. *Infants—Necessaries—Father's Wrongful Conduct—Emancipation of Son—Father's Liability.*—A father is responsible for necessaries furnished his son when he has wrongfully driven him from home and forced him to earn his own living; for though the father's act may have emancipated his son to the extent of depriving him of his right to the earnings of the son, it does not extend to his responsibility for necessaries furnished the son arising from conditions brought about by his own wrong. *Hunycutt v. Thompson*, 29.

2. *Same—Funeral Expenses.*—The responsibility of a father for necessaries furnished his son, whom he has driven from home and forced to make his own living, extends to funeral expenses of the son, necessarily incurred, which the father had not authorized. *Ibid.*

PARTIES.

1. *Pleadings—Misjoinder of Parties—Demurrer.*—A demurrer to a complaint for a misjoinder of a party plaintiff, on the ground that he is without interest in the suit, is bad. *Withrow v. R. R.*, 222.

2. *Wills—Caveat—Infants—Adverse Interests—Consent Judgment—Process.*—Where, in proceedings to caveat a will, the interests of minor children are involved, who are not properly represented, the issue of *devisavit vel non* cannot be answered by consent of the parties to the action so as to bind the infants. *Holt v. Ziglar*, 272.

3. *Corporations—Officers—Fraud—Debtor and Creditor—Parties*—An action by a creditor or stockholder will lie against the officers, including the directors, of a corporation for losses resulting from bare fraud or negligence, without his having first applied to the corporation to bring the action. *Braswell v. Bank*, 628.

PARTITION. See Tenants in Common.

1. *Executors and Administrators—Partition—Commissions—Interpretation of Statutes.*—An executor who sells his testator's land for parti-

PARTITION—*Continued.*

tion, and not in the execution of any trust under the will, is only entitled to commissions as provided by the statute. Revisal, sec. 2792. *Williamson v. Bitting*, 321.

2. *Estates, Contingent—Partition of Lands.*—Proceedings for partition of lands cannot be maintained when the plaintiff holds only a contingent interest in the lands, determinable on the death of the life tenant, who is still living at the time. *Vinson v. Wise*, 653.

PARTNERSHIP. See Pleadings.

1. *Partnership—Mortgages of a Partner—Receiver—Continued Business—Creditors—Priority of Payments.*—The indorsers on a note made to a bank of money borrowed for the purchase price of an interest of a retiring partner from a firm, secured by a mortgage on the partner's interest in the firm's assets, agreed with other creditors of the firm that a receiver, thereafter appointed, should continue the business, which he did, incurring further indebtedness of the firm by continued purchases. The indorsers paid off the bank indebtedness and brought suit to foreclose the mortgage: *Held*, the mortgage held by the indorsers is in subrogation to the rights of the bank, being on the individual interest of a partner, and was subject to the fluctuations in business and postponed to the payment of the firm's creditors; (2) that class of creditors of the firm who sold goods to the receiver had the right to prior payment to the class who existed at the time of the appointment of the receiver, and who consented to his continuing the business. *Ivie v. Blum*, 121.

2. *Partnership—Action of Debt—Parties—Pleadings.*—A partner cannot recover on a note owned by the partnership, in an action thereon brought solely in his own name, for all the partners are necessary parties, and the action must be brought in the partnership name. The answer in this case denied the ownership of the plaintiff, and *Brewer v. Abernathy*, *ante*, 283, cited and distinguished. *Roller v. McKinney*, 319.

PAYMENTS. See Contracts; Deeds and Conveyances.

PENALTY STATUTES. See Sales.

County Commissioners—Penalty—Jurisdiction—Justice of the Peace—Appeal.—An action against a county commissioner for the penalty of $200 prescribed by Revisal, sec. 3590, for neglecting to perform the duties required of him, and to be paid to the party suing therefor, etc., is *ex contractu*, and is originally cognizable in the court of a justice of the peace, and hence is not open to a party seeking its recovery originally in the Superior Court. *Templeton v. Beard*, 63.

PLEADINGS. See Judgments.

1. *Process—Amendments—Interpretation of Statutes.*—It is the policy of our Code system to be liberal in allowing amendments of process, pleadings, and proceedings, so that causes may be tried upon their merits, and to prevent a failure of justice for reasons which may be technical or frivolous, not affecting the substantial rights of the parties. Revisal, sec. 507. *Page v. McDonald*, 38.

PLEADINGS—*Continued.*

2. *Pleadings—Plea in Bar—Former Action—Answer—Joinder—Demurrer—Practice.*—A defendant may demur to a complaint from which it appears that another action is pending between the same parties for the same cause, Revisal, sec. 475 (3); and when it does not so appear, the objection may be taken by answer to the merits, joined with a plea in bar. Revisal, 477. *Cook v. Cook*, 46.

3. *Same—Appeal and Error—Harmless Error.*—In an action for divorce the answer set up a plea in abatement that an action was then pending between the same parties for the same cause, and further answered to the merits: *Held*, error for the trial judge to require the defendant to withdraw his answer to the merits before considering his plea in abatement, but harmless when it appears on appeal that his plea was bad. *Ibid.*

4. *County Commissioners—Negligence—Individual Responsibility—Corruption and Malice—Pleadings—Evidence.*—To recover individually of county commissioners for their acts or omissions as such, involving an exercise of discretionary powers, it is necessary to allege and prove that they acted or failed to act "corruptly or of malice," and that principle is not affected by the fact that in other and many instances they act ministerially. *Templeton v. Beard*, 63.

5. *Pleadings—Limitation of Actions—Burden of Proof.*—Upon defendant's plea of the statute of limitations in an action upon contract, the burden of proof is upon the plaintiff to show that his cause of action is not barred. *Sprinkle v. Sprinkle*, 81.

6. *Pleadings—Allegations—Burden of Proof.*—The burden of proof is on the relator in a contested election for office, who alleges that the defendant is in possession and that he, the relator, received the majority of votes cast. *Jones v. Flint*, 87.

7. *Pleadings — Partnership—Corporation—Evidence—Demurrer—Waiver.*—When suit is brought in the name of a partnership, objection that it does not appear whether the plaintiff is a partnership or a corporation is deemed to be waived unless taken advantage of by a written demurrer or answer, and comes too late upon demurrer to the evidence. *Brewer v. Abernathy*, 283.

8. *Pleadings—Motion to Strike Out—Impanelment of Jury—Practice.*—A motion to strike out portions of the pleadings comes too late if made after the jury has been impaneled to try the cause, and should be denied. *Roller v. McKinney*, 319.

9. *Partnership—Action of Debt—Parties—Pleadings.*—A partner cannot recover on a note owned by the partnership, in an action thereon brought in his own name, for all the partners are necessary parties, and the action must be brought in the partnership name. The answer in this case denied the ownership of the plaintiff, and *Brewer v. Abernathy, ante*, 283, cited and distinguished. *Ibid.*

10. *Pleadings—Prayers for Judgment—Relief Granted.*—The facts alleged in the pleadings determine the nature of the relief to be granted, and the form of the prayer for judgment is not material. *Herring v. Lumber Co.*, 382.

PLEADINGS—*Continued.*

11. *Pleadings—Joinder of Actions—Alternate Relief.*—A plaintiff may unite two causes of action relating to the same transaction and have alternate relief, that is, a judgment upon either one or the other of the causes alleged. *Ibid.*

12. *Issues—Misleading—Pleadings.*—Issues should be framed from the pleadings, and those in this case are not commended. *Westfelt v. Adams*, 409.

13. *Pleadings—Agreements—Writing—Custom—Appeal and Error.*—Agreements of extension of time to plead beyond the statutory period must be in writing to be recognized by the courts; and the fact that the party litigant had employed an attorney in another county where there was "a custom" to allow sixty days to answer, is not such excusable neglect as will warrant the court on appeal to set aside a judgment rendered, for the want of an answer. *Hardware Co. v. Buhmann*, 511.

14. *Pleadings—Lis Pendens—Notice.*—A complaint containing the names of the parties, the object of the action to set aside a deed to lands for fraud in its procurement, given when a mortgage to secure the balance of the purchase price of the lands should have been executed and a description of the lands is a *lis pendens*, and is notice to a subsequent purchaser without the necessity of filing a separate and formal notice. *Culbreth v. Hall*, 588.

PRACTICE.

1. *Mandamus — Mandatory Injunction — Equity — Courts—Practice.*—In this State, where both legal and equitable jurisdiction is vested in the same court, there is very little difference in its practical results between proceedings in mandamus and by mandatory injunction, the former being permissible when the action is to enforce performance of duties existent for the benefit of the public, and the latter being confined usually to causes of an equitable nature, and in enforcement of rights which solely concern individuals. *Telephone Co. v. Telephone Co.*, 9.

2. *Process—Returns—Jurisdiction—Amendments, Effect of—Procedure—Practice.*—Where process is erroneously made returnable before the clerk, instead of to the term of the court, the court at term, having acquired jurisdiction, may make all necessary amendments of the process and proceedings, in order to give it effectual jurisdiction, if no intervening and vested right is injuriously affected; and when the process is thus amended, it justifies the original service or any official action previously taken under it. *Page v. McDonald*, 38.

3. *Attachments—Defense After Judgment—Appeal and Error—Practice.*—The court having erroneously refused to vacate a judgment obtained in proceedings in attachment against a nonresident defendant by publication of summons, the judgment appealed from is ordered to be set aside and the defendant allowed to answer or file other pleadings within a reasonable time, to be fixed by the trial court. The property attached will remain in the custody of the court to await the determination of the action, unless replevied under the provisions of the Revisal, secs. 774, 775. *Ibid.*

PRESUMPTIONS.

1. *Tax Sales—Notice—Purchaser—Evidence—Presumptions.*—The statutory notice required to be given by a purchaser of lands at a sale for taxes (Revisal, sec. 2903) is a condition precedent to the execution of a valid deed, and the purchaser must show that it has been given, there being no presumption of that fact from a recital in the sheriff's deed. *Rexford v. Phillips*, 215.

2. *Tax Sales — Tax Deeds — Evidence — Presumptions — Rebuttal.*—The sheriff's deed to lands sold for taxes is presumptive evidence that the lands have been listed, which may be rebutted by the evidence. The presumption is rebutted in this case by the admitted facts. *Ibid.*

3. *Carriers of Goods—Connecting Carriers—Live Stock—Delivery in Bad Condition—Presumptions—Burden of Proof.*—When a shipment of live stock is made over connecting lines of carriers, and delivered in bad condition to the consignee, there is a presumption, in an action for damages against the delivering carrier, that the injury occurred on its line, under the principle that, as between the plaintiff and defendant, the latter is peculiarly in a position to know the facts, the burden of proof should rest on it. *Beville v. R. R.*, 227.

4. *Cherokee Lands—Grants—Burden of Proof—Presumptions.*—The defendant having introduced his grants for lands lying in Macon County west of the Meigs and Freeman line, which were issued 10 November, 1854, upon entries made 15 February, 1850: *Held*, in the absence of proof to the contrary, it will be assumed that the lands entered were a part of those acquired by the State from the Cherokee Indians in 1817 and 1819, which were open to entry at that time, if there were no other land in that county then subject to entry. *Westfelt v. Adams*, 409.

5. *State's Lands—Grants—Presumptions—Vacant Lands—Evidence—Collateral Attack.*—While it is true that a State's grant of land cannot be attacked collaterally for fraud or irregularity, and there is a presumption that it is valid and that all requisite preliminary steps have been taken, the officer must have had power or jurisdiction to issue the grant, and it may be shown collaterally that the lands described in the entries and grants were not subject to entry. *Ibid.*

6. *Liability Insurance—Evidence of Indemnity—Prejudicial Questions—Correction—Presumptions—Courts—Discretion.*—It is not a relevant circumstance, in an action for damages for personal injuries negligently inflicted, whether or not the defendant's liability is protected under an insurance policy; and if plaintiff has asked a question of this character in bad faith, before the jury has been impaneled, and which likely operated to defendant's prejudice, a recovery against him should not be allowed to stand. The presumption, however, is that the court below properly corrected any prejudice which may have been produced and that intelligent jurors rejected it; and therefore the matter is largely left in his discretion. *Featherstone v. Cotton Mills*, 429.

7. *Recorders' Courts—Statutory Misdemeanors—Second Offense—Indictment—Presumptions.*—When the Legislature had conferred original, exclusive jurisdiction upon a recorder's court of an incorporated city or town, or larceny of goods not exceeding $20 in value, for the first

PRESUMPTIONS—*Continued.*

offense committed, making it a petty misdemeanor, punishable by imprisonment in the county jail or on the public roads not exceeding a longer period than a year, and a conviction is had thereunder, it is presumed, upon the failure of the warrant to charge a second offense, that the conviction was for the petty misdemeanor within the terms of the statute. *S. v. Dunlap*, 491.

8. *Federal Questions—Objections and Exceptions—Practice—Intoxicating Liquors—Sales—Presumptions—Statutes.*—When a Federal question arises it must be presented by an exception taken at the trial upon the merits, and be reviewed on appeal in that case. *Semble*, that under chapter 20, Laws of 1915, making the possession of more than two gallons of whiskey *prima facie* evidence of the illegal sale, no Federal question can arise. *S. v. Dunn*, 470.

PRINCIPAL AND AGENT. See Attorney and Client; Sales.

1. *Carriers of Passengers—Mileage Books—Exchange Tickets—Conditions—Conductor—Principal and Agent—Waiver.—Semble*, it is not optional with the conductor on the train to waive the requirement that a purchaser of a mileage book, riding on an exchange ticket, exhibit the mileage book to him. *Mason v. R. R.*, 183.

2. *Telegraph—Collect Message—Principal and Agent—Application of Money—Negligence—Damages.*—A husband and wife sued for damages for mental anguish caused by the failure to send a message the husband had addressed to her. The next day the wife sent a message to another person, charges collect, inquiring as to where her husband was. The addressee of the last message instructed the defendant's agent to apply the money paid for the first message to the charges on the second one: *Held*, the addressee of the second message was without authority to thus direct the application of the money; and further, as the negligence had theretofore occurred, recovery was not barred by one payment of charges. *Christmon v. Telegraph Co.*, 195.

3. *Carriers of Goods—Live Stock—Connecting Lines—Terminal Carriers—Possession—Principal and Agent—Evidence.*—Where there is a nonsuit upon the evidence, in an action against a delivering carrier for damages in transit to live stock shipped over several roads, the possession of the live stock by that carrier, and its conduct and dealings with the consignee with reference to the shipment, were held to be sufficient evidence of the authority of the defendant's agent, upon whom demand had been made to settle the loss, without the necessity of introducing the bill of lading of the initial carrier under which the shipment was made. *Beville v. R. R.*, 227.

4. *Deeds and Conveyances—Principal and Agent—Acceptance of Benefits—Waiver.*—The owner of lands who has accepted the benefits of a sale thereof induced by the fraudulent representation of his sales agent, acting within the apparent scope of his authority, is bound by the transaction, and the doctrine of *respondeat superior* applies. *Stewart v. Realty Co.*, 230.

5. *Discharged Employee—Principal and Agent—Evidence—Questions for Jury.*—A railroad company, upon the request of a discharged engi-

PRINCIPAL AND AGENT—*Continued.*

neer, made reports to several railroad companies to whom the employee had applied for work, of such character as to prevent his being employed by them, with a statement that the employee was suing the railroad for damages for a personal injury. In his action against his former employer, under chapter 858, Laws 1909, the employee alleged and offered evidence tending to show that the report was untrue. It appearing that the one who made the report was duly authorized to make it by the defendant company, and that the suit referred to was thereafter settled upon a payment to the employee of substantial damages, and the employer knowingly continued to make the same statements: *Held*, the question should have been submitted to the jury upon the question of malice, and that the statement as to the suit was not a privileged communication as a matter of law. *Seward v. R. R.*, 241.

6. *Principal and Agent—Deceased Agent—Declarations—Evidence—Interpretation of Statutes.*—Declarations of a deceased agent of a party litigant made at the time of a transaction for his principal, and within the scope of his authority as such, is not a conversation with a deceased person within the meaning of Revisal, sec. 1631. *Walker v. Cooper*, 536.

7. *Principal and Agent—Declarations—Evidence of Agent—Contradictions—Discretion of Court.*—The declarations of agent as to an alleged contract made by him for his principal after the event are incompetent as evidence, but may be admitted by the trial judge, in his discretion, subject to the condition that they be thereafter made competent; and in this case they are held competent in contradiction of the evidence of the agent as to the terms of the contract. *Steel Co. v. Copeland*, 556.

PRIVILEGED COMMUNICATIONS. See Master and Servant.

PROBABLE CAUSE. See Malicious Prosecution.

PROBATE. See Deeds and Conveyances.

PROCESS.

1. *Process—Pleadings—Amendments—Interpretation of Statutes.*—It is the policy of our Code system to be liberal in allowing amendments of process, pleadings, and proceedings, so that causes may be tried upon their merits, and to prevent a failure of justice for reasons which may be technical or frivolous, not affecting the substantial rights of the parties. Revisal, sec. 507. *Ibid.*

2. *Process—Returns—Jurisdiction—Amendments, Effect of Procedure—Practice.*—Where process is erroneously made returnable before the clerk, instead of to the term of the court, the court at term, having acquired jurisdiction, may make all necessary amendments of the process and proceedings, in order to give it effectual jurisdiction, if no intervening and vested right is injuriously affected; and when the process is thus amended, it justifies the original service or any official action previously taken under it. *Ibid.*

PROCESS—*Continued.*

3. *Power of Courts—Process—Amendments—Change of Cause.*—The court has no power to convert a pending action that cannot be maintained into a new or different action by amendment of process or pleadings. *Bennett v. R. R.*, 345.

4. *Same—Wrongful Death—Executors and Administrators—Interpretation of Statutes.*—In an action to recover for the wrongful death of another (Revisal, sec. 59), brought by the wife individually, the court has no power to allow an amendment to the summons so as to change the action into one by her in an administrative capacity. *Ibid.*

5. *Water and Watercourses—Riparian Owners—Vested Rights—Due Process—Constitutional Law.*—When riparian rights in a river have become vested, the owner of the lands holds them subject to the rights of the public, as, for instance, the right of navigation, and can only be deprived of them by due process of law and upon compensation being paid him. *Power Co. v. Navigation Co.*, 393.

6. *Special Appearance—Jurisdiction—Waiver.*—A party by entering a general appearance in an action remedies any irregularity in the service of the summons on him. *Grant v. Grant*, 528.

PUBLIC ROADS. See Roads and Highways; Constitutional Law.

PUBLIC SERVICE. See Corporations.

PUNITIVE DAMAGES. See Measure of Damages.

PURCHASER. See Sales.

QUESTIONS AND ANSWERS. See Appeal and Error.

QUO WARRANTO.

Appeal and Error—Record—Quo Warranto—Admissions—Corrections——Consent of Attorney-General—Interpretations of Statutes—Practice. It appearing that, by inadvertence, the record in this action of *quo warranto* to try the title of office did not show that permission of the Attorney-General was given according to the requirements of Revisal, sec. 826, it is held that proof of such permission given anterior to the commencement of the action may be offered upon the new trial awarded, and upon failure thereof the action may be dismissed. *Midgett v. Gray*, 443.

RAILROADS.

1. *Railroads—Negligence—Persons Drunk on Track—Admissions in Pleadings—Evidence—Questions for Jury.*—In an action for the negligent killing of plaintiff's intestate by defendant railroad company, a motion for nonsuit should be denied when the defendant's answer alleges that the intestate was lying drunk upon the track when struck and killed, and the evidence tends to show that he should have been seen by defendant's engineer and fireman in time to have avoided the killing; that had the speed of the train been within that allowed by the town ordinance the train could have been stopped in time; that the train was running through a populous part of a town and

RAILROADS—*Continued.*

where pedestrians were accustomed to walk upon the track, especially Saturday and Sunday nights, and that the intestate was killed on Saturday night. *Holman v. R. R.*, 44.

2. *Railroads—Parties—Residence—Venue—Executors and Administrators —Residence—Interpretation of Statutes.*—*Semble*, that the provision in Revisal, sec. 424, that actions against a railroad shall be tried "where the plaintiff resided at the time the cause of action arose," when applied to an action of an administrator for the negligent killing of his intestate, has reference to the residence of the individual holding the office, and not to the official residence or place where he may have qualified. *Smith v. Patterson*, 138.

3. *Railroads—Joinder of Parties—Venue—Residence—Removal of Causes.* —In an action for damages to recover of a railroad company and its engineer for the negligent killing of plaintiff's intestate, the cause is not removable if the defendant engineer is a resident of the county wherein the action has been brought, though the other parties to the controversy are not residents thereof and the cause of action did not accrue therein. Revisal, sec. 424. *Ibid.*

4. *Railroads, Domestic—Personal Injuries—Damages—Venue—Adjoining County—Interpretation of Statutes.*—The provisions of Revisal, sec. 424, permitting a plaintiff to sue a railroad for damages for a personal injury in an adjoining county to that wherein the cause of action arose, applies to all railroad companies. *Forney v. R. R.*, 157.

5. *Master and Servant—Discharged Employee—Railroads—Express Malice —Interpretation of Statutes.*—When a report is made by one railroad company to another upon a discharged engineer, the report is regarded as privileged, and in the absence of express malice no cause of action can be based on its publication. (Chapter 858, Laws 1909.) The doctrine is especially applicable in instances of this kind where the interest of the public and of the other employees make it necessary that only competent and careful men fill such responsible positions. *Seward v. R. R.*, 241.

6. *Railroads—Rights of Way—Damages—Limitation of Actions.—Interpretation of Statutes.*—Revisal, sec. 394, in regard to bringing an action against a railroad for damages for a right of way taken by it without condemning the same or acquiring the easement by purchase, is a statute of limitation, and must be specially pleaded by the railroad company, if relied on; and it is not required of the owner to affirmatively show that he has commenced his action within the time specified, as it is not a condition annexed to his cause of action. *Abernathy v. R. R.*, 340.

7. *Railroads—Rights of Way—Damages—Interest—Court's Discretion— Appeal and Error.*—It is within the power of the lower court, in passing upon a report of a referee in an action against a railroad company for the value of an easement in lands, to allow interest on the amount found by him since the actual taking by the railroad company of the owner's land for its right of way, as a part of the damages. *Ibid.*

RAILROADS—*Continued.*

8. *Railroads—Rights of Way—Damages—Judgment—Interest—Interpretation of Statutes.*—A judgment in the owner's favor, in the assessment of damages for lands taken for a right of way by a railroad company, bears interest by express provision of the statute. Revisal, sec. 1954. *Ibid.*

9. *Railroads—Rights of Way—Conveyance of Lands—Damages—Interpretation of Statutes—Parties.*—After the owner of lands has commenced his action against a railroad company to recover damages for taking a right of way thereon without compensation, the amount of the damages to be awarded is not affected by the fact that he conveyed a part of the *locus in quo* to another; and when the purchaser is not a party to the action his claim upon his vendor in respect to the damages will not be considered. *Ibid.*

10. *Railroads—Master and Servant—Disobedience of Orders—Proximate Cause—Instructions.*—In an action for damages brought by an employee of a railroad for an injury to his hand received in uncoupling an air-brake between two cars, the evidence upon the issue as to defendant's negligence was conflicting, alone presenting to the jury the question as to whether the uncoupling was done after the train had stopped, or while it was in motion, which would be disobedience of the defendant's rules, of which the plaintiff was aware at the time. A charge was held to be erroneous which made no distinction, on the issue of negligence, whether the plaintiff attempted to disconnect the air-brake when the train was at a standstill or while it was in motion, and also in that the court instructed the jury that the defendant was not negligent if the injury was received by plaintiff's act in disobedience of orders, leaving out the question of proximate cause. *Fry v. R. R.*, 357.

11. *Same—Illegal Promise—In Pari Delicto.*—A lumber company cannot avail itself of the defense, in an action for damages, that it was prohibited by our statute, Revisal, sec. 2598, from building a standard-gauge railroad, in consideration of which it had obtained the plaintiff's timber at a less price than its actual value; for if the stipulation to construct the road is invalid, the plaintiffs, though they should be *particeps criminis*, are not *in pari delicto*. *Herring v. Lumber Co.*, 382.

12. *Same—Implied Promise to Repay.*—The vendors of timber at a price less than its value, in consideration of the benefits to be derived from the construction of a standard-gauge railroad by a lumber company, which the latter had contracted to build, but were unauthorized by law to do, may recover damages on the promise created by law to repay money of the plaintiffs improperly obtained. *Edwards v. Goldsboro*, 141 N. C., 60, cited and distinguished. *Ibid.*

13. *Lumber Roads—Timber—Illegal Consideration—Contract to Build Railroad—Evidence.*—In this case it was alleged that the defendant lumber company obtained deeds to plaintiff's timber for a less price than its value in consideration of an agreement that it would build a standard-gauge railroad, which would be beneficial to the plaintiff: *Held*, evidence of the agreement of defendant to build the railroad was erroneously excluded. *Ibid.*

RAILROADS—*Continued.*

14. *Contributory Negligence—Evidence—"Look and Listen" —Railroads—Warnings.*—Upon the admission of the parties in this action for damages for the negligent killing of plaintiff's intestate: *Held*, the plaintiff is barred of recovery owing to the intestate's contributory negligence in stepping upon the track of the defendant, under the circumstances, without looking or listening, and without introducing evidence tending to show that the defendant's passing train, which caused the death of the intestate, was not giving the customary signals or warning of its approach. *Gainey v. R. R.*, 453.

15. *Railroads—Subscriptions of Stock—Deeds and Conveyances—Escrow —Consideration—Location of Depot—"On" Certain Town Limits—Evidence—Contracts.*—When a deed to lands is given for a subscription to the stock of a railroad company in the course of constructing its lines, placed in escrow, to be "null and void" if the grantee "fails to construct a depot on the southern limits of H," a small town, and where the grantor owned other lands: *Held*, in an action to compel the delivery of the deed, that, construing the word "on" as meaning "near to" the southern limits of the town, the provision upon which the delivery of the deed was made to rest was not complied with by the grantee locating the depot 1,450 feet from the southern boundary, when, from the size of the town, this location placed the depot 100 feet from its eastern boundary, within 300 feet of the northern boundary, thus locating it in the northeastern part of the town. *Bridgers v. Beaman*, 521.

16. *Same—Town Charter.*—A provision in a deed to lands given for subscription to stock in a railroad, placed in escrow to be delivered when a line of the railroad, in the course of construction, should locate its depot "on the southern limits" of a named town, the location of the "southern limits of the town" is found by referring to the charter in force at the time of the deed, and not to that named in a subsequent charter. *Ibid.*

17. *Cities and Towns—Railroads—Use of Streets—Franchise—Contracts—Consideration—Prospective Conditions.*—When the express consideration for a franchise given by a city to a railroad company for the latter to have a right of way for its railroad through a street is that the railroad shall keep and preserve the street in good order for the use of the citizens of the town, the railroad, by operating under its franchise, impliedly promises to perform the same obligations in respect to keeping up this street as the municipality should owe to its citizens, contemplating the growth of the city and such improvements as would be suitable and proper in the future. *New Bern v. R. R.*, 542.

18. *Railroads—Construction—Embankments—Damages—Limitation of Actions—Interpretation of Statutes.*—An action against a railroad company for damages caused to plaintiff's lands by an embankment built by the defendant's grantor, a railroad company, which at the time of its erection produced the same physical conditions, necessarily causing the same or substantial injury and interference on plaintiff's lands that have existed since, is barred by the statute of limitations after five years. Revisal, sec. 394, subsec. 2. *Campbell v. R. R.*, 586.

RECONVERSION. See Wills.

RECORD. See Appeal and Error.

REFERENCE.

Reference — Findings of Fact — Widow's Year's Support — Appeal and Error.—A finding of the referee, confirmed by the lower court upon supporting evidence, that the widow of a decedent was reasonably entitled to the sum of $3,000 as a proper support during several years, will not be disturbed on appeal, upon the exception of the creditors of an heir at law that it had been wrongfully applied to her support, the will providing that she should have a reasonable support from his estate. *Williamson v. Bitting*, 321.

REGISTRATION. See Deeds and Conveyances; Mortgages; Liens.

RELIGIOUS SOCIETIES.

Wills—Latent Ambiguity—Religious Institutions.—One who was an active member of a Baptist church in a certain locality, and during his life contributed to its foreign, home, and State missions, its orphanage, and other causes, devised and bequeathed certain of his property to (*a*) the Home Missions of the Baptist denomination; (*b*) to the Foreign Missions of the Baptist church; (*c*) to the Thomasville Orphanage: *Held*, it was competent to show by parol or extrinsic evidence that the intended donees were, (*a*) the Home Mission Board of the Southern Baptist Convention; (*b*) the Foreign Mission Board of the Southern Baptist Convention; (*c*) the Trustees of the Thomasville Baptist Orphanage; and that these were the only institutions of the church of which he was a member that he could have intended as the beneficiaries under his will. *McLeod v. Jones*, 74.

REMAINDERS. See Equity.

REMOVAL OF CAUSES.

1. *Railroads—Joinder of Parties—Venue—Residence—Removal of Causes.* In an action for damages to recover of a railroad company and its engineer for the negligent killing of plaintiff's intestate, the cause is not removable if the defendant engineer is a resident of the county wherein the action has been brought, though the other parties to the controversy are not residents thereof and the cause of action did not accrue therein. Revisal, sec. 424. *Smith v. Patterson*, 138.

2. *Special Appearance—Jurisdiction—General Appearance.*—A special appearance may only be entered for the purpose of moving to dismiss for want of jurisdiction, and when it is made for the purpose of a motion to remove the cause to another county, the appearance is general, by whatever name the party may designate it. *Grant v. Grant*, 528.

REVISAL.

SEC.

59. Action for wrongful killing is statutory, and must be brought within the year by personal representative, etc. *Bennett v. R. R.*, 345.

394. The statute of limitations will run against an action against a railroad for taking land without condemnation, and must be pleaded if relied on. *Abernathy v. R. R.*, 340.

REVISAL—*Continued.*

SEC.

394 (2). Action for damages caused by construction of railroad embankment and continuing from original construction, barred by the statute. *Campbell v. R. R.*, 586.

395. When not under seal, an agreement to arbitrate is a contract between the parties, and the three-year statute applies. *Sprinkle v. Sprinkle*, 81.

424. This section applies to all railroad companies. *Forney v. R. R.*, 157.

424. A railroad company's engineer being resident of the county where the injury was inflicted, a suit against him and the company is not removable therefrom. *Semble*, it could be brought where administrator resided. *Smith v. Patterson*, 138.

442. When affidavits for publication of summons and notice of attachment are sufficient. *Page v. McDonald*, 38.

475 (3.) A demurrer may be made during the pendency of another action between the same parties for the same cause. *Cook v. Cook*, 46.

477. Objection may be taken by answer on merits with a plea in bar, in an action for the same cause between the same parties. *Cook v. Cook*, 46.

507. Irregularity of service by publication and warrant of attachment may be cured by amendment. *Page v. McDonald*, 38.

509. Irregularity of service by publication and warrant in attachment may be cured by amendment. *Page v. McDonald*, 38.

759. When affidavit for publication of summons and notice of attachment are sufficient. *Page v. McDonald*, 38.

774. In this case, in proceedings in attachment against a nonresident, judgment below is set aside and defendants allowed to answer, the property remaining in the custody of the court. *Page v. McDonald*, 38.

775. In this case, in proceedings in attachment against a nonresident, judgment below is set aside, and defendants allowed to answer, the property remaining in the custody of the court. *Page v. McDonald*, 38.

826. In action of *quo warranto*, the consent of Attorney-General may be shown anterior to the commencement of the action, upon a new trial. *Midgett v. Gray*, 443.

967. The "four months" period next preceding making of a deed of assignment is counted from the date of deed, and not from registration. Consideration sufficient. *Wooten v. Taylor*, 604.

968. The trustee in a general deed of assignment is not controlled by a recitation in a deed giving a former mortgagee a priority of claim. *Wooten v. Taylor*, 604.

969. The "four months" period counted from the making of deed of assignment, and not from registration. Consideration sufficient. *Wooten v. Taylor*, 604.

970. The "four months" period counted from the making of deed of assignment, and not from registration. Consideration sufficient. *Wooten v. Taylor*, 604.

REVISAL—*Continued.*

SEC.

972. The "four months" period counted from the making of deed of assignment, and not from registration. Consideration sufficient. *Wooten v. Taylor*, 604.

982. The purpose of this section was only to provide an inexpensive form of chattel mortgage. *Williams v. Bitting*, 321.

1040. No special statutory mode for registration of chattel mortgage. *Williams v. Bitting*, 321.

1044. This section barring the foreclosure of a mortgage, when the note it secures is barred, only affects an existing remedy, and applies when a reasonable time has been given for action on existing contracts. *Graves v. Howard*, 594.

1224. Interest is not chargeable against the receiver of a corporation. *Pants Co. v. Insurance Co.*, 78.

1277. Appellee may not be taxed with cost unless shown he was acting in bad faith. *Thompson v. Smith*, 439.

1318. County commissioners given governmental control of county affairs. *Bunch v. Commissioners*, 335.

1318 (27). Counties may contract debts for necessary road purposes, without the necessity of a special act; or if bonds are issued under a special act, the terms of the act are complied with, without "aye" and "no" vote. *Pritchard v. Commissioners*, 636.

1421. Upon remitting excess of amount sued for on contract, a justice of the peace has jurisdiction. *Brock v. Scott*, 513.

1421. Plaintiff having remitted excess over $200, and obtained judgment in justice's court, on defendant's appeal may take voluntary nonsuit and sustain his separate action in the Superior Court, the excess remitted in the justice's court being a waiver, however, of his rights to recover it. *Brock v. Scott*, 513.

1569. A defect that complaint in action for divorce has not been properly verified, is jurisdictional. *Grant v. Grant*, 528.

1631. Testimony of a party adverse to his interest is competent. *In re Fowler*, 203.

1631. When under the doctrine of principal and agent the declarations of agent are admissible, they are not prohibited as evidence under this section. *Walker v. Cooper*, 536.

1822 (2). Writ of *habeas corpus* is not of the nature of a writ of error, and will not be heard on appeal from final judgment of a court of competent jurisdiction. *S. v. Dunn*, 470.

2093. The statute of limitations may now bar the husband's claim against his wife, when it concerns her separate property. *Graves v. Howard*, 594.

2094. A justice of the peace has jurisdiction of an action against a *feme covert* for a debt for her necessary personal expenses or the support of the family. *Robinson v. Jarrett*, 165.

2598. A lumber company may not show that it had no power to build a standard-guage railroad that it contracted to do upon a consideration, both parties being *in pari delicto*. *Herring v. Lumber Co.*, 382.

2647. The breaking of a partially defective rope, inflicting injury on an employee, etc.: *Held*, evidence for the jury, in this case. *Harmon v. Contracting Co.*, 22.

REVISAL—*Continued.*

SEC.

2690. An appeal from county commissioners' order laying out a highway vacates the order, and does not come under this section as to its maintenance and workings, and under indictment for not working it, the trial is *de novo* in Superior Court upon issues raised. *S. v. Davis*, 455.

2792. On a sale by an executor of lands his commissions are only those provided by statute, when not made in the execution of a trust. *Williamson v. Bitting*, 321.

2929. General powers conferred on municipalities by this section are governmental, for which they are not liable in damages for negligence. *Harrington v. Greenville*, 632.

2629. A carrier has the right ordinarily to require the user of a mileage book to show his mileage book in connection with his ticket. *Mason v. R. R.*, 183.

2830. The repeal of Revisal, sec. 3028b, does not affect an action theretofore commenced. *Smith v. Ice Co.*, 151.

2903. Notice must be given to certain parties in interest in lands for a valid tax deed; it is a condition precedent, and sheriff is required to make affidavit, etc. *Rexford v. Phillips*, 213.

2904. The affidavit of the sheriff necessary to make *prima facie* evidence of notice for a tax deed. *Rexford v. Phillips*, 213.

2977. City bonds, issued for necessary purposes, are not inhibited by this section. *Charlotte v. Trust Co.*, 388.

2981. The powers conferred on municipaliies over buildings are governmental, and they are not liable for damages for alleged negligence in their exercise. *Harrington v. Greenville*, 632.

3028. The antitrust law applies only to "circulating false reports." *Smith v. Ice Co.*, 151.

3028 (b). The repeal of this section does not affect an action theretofore commenced, or the common-law doctrine preventing unlawful combinations. *Smith v. Ice Co.*, 151.

3354. Certain misstatements of the defendant and previous corroborative statements made by the prosecutrix held sufficient, and not objectionable as "unsupported testimony," in an action of seduction under promise of marriage. *S. v. Page*, 462.

3950. The Superior Court has not original jurisdiction in an action for penalty against a county commissioner for neglecting to perform his duties. *Templeton v. Beard*, 63.

4026. The intent of drainage statutes should be construed to carry out the legislative beneficent purposes, in connection with the various relative sections, and certain artificial canals or ditches are held to come within their meaning, without original contribution for their creation being necessary. The sections include railroads owning the land. *Forest v. R. R.*, 547.

4356. The findings of a board of canvassers of votes cast in an election is *prima facie* correct. *Jones v. Flynt*, 87.

4760. A subsequent and unauthorized mortgage on insured property is a "change of interest." *Watson v. Insurance Co.*, 638.

5217. The owners or their agents must list lands for taxation as the statute specifies. *Rexford v. Phillips*, 213.

REVISAL—*Continued.*

SEC.

5218. The owners or their agents must list lands for taxation as the statute specifies. *Rexford v. Phillips*, 213.

5222. The owners or their agents must list lands for taxation as the statute specifies. *Rexford v. Phillips*, 213.

5227. The owners or their agents must list lands for taxation as the statute specifies. *Rexford v. Phillips*, 213.

ROAD DISTRICTS. See County Commissioners.

ROADS AND HIGHWAYS. See County Commissioners; Constitutional Law.

1. *Same—Legislative Powers—Police Powers—Constitutional Law.*—The levying of a tax upon those hauling mill logs, etc., upon a public road of a certain county is within the discretionary power of the Legislature, and comes within its police power, with which the fourteenth amendment to the Federal Constitution does not interfere. *Dalton v. Brown*, 175.

2. *Roads and Highways—County Commissioners—Order Establishing Road—Appeal—Superior Court—Trial de Novo—Order Vacated.*—An appeal properly taken to the Superior Court from an order of the county commissioners directing the laying out of a highway has the force and effect of vacating the order appealed from; and pending such appeal the case does not come within the provisions of the law looking to the proper maintenance and working of the roads. Revisal, sec. 2690. *S. v. Davis*, 455.

3. *Same—Working Roads—Indictment.*—Defendants are not guilty of a violation of the statute in refusing to work on a public road, after being summoned to do so by the overseer, after they have appealed to the Superior Court from an order of the county commissioners to lay out the road in question, and have given the bond and in all respects have complied with the statute; for under the express words of the statute "the whole matter is to be heard anew"; all issues of fact raised are to be determined in the Superior Court, and the appeal vacates the order. Revisal, sec. 2690. *Ibid.*

4. *Same—Case Agreed—Special Verdict—Practice.*—Defendants, being indicted for refusing to work the road, agreed with the solicitor as to the facts constituting the offense, and consented that these facts should be regarded by the court as a special verdict. Therein it appeared that the order establishing the road in question had been appealed from to the Superior Court and the appeal perfected as required by the statute. It is held that the appeal would have vacated the order establishing the road if it had been in fact from a special verdict of an impaneled jury, and when so found, the defendants should be acquitted. *Ibid.*

RIPARIAN RIGHTS. See Water and Watercourses.

RULE IN SHELLEY'S CASE. See Estates.

SALES. See Contracts; Intoxicating Liquors.

1. *Tax Sale—Listing Lands—Tax Deeds—Interpretation of Statutes.*—Lands may be sold for taxes and a valid deed made therefor only when the lands are listed according to the requirements of the statute. *Rexford v. Phillips*, 213.

2. *Same—By Whom Listed—Penalties.*—In 1908 the statutory requirements for listing lands for taxes were that the owners or their agents should do so under oath in a certain specified manner (Revisal, secs. 5217, 5222, 5227, and 5218); and upon the failure of the owner to list his lands at the appointed time, the chairman of the county commissioners should do so, in the name of the owner, giving valuation and description thereof, and charging double taxes; and with provision that if the lands have escaped taxation, the taxes shall be collected for previous years, by adding to the simple taxes of the current year all taxes due for preceding tax years, with 25 per cent interest thereon; and these provisions must be observed. *Ibid.*

3. *Tax Sales—Tax Deeds—Perfecting Deed—Listing by Stranger—Principal and Agent.*—The statutory provision for perfecting, in the sheriff's deed, an indefinite description of lands listed for taxes, applies only when there has been a listing by the owner or some other person designated by the statute, and not where it is done officiously by a stranger. *Ibid.*

4. *Tax Sales—Tax Deeds—Principal and Agent—List Taker—Interpretation of Statutes.*—A list taker of property has no statutory authority to list taxes for the owner of lands, unless it appears that such authority has been given him by the owner, and if the lands have been sold for taxes upon such a listing by the list taker, the sheriff's deed under a sale for taxes is void. The failure of the owner to list is governed by other provisions of the statute, which do not provide for a forfeiture of the lands, but prescribe a penalty for failure to list them. *Ibid.*

5. *Same—Purchaser—Occupants—Possession—Notice.*—The purchaser at the sale of lands for taxes is required to serve written notice of his purchase and of the date when the time of redemption will expire "on every person in actual possession or occupancy of the land," and also "upon every person having a mortgage or deed of trust thereon, recorded in the county, if by diligent inquiry he can be found," requiring notice by publication if actual service cannot be had. Hence, where notice by publication is attempted, and direct notice may readily have been given, or where there is a registered deed of trust and various occupants of several tracts of the land, all of whom may readily have been served with direct notice, and were not, the purchaser of the lands is not entitled to a deed therefor from the sheriff, though proper notice may have been given to one or more of those in actual possession for the owner. Revisal, sec. 2903. *Ibid.*

6. *Tax Sales—Tax Deeds—Principal and Agent—Notice to Occupants—Purchaser.*—The failure of the purchaser of lands sold for taxes to give the notice required by Revisal, sec. 2903, is a fatal defect which will invalidate his deed from the sheriff, for without proper notice the purchaser is not entitled to his deed. *Ibid.*

SALES—*Continued.*

7. *Same—Prima Facie Evidence—Interpretation of Statutes.*—Before a purchaser of lands sold for taxes is entitled to his deed from the sheriff, he must make affidavit that he has complied with the requirement of notice (Revisal, sec. 2903), setting forth therein particularly the facts showing such compliance, which must be delivered to the sheriff, before he executes the deed, and filed by him with the register of deeds for registration. It then becomes *prima facie* evidence that the notice has been given. Revisal, 2904. *Ibid.*

8. *Same—Evidence—Presumptions.*—The statutory notice required to be given by a purchaser of lands at a sale for taxes (Revisal, sec. 2903) is a condition precedent to the execution of a valid deed, and the purchaser must show that it has been given, there being no presumption of that fact from a recital in the sheriff's deed. *Ibid.*

9. *Tax Sales — Tax Deeds — Evidence — Presumptions — Rebuttal.*—The sheriff's deed to lands sold for taxes is presumptive evidence that the lands have been listed, which may be rebutted by the evidence. The presumption is rebutted in this case by the admitted facts. *Ibid.*

10. *Tax Sales—Tax Deeds—Title—Burden of Proof.*—A person who questions the title conveyed by a sheriff's deed, under a tax sale, must first show that he had title to the property at the time of the sale; and the evidence is held sufficient in this case under the deeds introduced by plaintiff in his chain of title, and the other circumstances in evidence. *Ibid.*

11. *Tax Sales—Tax Deeds—Payment by Purchaser—Reimbursements—Practice—Tender—Appeal and Error—Costs.*—It appearing that the defendant had paid certain taxes on lands which he had assumed to hold under an invalid tax deed, it is *Held*, that he should be reimbursed that amount of taxes and interest by the plaintiff, as he has relieved the land of a charge which otherwise would have rested upon it; and it is ordered that plaintiff pay this amount to defendant or deposit it in court for his benefit, and that the cost of appeal be taxed against the defendant, who had refused the tender thereof. *Ibid.*

12. *Judgments—Execution Sales—Fraud—Burden of Proof.*—In an action to set aside a judgment and sale for fraud in procuring title to lands, the burden is upon the plaintiff to establish the fraud complained of by the greater weight of the evidence. *Gross v. McBrayer*, 372.

13. *Judgments — Execution Sales — Lands—Remote Values—Evidence—Harmless Error.*—In an action to set aside a judgment and sale for fraud in procuring title to lands, a plaintiff's evidence offered to show their value many years before the sale complained of was too remote, and inadmissible. There was barely sufficient evidence of fraud to be submitted to the jury, but the plaintiff cannot be heard to complain that the jury were permitted to consider it. *Ibid.*

14. *Sales—Merchandise in Bulk—Statutes—Constitutional Law.*—Chapter 623, Laws 1907, being "An act to prohibit the sale of merchandise in bulk in fraud of creditors," is not unconstitutional or void as an unwarranted limitation of the right to sell and dispose of property. *Pender v. Speight*, 612.

SCHOOLS AND SCHOOL DISTRICTS. See Constitutional Law.

SEALS. See Contracts.

SEDUCTION.

1. *Seduction—Breach of Promise—Evidence—Testimony of Prosecutrix—Corroboration—Interpretation of Statutes.*—While the statute provides that "the unsupported testimony of the woman shall not be sufficient to convict" for seduction under promise of marriage (Revisal, sec. 3354), it does not limit or define the character of the corroborating testimony required. *S. v. Pace,* 462.

2. *Same—Statements Made to Others.*—In an action for seduction under a breach of promise of marriage (Revisal, sec. 3354), evidence of statements made to others that the prosecutrix and the defendant were to be married is competent to corroborate the testimony of the prosecutrix that the defendant had offered and promised to marry her, and with other evidence in this case of his registering with her as man and wife at a hotel, his misstatements as to the marriage license and as to his not being a married man, etc., told by her to others before and after the act of seduction, and corroborated by them, is held sufficient for a conviction. *Ibid.*

"SIXTY DAYS." See Telegraphs and Telephones.

SLANDER.

1. *Slander—Issues—Exact Words—Substance—Appeal and Error.*—In an action for slander, it is reversible error for the judge to submit an issue under a charge that requires the jury to find that the defendant used the slanderous words exactly as set out in the complaint; for a recovery may be had if the defendant had used the words complained of in substance. *Hamilton v. Nance,* 56.

2. *Slander—Utterances—Present Condition—Actionable per se.*—The utterance of defendant, that the plaintiff had (at the time of the utterance) a certain loathsome venereal disease, is actionable slander. As to whether at the time of the utterance it would have been actionable if it referred to the past, *quære. Ibid.*

3. *Slander — Utterances — Malice Presumed — "Reports"—"News."*—The law will presume malice, in an action for slander, from the statement of the defendant that the plaintiff has a certain loathsome venereal disease (referring to the time of the statement), whether it was made in the form of a "report," or "news," or a direct charge. *Ibid.*

4. *Slander—Measure of Damages—"News"—"Reports"—Evidence.*—When a plea of justification is not interposed in defense of an action for slander, the defendant may offer evidence in mitigation to the issue as to the damages, tending to show that his slanderous utterances were in the form of a "report" or "news." *Ibid.*

5. *Slander — Issues — Justification — Verdict—Malice Presumed—Actual Malice—Measure of Damages—Punitive Damages.*—In an action for slander, where justification is not pleaded and privilege is not claimed,

SLANDER—*Continued.*

the jury, upon finding an affirmative answer to the first issue, implies, as a matter of law, that the charge complained of is false and malicious, and compensatory damages should be awarded; and additional punitive damages may also be given if the jury find actual malice. The proper issues and legal inferences in actions for slander where justification is and where it is not pleaded, set out and discussed by MR. JUSTICE ALLEN. *Ibid.*

SPECIAL VERDICT. See Courts.

SPIRITUOUS LIQUORS. See Intoxicating Liquors.

STATE'S LANDS.

1. *State's Lands—Cherokee Indian Treaties—Entry—Vacant Lands—Interpretation of Statutes.*—The lands acquired by the State by the treaties with the Cherokee Indians in 1817 and 1819 were made subject to entry by the act of 1852 only when vacant, or not previously sold under the Cherokee land statutes; and hence an entry made of lands required by the act of 1819, chap. 997, to be sold is invalid, and a subsequent purchaser of the same lands under the provisions of the act acquires the title. *Anderson v. Meadows*, 404.

2. *Same—Instructions.*—The lands in dispute in this action were a part of the Cherokee Indian lands acquired by the State under the treaties of 1817 and 1819. The defendant deraigned his title through one who purchased them in 1820, under the act of 1819, and obtained his grant in 1864. The plaintiff claimed under a grant made in 1862 on an entry made in 1859: *Held*, an instruction which made the controversy to rest upon the question of the seniority of the grants was erroneous, the land not being vacant and subject to entry at the time of the entry made by the plaintiff. *Ibid.*

3. *State's Lands—Cherokee Indian Treaties—Vendor and Vendee—Interpretation of Statutes.*—One who acquired a part of the Cherokee Indian lands under the act of 1819 did so by purchase, establishing the relationship of vendor and vendee between the State and himself. *Ibid.*

4. *State's Lands—Void Entry—Collateral Attack.*—An entry upon the State's land which are not vacant at the time is void, and may be attacked collaterally. *Ibid.*

5. *State's Lands—Entry—Limitation of Actions.*—It appearing in this case that a part of the Cherokee Indian lands, the subject of the controversy, had been sold under the act of 1819, prior to the time of entry and grant under which the plaintiff claimed, it is *Held*, that the plaintiff's right is not barred by the statute of limitation pleaded. *Ritchie v. Fowler*, 132 N. C., 788, distinguished. *Ibid.*

6. *Cherokee Indian Lands—Entry—Interpretation of Statutes.*—Lands acquired by treaty with the Cherokee Indians in 1817 and 1819, and not already surveyed, were made subject to entry by Public Laws 1835, chap. 6; and the act of 1836-37, amending the act of 1835, refers to the Cherokee lands which had been reserved or allotted to "any Indian or Indians" under the treaties of 1817 and 1819 and afterwards

STATE'S LANDS—*Continued.*

bought by the State, and not to the lands then acquired under the treaties, providing, as to the lands reserved or allotted to "any Indian or Indians," that they be sold in the manner pointed out by the statute, and prohibiting entry as to them. *Westfelt v. Adams*, 409.

7. *Same—Grants—Amendatory Acts—Repeal.*—The acts of 1836-37, requiring that the Cherokee Indian reservations be surveyed and sold, were passed several days before the Revised Statutes which incorporated the act of 1835-36, permitting entry upon the Cherokee Indian lands acquired by the State under treaty with the Indians, and by the express terms of the Revised Statutes the acts of 1835-36 did not take effect until after the ratification of the act of 1836-37: *Held*, the act of 1836-37 is not in conflict with the act of 1835-36; but, if otherwise, it was repealed by the Revised Statutes. *Ibid.*

8. *Cherokee Indian Lands — Treaties—Vacant Lands—Evidence—Location.*—In order to ascertain whether there were any lands acquired by the State by treaty with the Cherokee Indians in 1817-1818 lying west of the Meigs and Freeman line and situated in Macon County, which were vacant and subject to entry, the Court will consider the act of 1852, chap. 70, validating entries of a certain entry-taker in Macon County made after the expiration of his term of office; acts of 1852 authorizing entries of lands in said county, and others of like nature. *Ibid.*

9. *Same—Burden of Proof—Presumptions.*—The defendant having introduced his grants for lands lying in Macon County west of the Meigs and Freeman line, which were issued 10 November, 1854, upon entries made 15 February, 1850: *Held*, in the absence of proof to the contrary, it will be assumed that the lands entered were a part of those acquired by the State from the Cherokee Indians in 1817 and 1819, which were open to entry at that time, if there were no other land in that county then subject to entry. *Ibid.*

10. *State's Lands—Grants—Presumptions—Vacant Lands—Evidence—Collateral Attack.*—While it is true that a State's grant of land cannot be attacked collaterally for fraud or irregularity and there is a presumption that it is valid and that all requisite preliminary steps have been taken, the officer must have had power or jurisdiction to issue the grant, and it may be shown collaterally that the lands described in the entries and grants were not subject to entry. *Ibid.*

11. *State's Lands—Grants—Location—Evidence—Entries.*—It is competent for the jury to consider the boundaries contained in an entry of land as evidence on a disputed location of the land claimed under the grant issued upon the entry, where the location of the land is not positively and clearly shown by the survey and the grant, though in a certain sense the entry is not a part of the documentary title, and the survey and description in the grant controls if sufficiently definite for location upon its face. *Ibid.*

12. *State's Lands — Grants—Entries—Location—Evidence—Instructions—Court Opinion on Evidence.*—In this action, involving title to lands in dispute claimed by defendants under certain grants from the State, it was error for the trial judge to direct an affirmative answer to an

STATE'S LANDS—*Continued.*

issue when by so doing he withdraws from the consideration of the jury descriptions in the defendant's entries, and parol evidence tending to show that the lands claimed did not include the *locus in quo*. *Ibid.*

13. *State's Lands—Grants—Vacant and Unappropriated—Previous Grants.* When upon competent evidence, and under proper instructions, the jury have found, in their answers to the issues, that the defendant's grants to lands, claimed by plaintiff also under grants from the State, covered the *locus in quo* at the time of plaintiff's entry, the lands at that time were not vacant and unappropriated, and plaintiff cannot recover them. Instructions in this case held correct, under *Bowen v. Lumber Co.*, 153 N. C., 368. *Garrison v. Williams*, 425.

14. *State's Lands—Grants—Boundaries—Instructions—Harmless Error.*—As the lands described in the grant in dispute were found by the jury to have previously been granted by the State to the defendant: *Held*, an instruction, if erroneous, was harmless, as to the running of one of plaintiff's lines with the county line. *Ibid.*

STATUTE OF FRAUDS.

1. *Contracts—Statute of Frauds—Direct Assumption of Liability.*—A contract to answer the "debt, default, or miscarriage of another," which the statute of frauds requires to be in writing to be binding, relates only to agreements to be surety for the debts of another; and the statute does not apply to verbal contracts assumed by the promisor so as to discharge such other from liability to the creditor. *Parker v. Daniels*, 518.

2. *Same—New Contract—Evidence.*—The plaintiff, who had been transporting cargoes by water in connection with a steamboat operated by a corporation, receiving as compensation a certain proportionate part of the freight charges, refused to continue this arrangement for the reason that the corporation was in arrears of its payment to him. The corporation having made a change of management, its president told the plaintiff that he would not assume the arrearage of debt, but would be personally responsible from then on for the amount the plaintiff should earn under the former arrangement: *Held*, the promise of the president of the corporation, the defendant in the action, created a new contract, not within the statute of frauds, and was binding on him. *Ibid.*

3. *Contracts—Statute of Frauds—Pleading—Waiver—Objection and Exception—Appeal and Error.*—The defense that a verbal promise was within the meaning of the statute of frauds, and unenforcible, must be pleaded and objection raised, to be available; and while in this case it was not done, the court decided upon the merits of the case, as no exception had been entered, the case argued upon its merits, and the point seemed to have been waived. *Ibid.*

4. *Contracts—Guaranty—Consideration—Statute of Frauds.*—When one at his own request receives money for investment from another, saying "he would guarantee it to be safe, and that the investor could look to him for the amount," and not to the borrower, and acts inde-

STATUTE OF FRAUDS—*Continued.*

pendently of the investor in making the loan, the transaction does not come within the statute of frauds, for at the time of the guarantee there was no other debt contracted, the only contract, at that time, being one of guarantee between the parties, separate and distinct from the obligation of a principal debtor, and the faith of the investor in the guarantee was a sufficient consideration. *Partin v. Prince*, 553.

5. *Same — Contemporaneous Transactions.*—When one receives money from another to be invested by him under his promise to guarantee its safety, the contract of guaranty, being contemporaneous with the principal debt, requires no other consideration to support it and does not fall within the meaning of the statute of frauds. It is otherwise if the guarantee is made afterwards without any new consideration. *Ibid.*

6. *Contracts—Guaranty—Consideration—Interests—Statute of Frauds.*—When one receives for investment money for another upon his guarantee that the investment proposed was a safe one, and assumes personal responsibility therefor, and it appears that the one receiving the money invested it in a concern for which he was doing business locally, his pecuniary interest in the local business wherein he was interested is a sufficient consideration to support the guaranty. *Ibid.*

7. *Contracts of Sale—Vendor and Vendee—Parol Evidence—Written Order—Statute of Frauds.*—The defendant contended the contract was in parol and the plaintiff that it was in writing: *Held*, competent to introduce evidence of the terms of the contract, and that the rule excluding evidence on the ground that it added to or varied a written order was not applicable. *Steel Co. v. Copeland*, 556.

STATUTES. See Penalty Statutes; Constitutional Law; Sales; Appeal and Error.

STENOGRAPHER'S NOTES. See Appeal and Error.

STOCKHOLDERS. See Corporations.

STREET RAILWAYS. See Carriers of Passengers.

STREETS AND SIDEWALKS. See Cities and Towns.

SUBSCRIPTIONS. See Railroads.

SUMMONS. See Process.

TAXATION. See Constitutional Law.

Taxation.—Occupations—Class Legislation—Legislative Powers—Constitutional Law.—The only constitutional restriction upon the power of the Legislature in classifying vocations and laying a tax of a different amount upon the different occupations is that the tax shall be uniform upon all in each classification. *Dalton v. Brown*, 175.

TAX SALES. See Sales.

TELEGRAPHS AND TELEPHONES.

1. *Telegraphs — Mental Anguish — Damages—Notice—Evidence.*—A telegraphic message asking the addressee to "send word to the sender's wife that he will be home the next day" does not upon its face show that the illness of the sender's wife will naturally and proximately result from the failure of the company to send it. *Christmon v. Telegraph Co.*, 195.

2. *Same—Verbal Notice.*—The sender, upon delivering a message to the agent of a telegraph company reading, "Send word to wife will be home tomorrow. Am well," informed the agent that he did not send the message direct to his wife because her condition was such that he was afraid it would surprise and excite her: *Held*, sufficient to notify the company that her condition was serious, if not critical; that she would suffer mental anguish if the message was not sent. *Ibid.*

3. *Same—Instructions.*—A husband delivered to the defendant's agent a message asking the addressee to inform his wife that he would be home the next day, which the defendant failed to transmit. The instructions of the court properly restricted evidence of the wife's consequent illness to the mental anguish suffered by the wife. *Ibid.*

4. *Telegraph—Announcing Arrival—Evidence—Lost Letters—Collateral Matters.*—A husband, having written to his wife to expect him home on a certain day, afterwards telegraphed that he would be home on the day following, and the telegram was not transmitted by the defendant: *Held*, the letter was a collateral matter, and, if it were necessary to produce it at the trial, evidence of its loss was sufficient which tended to show that the wife did not keep her husband's letter, and that the husband had made unavailing search for the letter where his wife kept her letters and papers. *Ibid.*

5. *Telegraph—Collect Message—Principal and Agent—Application of Money—Negligence—Damages.*—A husband and wife sued for damages for mental anguish caused by the failure to send a message the husband had addressed to her. The next day the wife sent a message to another person, charges collect, inquiring as to where her husband was. The addressee of the last message instructed the defendant's agent to apply the money paid for the first message to the charges on the second one: *Held*, the addressee of the second message was without authority to thus direct the application of the money; and further, as the negligence had theretofore occurred, recovery was not barred by one payment of charges. *Ibid.*

6. *Telegraphs—Mental Anguish—Measure of Damages—Notice.*—Under certain circumstances substantial damages for mental anguish may be recovered against a telegraph company for wrongful and negligent failure to deliver or correctly transmit a telegraphic message, independently of bodily or pecuniary injury, by the sender, addressee, or the beneficiary, whose interest therein has been sufficiently made known to the company. *Penn v. Telegraph Co.*, 306.

7. *Telegraphs—Public-service Corporations—Messages—Contracts—Public Policy.*—Damages for mental anguish are permitted to be recovered in this State, not only as a rule of interpretation and adjustment of

TELEGRAPHS AND TELEPHONES—*Continued.*

the rights of the parties growing out of the contract between them, but because of our public policy, adopted and recognized as necessary to enforce the proper performance of duties incumbent on telegraph companies as public-service corporations. *Ibid.*

8. *Same—Torts.*—A party entitled to recover damages from a telegraph company for its failure in its duty to transmit and deliver a message may bring his action either in contract or in tort. *Ibid.*

9. *Same—Negligence—Delivery—Jurisdiction—Measure of Damages.*—The sendee of a telegram delivered to the telegraph company in another State, where damages for mental anguish were not recoverable, may bring his action in this State in tort for negligent breach of duty occurring here, and recover such as may have naturally resulted from the wrong, that is, such as were reasonably probable under the circumstances existent at the time according to the law, statutory or otherwise, of North Carolina. Cases in which the measure of damages were regulated by rules obtaining on breach of contract discussed and distinguished by HOKE, J., showing that under the circumstances of the case at bar, where recovery in tort is sought, they were inapplicable, and, if otherwise, they were not intended to be controlling. *Ibid.*

10. *Same—Stare Decisis.*—The doctrine of *stare decisis* does not apply when the former decisions are clearly found to be erroneous, and contrary to our declared public policy; and in this case it is held that the former decisions of our Court upon the mental anguish doctrine, measuring the damages as if arising in contract, if applicable, will not control in an action brought in tort for the failure of a telegraph company to use proper efforts in the delivery of a message here which had been received for transmission in another jurisdiction where damages of this character are not recoverable. *Ibid.*

11. *Telegraphs—Mental Anguish—Tort—Parties in Interest.*—When a recovery for mental anguish for the negligence of a telegraph company in transmitting or delivering a telegram is laid in tort, it is confined to the parties to the contract, or to those whose interest, as beneficiaries of the message, have been sufficiently disclosed to the company, this being the only damage that could be considered reasonable or probable for such breach of duty. *Ibid.*

12. *Same—Stipulations—"Sixty Days."*—The regulations of a telegraph company requiring presentation of claims for damages within sixty days, etc., are upheld, and held to have no bearing upon the doctrine of holding a telegraph company responsible for its negligence in delivery in North Carolina of a message received by it in another jurisdiction where a recovery for mental anguish alone is denied. *Ibid.*

13. *Telegraphs—Delay in Delivery—Burden of Proof—Service Message.*—On proof of the delivery of a message to a telegraph company, and payment of the charges, or acceptance of the message without such payment, and failure to deliver to the sendee in a reasonable time, a *prima facie* case of negligence is made out, with the burden upon the defendant to make all reasonable effort to deliver the message; and, upon failure to find the addressee, to wire back a service message for a better address. *Miller v. Telegraph Co.*, 501.

TELEGRAPHS AND TELEPHONES—*Continued.*

14. *Same—Nonsuit.*—In an action for damages for mental anguish against a telegraph company for failure to promptly deliver a telegram announcing a death, there was evidence tending to show that the telegram could have been promptly delivered at the address given on its face. The defendant introduced no evidence, though it appears that by a phonetic mistake a change of the addressee from "Woodie Miller" to "Wood C. Miller" was made: *Held*, the burden of proof being on the defendant to show that it made a reasonable effort to deliver the message, including the sending of a service message asking a better address, a judgment of nonsuit should not have been rendered. *Ibid.*

TELEPHONE COMPANIES. See Corporations.

TENANTS IN COMMON.

1. *Wills—Devises—Indefinite Description—Division of Lands—Tenants in Common—Partition—Parol Evidence.*—Under a devise of testator's lands in different portions to his children, to one of them "the old home place where I now live," it appearing that the sum of all the portions equaled the acreage of all of his lands, the children named took as tenants in common, except as to "the old home place" specifically devised. The lands may be divided among them in proceedings for partition in accordance with the number of acres each was to take under the will. The number of acres being equal to all the testator owned, would make the admission of parol evidence unnecessary to fit the lands to the devise, which otherwise would have been competent. *Caudle v. Caudle*, 52.

2. *Husband and Wife—Jus Accrescendi—Deeds and Conveyances—Interpretation—Intent—Tenants in Common—Second Wife—Dower.*—In construing a deed to a husband and wife as a whole, to arrive at its intent, it is held that in a conveyance of land to them, "each a one-half interest," creates a tenancy in common, and the right of survivorship does not apply; and when the wife is dead, the husband remarries and then dies, leaving a widow, the widow is only entitled to dower in the undivided one-half interest in the lands. *Eason v. Eason*, 539.

TENDER. See Sales.

TIMBER. See Contracts.

TIMBER DEEDS. See Deeds and Conveyances.

TITLE. See Insurance; Deeds and Conveyances; Escrow; Limitation of Actions; Equity.

TORTS. See Telegraphs; Vendor and Vendee.

TRIAL BY JURY. See Practice; Constitutional Law.

TRUSTS.

1. *Antitrust Laws—Interpretation of Statutes.*—The antitrust law of 1907, ch. 218 (Revisal, sec. 3028), since its amendment by chapter 167, Laws of 1911, restricts unlawful conduct "tending to interfere with

TRUSTS—*Continued.*

the trade of an opponent or business rival with the purpose of attempting to fix the price of anything of value when the competition is removed" to the single instance when it is done "by circulating false reports." *Smith v. Ice Co.*, 151.

2. *Same—Commencement of Action.*—By express terms of the statute, the repeal of chapter 218, Laws of 1907 (Revisal, sec. 3028b), does not affect an action theretofore commenced. Revisal, sec. 2830. *Ibid.*

3. *Same—Common Law.*—By express provision, chapter 218, Laws of 1907 (Revisal, sec. 3028b), shall "not be construed so as to repeal or restrict the common-law doctrine preventing unlawful combinations in trade and commerce," and this provision is still effective, being reënacted by chapter 167, sec. 9, Laws of 1911. *Ibid.*

4. *Same—Punitive Damages—Instructions.*—The plaintiff was a dealer in meats in M., and desirous of dealing in ice, also, made a contract with an ice plant at N., a nearby town, whereby he could sell ice in M. for a profit at 35 cents per hundred pounds. The defendant procured an agreement with the only ice plant in the town of M. by which it would not sell ice there, and by threats of competition at N. deterred the Ice Manufacturing Company there from shipping ice to the plaintiff, and at least temporarily broke up his meat and ice business, whereupon the defendant put the minimum price of ice at M. at 50 cents per hundred pounds: *Held*, (1) the conduct of the defendant was violative of the common-law doctrine against monopolies; (2) conceding that the defendant did not know of plaintiff's contract, its unlawful conduct was the preventing plaintiff from obtaining the ice; (3) exemplary or punitive damages are recoverable in an amount to be allowed in the discretion of the jury, if the jury find that defendant's acts were maliciously done; (4) the defendant's acts if done without right or justifiable cause would constitute malice; (5) an instruction was not error, when considered in connection with the charge as a whole, that the jury could "award exemplary damages for any injury they may find that the plaintiff suffered by the interference in his business by the defendant's attempt to fix the price of ice at M." for the illegal purposes, etc. *Ibid.*

TRUSTS AND TRUSTEES.

1. *Wills—Power of Sale—Conversion—Intent—Trusts and Trustees—Election—Reconversion—Evidence.*—When a power in a will directs the trustee to convert the testator's real and personal property into cash for certain purposes, and this has been done, leaving unsold realty in his hands, the parties entitled to the property as converted may elect to take it in its original form, which may be inferred from acts or conduct which manifest an unequivocal intention, as a division of the lands among themselves, or holding the possession for period of years, in this case for a period of thirty years. *Phifer v. Giles*, 142.

2. *Deeds and Conveyances—Mortgages—Consideration—Good Faith—Assignment for Creditors.*—The principle that a mortgage of practically all of a grantor's property to secure a preëxisting debt should, under certain circumstances, be treated as an assignment, and subject to the provisions of law in reference to that class of conveyances, does

TRUSTS AND TRUSTEES—*Continued.*

not obtain where the transaction is *bona fide*, was intended as a mortgage, and it appears that the property greatly exceeds in value the amount of the mortgage debt; that it was made in good faith, and a substantial part of the consideration, *i. e.*, $400 of the consideration of $700, then presently moved between the parties. *Wooten v. Taylor*, 604.

UNDUE INFLUENCE. See Wills.

UNLAWFUL PREFERENCE. See Debtor and Creditor.

VENDOR AND VENDEE.

1. *Corporations, Public-service—Contracts—Breach—Physical Connection—Rights of Public.*—In the absence of constitutional or statutory requirement, the obligation of a public-service corporation to afford service at reasonable rates, without discrimination, to those who pay the charges and abide by the reasonable regulations of the company, does not extend to the enforcement of one company to make physical connection with another; but after this physical connection has been voluntarily made, under a fair and workable arrangement and guaranteed by contract between the companies, and the continuous line has come to be patronized and established as a great public convenience, such contract shall not, in breach of the agreement, be severed by one of the parties. *Telephone Co. v. Telephone Co.*, 9.

2. *Vendor and Vendee—Conditional Assumption of Debt—Contracts, Written—Notice—Accounting.*—In an action by a bank upon notes of an insurance corporation which had sold all of its assets to another insurance corporation, alleging the vendee corporation had assumed the debts of its vendor, it appeared that the contract of sale was in writing, introduced in evidence, and that it provided among other things, that the selling corporation was to be paid a certain per cent of the premium receipts which was to be applied to the notes in suit. The representatives of the contracting parties had carried the contract to the president of plaintiff bank: *Held*, the liability of the vendee corporation depended upon the written instrument, of which the plaintiff had notice, and, thereunder, the vendee did not unconditionally assume the obligation upon the notes; and, further, that upon proper amendment to the pleadings the plaintiff would be entitled to an accounting against the vendee for such sums as it had collected under the terms of the contract, and have the same applied to the payment of the notes. *Bank v. Insurance Co.*, 200.

3. *Same—Parol Evidence.*—When a vendee corporation is sued for the debts of its vendor under a written contract of which the plaintiff had notice, testimony of a witness that the vendee assumed the liability unconditionally will not be admissible to vary the terms of the written contract, especially when he modifies his testimony on cross-examination by saying that he knew there was a written contract which he had not seen, and was not present when it was executed. *Ibid.*

4. *Deeds and Conveyances—Mortgages—Vendor and Vendee—Covenants.* One claiming under a deed wherein it is stipulated that the original

VENDOR AND VENDEE—*Continued.*

vendee agrees to pay a certain mortgage indebtedness on the lands conveyed, as a part of the consideration, is bound by the terms of the deed to pay this indebtedness, and a personal judgment may be rendered against him for it. *Van Gilder v. Bullen*, 291.

5. *Vendor and Vendee—Sale of Horse—False Warranty—Deceit—Personal Injury—Damages—Evidence—Questions for Jury.*—Evidence tending to show that a dealer in horses sold a vicious horse to one who told him that he was inexperienced in horses, and that he wanted a gentle horse that his wife and family could safely drive, and which ran away with the vendee soon after his purchase, and injured him; that the horse trader had had the horse for some time, is sufficient to take the case to the jury in an action to recover damages for the injuries inflicted, it being a fair inference from the period of possession of the horse by the defendant that he knew the character of the horse he was selling, and it being incumbent upon him, under the circumstances, not to make representations of this character unless he knew them to be true. *Hodges v. Smith*, 525.

6. *Vendor and Vendee—Sale of Horse—False Warranty—Deceit—Personal Injury—Tort—Damages.*—When there is an affirmative finding on the issue of false warranty and deceit in the sale of a horse, which proximately caused the purchaser to be injured in a runaway while driving it, a suit for damages, being in tort, the plaintiff's damages are not confined to those in the contemplation of the parties at the time of the sale. *Ibid.*

7. *Contracts of Sale—Vendor and Vendee—Parol Evidence—Written Order—Statute of Frauds.*—The defendant contended the contract was in parol and the plaintiff that it was in writing: *Held*, competent to introduce evidence of the terms of the contract, and that the rule excluding evidence on the ground that it added to or varied a written order was not applicable. *Steel Co. v. Copeland*, 556.

8. *Vendor and Vendee—Contracts—Delivery—Parol Agreement—Accommodation Bailee.*—When the vendor of goods has contracted for delivery at one of two designated places at the option of the vendee at a specified time, and at the request of the vendee agrees to keep them beyond that time after payment thereof, stipulating only that the vendee should keep the insurance paid while remaining in his warehouse, the title passes to the vendee at the time of his payment and acceptance, and the vendor becomes an accommodation bailee, required to exercise only slight care, and the goods thus kept are at the risk of the vendee. *State's Prison v. Hoffman*, 564.

9. *Vendor and Vendee—Sales Upon Commission—Gambling Device—Illegal Consideration—Action in Assumpsit.*—One who has consigned goods to another for sale upon commission may recover the unsold consignment and his share of the proceeds of the sale of the goods thereunder from the consignee, irrespective of the question as to whether a gambling device was to be used, and actually used, in the sales thus made, the title of the goods remaining in the consignor; or the plaintiff may maintain his action on the case upon the ground that an *indebitatus* has been created from which an *assumpsit* has arisen. *Jewelry Co. v. Joyner*, 644.

VENUE. See Parties; Removal of Causes.

Railroads, Domestic — Personal Injuries — Damages—Venue—Adjoining County—Interpretation of Statutes.—The provisions of Revisal, sec. 424, permitting a plaintiff to sue a railroad for damages for a personal injury in an adjoining county to that wherein the cause of action arose, applies to all railroad companies. *Forney v. R. R.*, 157.

VERDICT.

1. *Intoxicating Liquors—Unlawful Sales—Indictment—Several Counts—General Verdict—Appeal and Error.*—The defendant was convicted under a general verdict of guilty upon an indictment charging these counts: (1) of unlawfully engaging in the business of retail liquor dealer; (2) of selling the liquor by the small measure; (3) of selling it for gain; and having moved to quash the bill of indictment and in arrest of judgment, he renewed his motion on appeal: *Held*, the motion to quash because of the general verdict should be denied. *S. v. Avery*, 495.

2. *Appeal and Error — Verdict, Directing— Intimation— Acquiescence.* — When upon intimation from the trial judge that he would charge the jury to return a verdict of murder in the second degree, if they believed the evidence beyond a reasonable doubt, counsel for the prisoner said he would not address the jury, the remark of the attorney implies that the truth of the evidence could not be contested, and the intimation will not be held as reversible error on appeal. *S. v. Jernigan*, 475.

WAIVER.

1. *Pleadings—Former Action—Plea in Bar—Waiver.*—The right to plead the pendency of another action between the same parties for the same cause before judgment had is, to a large extent, a rule founded on convenience, and same may be waived or cured by dismissing the prior action at any time before the hearing. *Cook v. Cook*, 46.

2. *Pleadings —Partnership—Corporation—Evidence—Demurrer—Waiver.* When suit is brought in the name of a partnership, objection that it does not appear whether the plaintiff is a partnership or a corporation is deemed to be waived unless taken advantage of by a written demurrer or answer, and comes too late upon demurrer to the evidence. *Brewer v. Abernathy*, 283.

3. *Motion to Quash—Plea in Abatement—Waiver.*—One who fails, with full knowledge of the facts, to file his plea in abatement in apt time will be deemed to have waived his rights thereto. *S. v. Pace*, 462.

4. *Divorce—Pleadings—Verification—Waiver.*—An objection that a complaint, in an action for divorce, has not been verified in accordance with Revisal, sec. 1569, is jurisdictional. *Ibid.*

5. *Vendor and Vendee—Delivery—Waiver.*—When a vendor of goods has agreed to deliver them at or before a certain time, and thereafter becomes an accommodation bailee without further agreement as to the time of delivery, he may not be held liable for failure to deliver under the original contract, but is entitled to have reasonable prior notice, depending upon the circumstances then existing, from his vendee, as to when he desires delivery to be made; and when, under

WAIVER—*Continued.*

the original contract, the vendee has the option of two places of delivery, one convenient and the other inconvenient to the vendor, and without reasonable notice requires the vendor to deliver at the inconvenient place, the latter will not be held liable for damages to the goods by reason of their delivery to the more convenient place at the request of the vendee, the second order to deliver them being a waiver of the vendee's right of delivery at the place first designated. *State's Prison v. Hoffman*, 564.

WASTE.

Deeds and Conveyances—Standing Timber—Waste—Consideration—Reconveyance—Registration—Notice—Equity.—A reconveyance of the same standing timber between the same parties expressing a consideration of $1 and a release of the grantor "from all claims for damages on account of waste" which had been committed in violation of the restrictions of the first deed, is for a valuable consideration, and the grantees therein do not take subject to any equities of purchasers under a prior acquired and subsequently registered deed, given by their grantor. *Burwell v. Chapman*, 209.

WATER AND WATERCOURSES.

1. *Contracts — Actions — Temporary Adjustments—Pleas in Bar.*—The agreement entered into between the parties in this case, affecting a temporary adjustment, held not to affect the defendant's rights as a lower riparian owner to the use of the water interfered with by a wing dam built by the plaintiff in the Roanoke River. The decision in this case, *Power Co. v. Navigation Co.*, 152 N. C., 472, affirmed. *Power Co. v. Navigation Co.*, 393.

2. *Water and Watercourses—Riparian Rights—Interpretation of Statutes.* The defendant was a purchaser, under a decree entered in a suit authorized by the Acts of 1874-75, chap. 198, which was ratified by Private Acts of 1885, chap. 57, and which vested in the purchaser, as a corporation, "the franchises, rights, privileges, works, and property of the Roanoke Navigation Company, as acquired by the sale," etc. The Private Laws of 1891, chap. 2, conferred certain other rights upon the plaintiff corporation, including, among other things, "the right to erect mills and factories on the lands situated on Roanoke River," with the right to the use of the water of the river for manufacturing purposes: *Held*, the defendant acquired the property with the restriction or qualification, expressed in the statutes, that in the use of the water for the purposes specified it should not interfere with other riparian owners. *Ibid.*

3. *Words and Phrases—Persons—Corporations—Interpretation of Statutes.*—The use of the word "person" in the plaintiff's charter, that in the exercise of the rights and privileges conferred it shall not "prevent any person owning lands on Roanoke River from operating or erecting any mill," etc., is held to include corporations. *Ibid.*

4. *Water and Watercourses—Riparian Owners—Vested Rights—Due Process—Constitutional Law.*—When riparian rights in a river have become vested, the owner of the lands holds them subject to the rights

WATER AND WATERCOURSES—*Continued.*

of the public, as, for instance, the right of navigation, and can only be deprived of them by due process of law and upon compensation being paid him. *Ibid.*

5. *Navigable Waters—Bridges—Construction—Open Spaces—Passing Vessels—Obstructions—Negligence.*—While constructing a bridge over navigable waters, in this case across Albemarle Sound, under the authority of the State and War Department, it is the duty of the builder to have open space sufficient to enable passing vessels to go through, and to keep those spaces free from all obstructions that would endanger them. *Townsend v. Construction Co.*, 503.

6. *Same—Questions for Jury.*—When the evidence tends to show that the builder of a bridge across navigable waters had left an opening for the passage of vessels, and that the plaintiff's vessel was injured while attempting to pass through this opening by coming in contact with a raft of piling material swinging out into the opening, and which had been fastened by a rope to the side of the bridge, it is sufficient, in an action for damages to the vessel, to be submitted to the jury upon the question of defendant's negligence. *Whitehurst v. R. R.*, 156 N. C., 48, cited and distinguished. *Ibid.*

WATER PLANTS. See Cities and Towns.

WATER, PONDING. See Easements.

WATERWORKS. See Negligence.

WIDOW'S YEAR'S SUPPORT. See Reference.

WILLS.

1. *Wills—Devises—Indefinite Description—Division of Lands—Tenants in Common—Partition—Parol Evidence.*—Under a devise of testator's lands in different portions to his children, to one of them "the old home place where I now live," it appearing that the sum of all the portions equaled the acreage of all of his lands, the children named took as tenants in common, except as to "the old home place" specifically devised. The lands may be divided among them in proceedings for partition in accordance with the number of acres each was to take under the will. The number of acres being equal to all the testator owned, would make the admission of parol evidence unnecessary to fit the lands to the devise, which otherwise would have been competent. *Caudle v. Caudle*, 53.

2. *Wills—Latent Ambiguity—Intended Donee—Extrinsic Evidence.*—When there is a latent ambiguity in the expression used in a will to denote the donee of a gift, extrinsic evidence is competent to apply the description to the intended donee, when it does not otherwise alter or affect the construction of the writing. *McLeod v. Jones*, 74.

3. *Same—Religious Institutions.*—One who was an active member of a Baptist church in a certain locality, and during his life contributed to its foreign, home, and State missions, its orphanage, and other causes; devised and bequeathed certain of his property to (*a*) the Home Missions of the Baptist denomination; (*b*) to the Foreign Missions of the

WILLS—*Continued.*

Baptist Church; (*c*) to the Thomasville Orphanage: *Held*, it was competent to show by parol or extrinsic evidence that the intended donees were, (*a*) the Home Mission Board of the Southern Baptist Convention; (*b*) the Foreign Mission Board of the Southern Baptist Convention; (*c*) the Trustees of the Thomasville Baptist Orphanage; and that these were the only institutions of the church of which he was a member that he could have intended as the beneficiaries under his will. *Ibid.*

4. *Wills, Interpretation of—Intent—Devises—Restraint of Marriage—Conditional Limitations.*—While a condition subsequent annexed to a devise of lands in general restraint of marriage, *i. e.*, without limitation as to time or person, will be disregarded, as a rule, the principle will not ordinarily obtain in the case of an estate upon limitation or a conditional limitation, where by the terms of its creation the estate is so defined and limited that it terminates of itself on the happening of the contingent event, without entry or other action on the part of the grantor or his proper representative. *In re Miller*, 123.

5. *Same—Evidence.*—When it appears from the perusal of the entire will and the facts and circumstances permissible in aid of a proper interpretation, that the testator intended to make provision for a beneficiary while she remain single, and the words used are not intended as a restraint upon marriage, the qualifying words will be given effect according to the testator's devise as intended and expressed by the will. *Ibid.*

6. *Same.*—A testator devised his only land, his home place, to his widow, and to two daughters "during their natural lives; but in case either or both marry again, this becomes void. In the case of the marriage of one, the remaining one will hold until her death or marriage," with limitation over to his son for life, then to his wife for her life or widowhood, and then to their children as purchasers: *Held*, the qualifying words used in respect to the marriage of the testator's daughters, when properly construed from the will and attending circumstances, were not intended as in restraint of their marriage, but as a provision for their support until the marriage occurred. *Ibid.*

7. *Wills—Power of Sale—Conversion—Intent.*—Bequests and devises of personal and real property, in trust, with power to sell, without making any distinction between the two kinds of property, is evidence of an intention to convert the whole to personalty, and a direction of the application of the proceeds indicates the purpose that all be sold. *Phifer v. Giles*, 142.

8. *Same—Partial Sale—Part Conversion.*—The intent of the testator to convert his real and personal property in the hands of a trustee into cash must be shown by an imperative power to sell, arising by express command or necessary implication; and in this case, by construction of the language of the will, "to sell said property or any portion thereof," the testator may have intended the trustee to sell so much of the property as might be necessary to pay his debts and charges for equality among his children, and no more, in which event there would be a conversion of a part only. *Ibid.*

WILLS—*Continued.*

9. *Wills—Power of Sale—Conversion—Intent—Trusts and Trustees—Election—Reconversion—Evidence.*—When a power in a will directs the trustee to convert the testator's real and personal property into cash for certain purposes, and this has been done, leaving unsold realty in his hands, the parties entitled to the property as converted may elect to take it in its original form, which may be inferred from acts or conduct which manifest an unequivocal intention, as a division of the lands among themselves, or holding the possession for a period of years, in this case for a period of thirty years. *Ibid.*

10. *Wills—Acknowledgment—Signing Sufficient.*—It is sufficient acknowledgment of a will, and the same in effect as if the testatrix had signed in the presence of the witnesses, for her to hold the signed instrument in her hands, declare it to be her last will and testament, saying she had signed it, and request the witnesses to sign, which they did in her presence. *Ripley v. Armstrong*, 158.

11. *Wills—Interpretation—Intent—Testator's Circumstances—Evidence.*—The primary purpose in construing the will is to ascertain the testator's intent, and it is competent to consider his condition and that of his family, with all the attendant circumstances. *Ibid.*

12. *Same—Devise—Powers of Sale.*—When it appears that the land of the testatrix was of comparatively little value, without sufficient income to maintain her children, the beneficiaries of her will, and that it was mortgaged without provision or means for releasing it, except by sale, a devise of the lands to the husband, "to use as he thinks best for the maintenance of" their children, makes the husband the trustee, and vests in him the power to sell and convey the property in fee simple. *Ibid.*

13. *Wills—Caveat—Declarations — Witness — Interest — Interpretation of Statutes.*—In proceedings to caveat a will, an heir at law who would receive more as a beneficiary under the will if it is not set aside may testify to declarations made by the testator after its execution which are competent to show that it was obtained by fraud and undue influence; and such testimony, being against the interests of the witness, is not prohibited by Revisal, sec. 1631. *In re Fowler*, 203.

14. *Same—Extent of Interests—Courts.*—When it appears that a witness, in proceedings to caveat a will, has testified against his own interest as to declarations made by the deceased after he had executed the paper which is contested, it is unnecessary for the court to inquire into the extent of his interest, upon the question of the admissibility of his evidence. *Ibid.*

15. *Wills—Caveat—Fraud—Undue Influence—Issues.*—In proceedings to caveat a will, upon the ground of mental incapacity and fraud or undue influence, an issue as to whether the paper-writing was the last will and testament of the deceased is sufficient, and a separate issue as to the fraud, undue influence, or mental incapacity is not necessary. *Ibid.*

16. *Wills—Caveat—Infants—Adverse Interests—Consent Judgment—Process.*—Where, in proceedings to caveat a will, the interests of minor

WILLS—*Continued.*

children are involved, who are not properly represented, the issue of *devisavit vel non* cannot be answered by consent of the parties to the action so as to bind the infants. *Holt v. Ziglar*, 272.

17. *Wills—Caveat—Infants—Adverse Interests—Representation—Process.* Infants taking under a will are not properly made parties to proceedings to caveat the will, who have been served with summons after the commencement of the term, only two days before the trial. *Ibid.*

18. *Same—Consent Judgment—Fraud and Collusion—Questions of Law.*—When it appears in proceedings to caveat a will that the parents of infants, who held an adverse interest to them, were appointed guardians *ad litem*, and who with their attorney and by their pleadings and testimony consented to an answer to the issue of *devisavit vel non* in their own favor, the decree accordingly rendered in an interval between the trial of criminal cases at the term is collusive and fraudulent as to the infants, and cannot bind them. *Ibid.*

19. *Wills—Caveat—Guardian Ad Litem—Adverse Interests—Disqualification.*—A guardian *ad litem* must have no interests adversary to those of his ward, and his attorney must be equally disinterested. *Ibid.*

20. *Wills—Caveat—Infants—Adverse Interests—Guardian Ad Litem—Disqualifications—Fraud and Collusion—Interests Unprejudiced.*—A testator devised two-thirds of his lands to be equally divided between certain children of his two daughters and his son. At the death of his wife, the third thereof, which was devised to her for life, was to be divided share and share alike between the son and the grandchildren named: *Held*, (1) the interests of the daughters and son of the testator were adversary to those of the grandchildren, and their consent to an answer in the negative to an issue of *devisavit vel non* in proceedings to caveat the will was collusive and fraudulent as to the grandchildren, who were not properly made parties or legally represented; (2) the only issue being as to collusion and fraud, the question as to whether the infants interested would be prejudiced by the judgment entered does not arise for consideration. *Ibid.*

21. *Wills, Lost or Stolen—Evidence of Loss—Diligent Search.*—Before proving by parol the contents of a will alleged to have been lost or stolen, it is necessary to show that diligent search has been made in places where there is a possibility it could be found; and in this case, evidence is held insufficient, that the testator had declared he had made a will, deposited it in a certain secret place, and that he has missed it therefrom after certain persons had access to the room wherein it had been deposited, without showing inquiry of any other persons except one of the witnesses to the will, who testified on the trial. *Byrd v. Collins*, 641.

22. *Same—Questions of Law.*—The sufficiency of the search for a will alleged to have been lost or stolen, to admit of parol evidence of its contents, is a matter of law for the court, depending upon the peculiar circumstances of each case. *Ibid.*

WITNESS. See Wills.

WORDS AND PHRASES.

1. *Banks—Certificates of Deposit—Bills and Notes—"Indorsements Guaranteed"—Words and Phrases.*—The indorsement on a certificate of deposit by a forwarding bank, sent to its correspondent bank for collection, reading "indorsements guaranteed," is merely to satisfy the bank issuing the certificate of the genuineness of the indorsements. *Bank v. Trust Co.*, 85.

2. *Deeds and Conveyances—Alterations—Legal Definition—Words and Phrases.*—The legal acceptation of the term "an alteration in writing" implies a change made after its execution, and while an erasure or interlineation may be an alteration, it is not such if made before the final execution of the writing. *Wicker v. Jones*, 102.

3. *Master and Servant—Safe Appliances—"Known and Approved"—Evidence.*—In order to show that a certain implement should have been furnished by a master to a servant for the performance of certain duties, the failure to furnish which is alleged as the cause of a personal injury received by the servant, it is not necessary to prove that the implement was in universal use, and several instances may be sufficient—especially, as in this case, when the implement is well known and has been in use for a long time. *Orr v. Telegraph Co.*, 132 N. C., 691, cited and approved. *Murdock v. R. R.*, 131.

4. *Malicious Prosecution—Nol. Pros., "With Leave."*—A criminal action is as much terminated by an entry of a *nol. pros.*, "with leave," as if an entry of a *nol. pros.* alone had been made, the effect being the discharge of the prisoner without day. *Wilkinson v. Wilkinson*, 265.

5. *Master and Servant—Negligence—"Ordinary Tools."*—It being established that the master furnished the servant a hard-tempered steel hammer with which to fix an old, badly worn machine to be used in cutting a heavy iron pipe in his foundry; that the hammer furnished was known to be dangerous for that class of work, a soft-metal hammer being safer for the purpose: *Held*, the master is responsible in damages for an injury proximately caused to the servant by the use of the improper hammer furnished him, and the doctrine of the use by the servant of "ordinary everyday tools and under ordinary everyday conditions" does not apply. *House v. R. R.*, 152 N. C., 397, cited and distinguished. *Young v. Fiber Co.*, 375.

6. *Cities and Towns—Bond Issues—"Bonds"—Words and Phrases—Direct Obligation.*—When the word "bonds" is used in connection with municipal obligations, designating what is commonly called "municipal bonds," it denotes a negotiable bond, and *ex vi termini* it implies that the city is bound for their payment. *Charlotte v. Trust Co.*, 388.

7. *Evidence—Nautical Terms—Explanation.*—It is competent for witnesses to testify to the meaning of certain lights and what such lights are intended to communicate in nautical terms to vessels passing on navigable water when it is material and relevant to the inquiry; though the meaning is fixed by rules and regulations of the National Government, it is not ordinarily known to the jurors. *Townsend v. Construction Co.*, 503.

WRITTEN CONTRACTS. See Contracts.