ANNOTATIONS INCLUDE 172 N. C.

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IN THE

SUPREME COURT

OF

NORTH CAROLINA

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

FALL TERM, 1912

J. R. WHITEHURST, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 25 September, 1912.)

1. Negligence—Personal Injuries—Wrongful Death—Executors and Administrators—Abatement of Action.

It is competent for an administrator of a deceased person, whose death was caused by a personal injury, negligently inflicted, to bring an action for damages for the wrongful death, though the deceased, in his lifetime, had brought his action for damages for the personal injuries inflicted by the same alleged negligent act.

2. Railroads—Freight Trains—Passengers—Rule of Employer—Rule of Company—Conduct—Waiver.

When there is evidence tending to show that the plaintiff's intestate, an employee, was negligently killed while riding on defendant railroad company's freight train, a rule of the company prohibiting passengers from riding on a train of that kind will not bar a recovery when it is shown that the rule had been violated so frequently and so openly and for such a length of time that the employers could, with exercise of ordinary care, have known that it was not observed.

3. Same—Evidence—Nonsuit.

The rules of a railroad company prohibiting passengers from riding on freight trains should be put in evidence to bar a recovery for the wrongful death of one so riding. There being evidence in this case that the rule had been waived by custom, a judgment of nonsuit entered by reason of the rule is not sustained.

APPEAL by plaintiff from *Foushee, J.*, at March Term, 1912, (2) of PITT.

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

Julius Brown, Ward, Grimes & Pierce for plaintiff.
Harry Skinner for defendant.

CLARK, C. J. The plaintiff's intestate began an action for injuries sustained by the negligence of the defendant. He died before the termination of that action and, the complaint avers, as a result of said injuries. It was competent for his personal representative to bring this action for wrongful death. *Bolick v. R. R.*, 138 N. C., 372.

There was evidence tending to show that the intestate was injured by the negligence of the defendant, in that the car was dangerous and antiquated; that the train was running at an unusually high rate of speed, and that the track was not in good condition. The defendant in its answer alleged that the plaintiff's intestate was riding on a freight train in violation of rules of the defendant. There was evidence that the plaintiff's intestate was assistant agent at Pactolus.

The plaintiff offered evidence to show that other agents were repeatedly seen riding on the train, with the knowledge of the conductor or trainmaster, notwithstanding the allegation in the answer that it was contrary to the rules of the company to permit any one to ride on such trains. This evidence was rejected by the court. In this there was error. In *Biles v. R. R.*, 139 N. C., 532, it is said: "When a rule has been violated so frequently and so openly and for such a length of time that the employers could, with the exercise of ordinary care, have observed its nonobservance, the rule is considered as waived and abrogated."

The nonsuit, we apprehend, was granted upon the ground that the plaintiff's intestate was wrongfully on the train; but the above evidence, if admitted, would have tended to show that he was rightfully on the train, either as an employee or by permission of the conductor, and that it was the custom for conductors on said road to allow agents, assistant agents, and others to ride on freight trains. (3) Indeed, this evidence was not contradicted; and even if it had been against the rules of the company, there was no evidence of the fact, for the rule book was not introduced in evidence.

The judgment of nonsuit must be

Reversed.

Cited: Edwards v. Chemical Co., 170 N. C., 557.

JAMES HOLDER, ADMINISTRATOR, v. NORTH CAROLINA RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 16 October, 1912.)

Railroads—Negligent Killing—Circumstantial Evidence—Presumptions—Nonsuit.

Upon the trial of defendant railroad company for the negligent killing of plaintiff's intestate by a passing train, the plaintiff relied on circumstantial evidence tending to show that deceased, staggering and acting like a drunken man, about dark, was seen alive for the last time, going to defendant's track, where several trains passed during the night, and about 7 o'clock the following morning was found dead, in a sitting position on the end of a cross-tie, without sign that the body had been dragged or mangled, and without wounds, excepting two in the back of his head; that he could have been seen in time to have stopped the train. There was no evidence of failure to sound the whistle or ring the bell: *Held*, no presumption of the defendant's negligence arose from the killing of the deceased, if it was caused by defendant's train, but if in sitting position, that the engineer had a right to presume that he would get off the sill up to the last minute, and avoid the danger; and the burden of proof being on the plaintiff to show that the position of his intestate was such as to lead a man of ordinary prudence, in charge of the train, to believe he was unconscious and helpless, in the absence of evidence, a nonsuit was properly entered; and, *Held further*, the fact that the intestate was found with his head resting on his arm between the cross-ties, lower than his body, was insufficient, as such posture would likely result if he had been hit by a passing train.

APPEAL by plaintiff from *Bragaw, J.*, at April Term, 1912, of WAKE.

This is an action to recover damages for the alleged negli- (4) gent killing of the plaintiff's intestate.

The defendant denied that it killed the deceased, or that it was negligent, and pleaded contributory negligence.

There was no eye-witness to the killing, the plaintiff relying on circumstantial evidence.

The deceased was going from the railroad about sunset, and he was then staggering and acted like a drunken man. About dark he was going to the railroad, and this is the last time he was seen alive, as far as the evidence discloses. His body was found the next morning about 7 o'clock, in a sitting position on the end of a cross-tie, and while in that position several trains passed and did not touch him. There was no sign of the body being dragged or mangled, and there were no wounds except two in the back of his head. There was evidence that he could have been seen sitting on the cross-tie in time to stop the train.

There was no evidence of failure to sound the whistle or ring the bell.

The position of the body, and other circumstances, are described by a witness for the plaintiff as follows: "I went to the place where the man was found dead on the Southern Railroad track on 3 April, 1910. I was there early Sunday morning somewhere around 7 o'clock. This spot is near my house. Back beyond where this man was found there was a curve in the track where it goes into a cut. That is coming back this way from where the man was found in the cut. In going from here to Clayton, he was found on the left-hand side of the track. There is a grade this way, but from where the engine emerges from the cut it is almost level. There is a public road that crosses the railroad. There is a public road that crosses the railroad a little beyond where the man was found. I think it was about 80 feet. The crossing was west from where he was found. I do not know the distance it is from the point where the man was found to the edge of the cut. I did not step it, because it had been surveyed by both parties. It was in my field where the body was found. There was no one there at all when I got there. I looked at the man and all around the track, to see what I could learn.
(5) No one else was there until I left. I will describe to the jury how I found him, as best I can. You all know how cross-ties are. As well as I remember, the man was sitting with his left foot extended and right foot under him. He was in his shirt sleeves. He had his coat on his right arm, and part was across it, and the right arm was between the two cross-ties and his head was resting on right arm between the cross-ties and still his body was higher. He was sitting on the end of the cross-ties. I did not touch his body. I saw a wound on the back of his head that I judged was the cause of his death. I did not see any blood. I looked down the side of his face to see if I could see any blood, and there was very little. I saw no blood anywhere else. On that morning I went up about as far in the direction of Raleigh as that crossing, about 80 feet; only saw a little blood on his face. My recollection is not distinct as to how his coat was cut. I simply remember he was in his shirt sleeves and his coat was on his arm, and a part across the iron. The man's head was bending towards the east. I do not have any recollection of any train passing along there that night. Of course, I know when the regular trains pass, but on that particular night I did not pay any attention to it. I know along about that time, just a few days before and a few days after this man was found there, that the trains on the Southern Railway customarily passed that point at night. *I know the regular schedule immediately before and immediately after. The*

first train that would pass after sundown would be the midnight train that is due at Clayton at 12 o'clock, which is the mixed train coming west. There is a freight train going east that passes that point about 10 o'clock. That would be the next train after sundown. There is a passenger train that leaves here about 7:30 that passes there about 8. I think at that time that it passed a little before dark. The schedule has been changed. After the midnight train, the next train would be the one that leaves here at 4:30 and passes there something after 5. The next one is the one that passes Clayton at 7:30 and that would bring you up to next morning. I was not present or near the body when the west-bound passenger train comes along. I saw it after coroner came and moved it. When I first went up there, of course I had curiosity to see what killed the man, but the wound on the back of (6) the head seemed a little indistinct. I did not look at it very closely. Did not examine it when I went back. When I saw the body the second time, they had taken it off the track and were preparing to move it away. I did not look for any blood at that time."

At the conclusion of the evidence, judgment of nonsuit was entered, and the plaintiff excepted and appealed.

Douglass, Lyon & Douglass and R. N. Simms for plaintiff.
W. B. Snow for defendant.

ALLEN, J. The evidence in *Clegg v. R. R.*, 132 N. C., 293, in which a judgment of nonsuit was sustained, was "that plaintiff's intestate was seen going in the direction of defendant's track and was later found dead, lying by the side of the track where a dirt road ran parallel with it, but not at a crossing, and with bruises from which it might be reasonably inferred that he had been knocked off the track and killed by defendant's engine. The track was straight at that point for half a mile, possibly more. Part of the back of intestate's head was knocked off. There was no eye-witness to the death, whether he was killed by the engine, or, if so, whether he was on the track or close by it when struck or whether he was walking or sitting down or lying down on the track. There was no sign of the intestate having been dragged, nor had he been run over by the engine. The killing was at night. There was evidence by plaintiff's witnesses that there was no sign of blood on the cross-ties, and some evidence to the contrary"; and the Court, speaking through the present *Chief Justice,* said: "If the deceased was either walking or sitting or lying down on the track, this was evidence of contributory negligence. *Hord v. R. R.*, 129 N. C., 305. If walking or sitting down, the engineer (nothing else appearing) had a right to presume he would get off before the train

struck him, and there would have been no negligence on the part of the defendant inferable from the mere fact, without further evidence, that the deceased was killed while on the track, for the engine had the right of way. If deceased had been helpless, lying down on the
(7) track, and the engineer with proper outlook could have seen him in time to avoid killing him, and did not do so, this would have been negligence rendering the defendant liable, notwithstanding the previous contributory negligence of deceased, and that the track was straight for half a mile or more was evidence to go to the jury that if he had been lying down the engineer, with proper outlook, could have seen him; but there was no evidence tending to show that he was lying down (*McArver v. R. R.,* 129 N. C., 380), and the burden of showing that the deceased was helpless on the track was upon the plaintiff. *Hord v. R. R.,* 129 N. C., 305. The evidence of some blood on the track (though contradicted by plaintiff's other witnesses) was equally consonant with deceased having been struck while walking or sitting down."

The evidence in this case is much more favorable to the defendant than was the evidence in the case cited, because here the plaintiff has shown that his intestate was sitting on the end of the cross-tie at the time he was struck by the train of the defendant, if it struck him, and is in all material aspects like that in *Upton v. R. R.,* 128 N. C., 173.

As no presumption of negligence arises from the killing of the deceased, and as the engineer had the right to presume, up to the last moment, he would get off the cross-tie, if he was sitting up, the burden was on the plaintiff to prove that his appearance while on the cross-tie was such as to lead a man of ordinary prudence, in charge of the train, to believe he was unconscious or helpless, and we find nothing in the evidence that amounts to more than conjecture or speculation as to this fact.

The circumstance that the head was bent over *at the time the body was found,* chiefly relied on by the plaintiff, is explained by the strong probability that a blow causing death could not have been received without making some change in the position of the body, and when death ensued it was natural for the head to drop.

It also appears that several trains passed the body while on the cross-tie, without touching it, which would indicate a change in the position of the body after it was struck, if the deceased was killed by a train of the defendant.

(8) We are, therefore, of opinion that the evidence is not of such character as to justify submitting it to the jury.

There is a marked distinction between this case and that of *Henderson v. R. R.,* 159 N. C., 581.

In the *Henderson case* the killing was admitted, and it was in the daytime. There was evidence that no whistle was sounded; that the deceased was found asleep by the side of the track about two hours before his death; that when aroused he walked up the track in the direction his body was afterwards found, staggering; that when found the body was on one side of the track, the head on the other, one arm under the trestle, and the other badly mangled; that there was blood on the rail; and none of these circumstances appear in this case.

The ruling on the admission of a part of the answer is immaterial, as it has no tendency to prove that the deceased was in an apparently helpless condition, but simply that he was sitting on the end of a cross-tie.

Affirmed.

Cited: *Stout v. R. R.*, 164 N. C., 385; *Tyson v. R. R.*, 167 N. C., 216; *Hill v. R. R.*, 169 N. C. 741, 743.

NATHANIEL CARTER v. THE COHARIE LUMBER COMPANY.

(Filed 16 October, 1912.)

1. Railroads—Logging Roads—Liens—Independent Contractor—Interpretation of Statutes.

A logging road operated by the use of steam is a railroad within the meaning of section 2018, and by following the requirements of that section a lien may be obtained for work done in its construction, though under an independent contractor.

2. Same—Intent—Prospective Effect.

Legislative enactments, in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general scope coming into existence subsequent to their passage. Hence, Revisal sec. 2018, first enacted in 1872 applies to logging roads operated by steam, though they may not have been in existence at the time it was first passed, in 1872.

WALKER and ALLEN, JJ., dissenting.

APPEAL by plaintiff from *Carter, J.*, at August Term, 1912, (9) of SAMPSON.

Appeal from justice of the peace. The plaintiff sued to recover of defendant $83.50 for work done in constructing railroad for defendant. The defendant bases his right to recover under section 2018 of the Revisal of 1905.

It is admitted that the notice required by the act was properly given and served, and that the action was commenced in apt time. A motion to nonsuit was allowed, and the plaintiff appealed.

Faison & Wright for plaintiff.
H. A. Grady and George E. Butler for defendant.

BROWN, J. The defendant owned and operated a lumber mill and also a standard-gauge railroad in connection therewith to Parkersburg on the Atlantic Coast Line, a distance of three miles. This road was connected with branch railroads extending in the woods.

The same engine and cars were used over the main stem and its branches. Sometimes a branch is taken up and relaid elsewhere.

The defendant entered into a written contract with one Buhman on 24 February, 1911, by which Buhman was to operate its railroad and lumber business. The plaintiff was foreman of the railroad construction crew, kept the time, and worked in constructing the branch railroads, laying down cross-ties, spiking rails, and doing other construction work. The defendant claims that Buhman was an independent contractor, and solely liable to the plaintiff, and that section 2018 has no application to defendant. His Honor so ruled, and the plaintiff excepted.

The plaintiff testified that he was building the railroad for the defendant under a contractor. Assuming that Buhman was an independent contractor, if defendant's railroad comes within the meaning and spirit of section 2018, the defendant is liable, as it appears that the requirements of the statute have been strictly followed.

(10) The defendant's plant constitutes what is called a "logging railroad." It is standard-gauged, steel-railed, connected by switch with the Coast Line, operated by steam engines and standard-gauge cars, and has branches extending for convenience into the woods, over which the same engines and cars are used.

The description of this road brings it within the definitions of a railroad as given by Rapalje and Bouvier, in their law dictionaries. The language of this statute, defining a railroad, is the same as in the fellow-servant act, Revisal, 2646.

In construing that act and its similar phraseology, we held that logging roads are railroads within the meaning of the act, and that the term "railroad" embraced any road operated by steam or electricity on rails. *Hemphill v. Lumber Co.*, 141 N. C., 489; *Witsell v. R. R.*, 120 N. C., 557; *Schus v. Powers Co.*, 85 Minn., 447.

We have also held that the law as applied to other railroads in respect to negligently causing fires on their rights of way shall be ex-

tended to railroads constructed solely for logging purposes. *Craft v. Timber Co.*, 132 N. C., 156; *Simpson v. Lumber Co.*, 133 N. C., 96.

We apply to both classes of railroads the same rule in regard to defective spark arresters. *Cheek v. Lumber Co.*, 133 N. C., 96.

For these reasons we see no reason why this defendant should not be classified as a railroad within the meaning of section 2018.

It is contended, however, that this section was first enacted in 1872, and that there were no logging roads in existence then, and that therefore they could not have been in contemplation of the Legislature.

We are not informed as to that, but we assume the correctness of the statement.

The mere fact that "logging railroads" came into more general use since the passage of the act does not alter the case. They are nevertheless "railroads," although used principally for transporting logs.

It is a general rule of statutory construction that legislative (11) enactments, in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general scope coming into existence subsequent to their passage. *McAunich v. R. R.*, 20 Iowa, 337; *Schus v. Powers Co., supra.*

Reversed.

WALKER, J., and ALLEN, J., dissenting.

ISHAM FIELDS v. W. T. COLEMAN AND JAMES H. YOUNG.

(Filed 9 October, 1912.)

Pleadings—Proceedings to Obtain Information—Materiality—Practice—Appeal and Error.

In proceedings to elicit information preparatory to filing a complaint in an action by plaintiff alleging that the defendants had conspired to injure the plaintiff's character by preferring false charges against him, and securing his expulsion from the church, it appeared that the information sought was the production of certain letters alleged to have been written by one of the defendants to a certain woman which tended to prove an immoral relationship existing between them, without averment by the plaintiff that he did not know the charges made against him, and without his making the materiality of these letters to his cause appear. The judgment of the clerk, approved by the judge of the lower court, denying the plaintiff the right of examination sought, is upheld on appeal.

FIELDS *v.* COLEMAN.

APPEAL by plaintiff from judgment of *Webb, J.*, made at chambers on 18 April, 1912; from WAKE.

This is an appeal from a judgment of the Superior Court of Wake County, confirming an order of the clerk, revoking an order for the examination of parties defendant, and recalling the subpœna *duces tecum* that was issued with the same. The order revoked was made upon affi-
davit for the examination of the defendants, and with a view par-
(12) ticularly to obtaining two certain letters alleged to have been
written by defendant Coleman to one Lovie Pitts, the plaintiff alleging that knowledge of the contents of said letters was necessary to the framing of his complaint.

The defendants contended that said letters were neither material nor necessary; that the object of the examination being to discover the said alleged letters, it was neither material nor necessary that said examination should be had, and that the application for said examination and subpœna *duces tecum* was in bad faith.

The plaintiff filed the following affidavit, upon which his motion was based:

"1. That this action is brought against the defendants, James H. Young and W. T. Coleman, for conspiring together to defame and injure the plaintiff in his good name, reputation, character, and business.

"2. That he expects to allege, upon securing from the said Young and Coleman the facts in relation thereto, that, pursuant to a conspiracy entered into between the said Young and Coleman, that they, the said Young and Coleman, circulated and preferred false charges against the plaintiff and procured his expulsion from the First Baptist Church, colored, of Raleigh, N. C., and otherwise injured the plaintiff in his character, reputation, and business.

"3. That he expects to establish evidence by the defendant James H. Young which will enable him to allege in his said complaint that the said Young has in his possession or under his control certain letters which were written by the defendant Coleman, who was at that time the pastor of the First Baptist Church, colored, of Raleigh, N. C., to a certain woman by the name of Lovie Pitts, which letters tend to show that there were existing between the said Coleman and the said Lovie Pitts improper relations, and that tend to show gross immorality on the part of the said Coleman.

"4. That the plaintiff expects in the said examination of the said Young and Coleman facts that will authorize him in his said complaint to allege that the said Coleman was the pastor of the said First Baptist Church, colored, at Raleigh; that plaintiff was a member thereof, and that plaintiff had certain information in reference to the rela-

tions existing between the defendant Coleman and the said Lovie (13)
Pitts and as to the existence of the letters hereinbefore referred to,
and that the plaintiff proceeded to take certain steps and preferred charges against the said Coleman, as pastor, and attempted to have the said Coleman brought to trial before the said church, on account of the letters written by the said Coleman to the said Lovie Pitts, when the said Young and Coleman conspired together to suppress said letters and other evidence against the said Coleman, and thereupon the said Young and Coleman preferred charges against plaintiff in the said church and circulated false and slanderous reports against the plaintiff, charging him with lying and with bringing false charges against the said Coleman, and on account of said conspiracy and suppression of facts, false charges, and trickery and chicanery, procured the expulsion of the plaintiff from said church, and injured plaintiff in his reputation, character, standing, and business.

"5. That the plaintiff demands the production of the said letters, that he may set forth copies or the substance thereof in his complaint, so that he may justify himself in the action which he took in attempting to have the said First Baptist Church of Raleigh, colored, deal with the said Coleman, and to show that said Coleman was guilty of gross immoral conduct and not a suitable person to be and remain as pastor of the said First Baptist Church, colored, and to show that said Young and Coleman suppressed said letters to shield and protect said Coleman, and to show that the suppression of the said letters and the charges against the plaintiff, which secured his expulsion from the said church, was in pursuance of the conspiracy between the said Young and Coleman, and to injure the plaintiff in his good name and reputation.

"And having thus submitted to the defendants a full and fair statement and bill of particulars, the plaintiff demands that said examination be proceeded with under the statute."

Douglass, Lyon & Douglass for plaintiff.
Jones & Bailey for defendant.

ALLEN, J. The plaintiff is not asking for an examination of (14)
the defendants, after pleadings filed, preparatory to a trial, but
that he may examine them to elicit certain information to enable him to file his complaint, and, as was said by *Justice Walker* in *Bailey v. Matthews,* 156 N. C., 81: "In a proceeding of this kind, it is of the first importance that the application for an order of examination should be under oath, stating facts which will show the nature of the cause of action, so that the relevancy of the testimony may be seen and the court may otherwise act intelligently in the matter, and it should appear in

some way, or upon the facts alleged, that it is material and necessary that the examination should be had and that the information desired is not already accessible to the applicant. It should also appear that the motion is made honestly and in good faith and not maliciously—in other words, that it is meritorious. 8 Enc. of Pl. and Pr., p. 41 *et seq.* Surely, a clerk or judge is not bound to grant such an order if it appears to be unnecessary, or if the evidence sought to be elicited is immaterial, or the application appears to be made in bad faith. It is but just and right that the application should be made under the obligation and responsibility of an oath to protect the respondent against false and malicious accusations and vexatious proceedings. The law will not permit a party to spread a drag-net for his adversary in the suit, in order to gather facts upon which he may be sued, nor will it countenance any attempt, under the guise of a fair examination, to harass or oppress his opponent."

Tested by this principle, the ruling of the clerk revoking the order for an examination, and of his Honor confirming his judgment, were in accordance with law.

The affidavit of the plaintiff shows that this action is brought, for that the defendants had conspired to injure his character by preferring false charges against him, and securing his exclusion from his church, and the information he is trying to procure is the production of certain letters alleged to have been written by the defendant Coleman to a woman, which he says will prove an immoral relationship existing between them. He does not allege that he does not know what charges were made against him, and it is not conceivable that he does not,
(15) and the materiality of the letters to his cause of action does not appear.

If so, he has sufficient information for preparing his complaint, and the letters are not material for that purpose.

Affirmed.

Cited: Bank v. McArthur, 165 N. C., 375.

IN RE PETITION OF JESSE T. JONES FOR RESTORATION TO CITIZENSHIP.

(Filed 9 October, 1912.)

1. Executive Pardon—Imprisonment—Restoration of Citizenship—Interpretation of Statutes.

One who has been convicted of murder in the second degree and has been pardoned by the Governor, and released from imprisonment, may not have his citizenship restored under the provisions of Revisal, sec. 2680, by petition to the judge presiding at any term of the Superior Court held for the county in which the conviction was had, when filed after the expiration of one year after such conviction, for in such instances Revisal, secs. 2675 and 2676 apply, requiring that the petition be filed after the expiration of four years, etc.

2. Same—Practice.

The question as to whether a pardon from the Governor has the effect of releasing a prisoner, convicted and imprisoned for an infamous crime, from the consequences of his offense to the same extent as if the offense had never been committed, and for that reason he was entitled to be restored to his citizenship, can only be presented when his right of suffrage and registration, or other right of citizenship, which he exercised before the commission of the offense, has been denied.

APPEAL by petitioner from *Ferguson, J.*, at September Term, 1912, of JOHNSTON.

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

This petition was filed in the Superior Court of Johnston by the petitioner under Revisal 2680 for restoration to citizenship. His Honor denied the petition, and the petitioner appealed.

F. H. Brooks for petitioner. (16)

BROWN, J. The petitioner was convicted in the Superior Court of Johnston County for murder in the second degree at September Term, 1911, and sentenced to twenty years in the State's Prison.

The petitioner was pardoned by the Governor, and the same presented to the Superior Court of Johnston County at March Term, 1912, and the prisoner was released.

It is evident that the Superior Court had no jurisdiction to grant the prayer of the petitioner. Under chapter 64 of the Revisal of 1905, secs. 2675, 2676, etc., a prisoner convicted of an infamous crime and sentenced to imprisonment may file his petition for restoration to citizenship at any time after the expiration of four years from the date of conviction.

Section 2680 provides that where the judgment of the court does not include imprisonment, and pardon has been granted by the Governor, or judgment suspended on payment of the costs, and the costs have been paid, such person may be restored to such forfeited rights of citizenship upon application, by petition to the judge presiding at any term of the Superior Court held for the county in which the conviction was had, which petition must be filed after the expiration of one year after such conviction.

As imprisonment was a part of the judgment of the court in this case, this petition cannot be entertained at this time, as the prisoner was convicted and sentenced only a year ago.

It is unnecessary for us to consider the effect of a pardon. It is very elaborately argued in the brief of the counsel for the petitioner. It may be, as contended, that the pardon is such an act of grace as releases the offender from the consequences of his offense to the same extent as if the offense had never been committed. This question cannot be raised in petition for restoration to the rights of citizenship under the statute, for the Court has no jurisdiction to entertain it except at the times and for the purposes named in the statute.

If the petitioner is denied the right of suffrage and registration, or other rights of citizenship which he exercised before the commission of the offense, he may then by proper legal proceedings have the full
(17) scope and effect of his pardon determined by the courts.

The petitioner will pay the cost of this appeal.

The judgment dismissing the petition is

Affirmed.

JOHN Q. A. WOOD ET AL. V. W. J. WOODLEY AND A. C. STOKES.

(Filed 11 September, 1912.)

1. Deeds and Conveyances—Easements—Appurtenant to Lands—Rights of Way.

When a deed to lands also conveys to the grantee and his heirs and assigns a right of ingress and egress of a specified width over the remaining part of the owner's land to a street, the easement thus conveyed is appurtenant to the land, not in gross, and inures only to the grantee, his heirs and assigns, as owners and occupants of the lands conveyed.

2. Same—Easements in Gross—Injunction.

One who is not the owner of lands appurtenant to which a right of way has been conveyed, and claims under a deed purporting to convey the right in gross, and intends presently to use and enjoy it, may be restrained from doing so.

APPEAL by defendant from restraining order of *Bragaw, J.*, at chambers; from PASQUOTANK.

Action heard on return to preliminary restraining order. The restraining order was continued to the hearing, and defendant excepted and appealed.

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

Ward & Thompson for plaintiff.
W. A. Worth and E. F. Aydlett for defendants.

HOKE, J. On the hearing it was made to appear that on 8 May, 1899, one Wiley N. Gregory owned a parcel or lot of land in Elizabeth City, N. C., abutting on the south on Matthews Street, and on said day he conveyed to W. J. Broughton and wife the northern portion of this lot to the amount of one acre. The deed, after describ- (18) ing and conveying the acre in question, contained the following: "Together with the right of ingress and egress for the space of 20 feet wide along the Riggs line to Matthews Street;" the habendum being as follows: "To have and to hold the said lot of land as follows, with the right and privileges thereto belonging, to the said William J. Broughton and his heirs and assigns forever;" and on 28 March, 1900, said Broughton and wife conveyed said acre of land by apt words to defendant W. J. Woodley, this deed containing the same stipulation for ingress and egress with habendum, as follows: "To have and to hold the aforesaid land, etc., together with all improvements, privileges, and appurtenances thereto belonging, to the said W. J. Woodley and his heirs and assigns," etc.

That on 11 November, 1904, said W. N. Gregory conveyed the southern portion of the aforesaid land to one Joseph A. Byrum, subject to the above right of way, and on 1 September, 1908, said Byrum conveyed said southern portion to plaintiff, subject to the same right of way, etc.

That on 16 February, 1912, defendant A. C. Stokes owned a parcel or lot of land adjoining the acre conveyed by Gregory to Broughton and from Broughton to Woodley, and on said date said Woodley undertook to convey to A. C. Stokes, owning and occupying this adjoining lot, the right to use and enjoy the right of way created and conveyed by said deeds of Gregory and Broughton in terms as follows: "Do bargain, sell, give, grant, and convey unto the party of the second part, his heirs and assigns, a right of way over and along the southwest corner of the property purchased by said W. J. Woodley from W. J. Broughton and wife, said right of way to be 20 feet wide east and west, and 40 feet long north

and south, together with the right of ingress and egress over and along a 20-foot alley leading from Matthews Street to the property described above, along the eastern side of the Riggs land, in so far as the parties of the first part have authority to convey; and for further reference see deed to said W. J. Woodley from W. J. Broughton and wife, recorded in Book 21, page 644, register of deeds' office for Pasquotank County."

It was further alleged and admitted that said defendant A. C.
(19) Stokes intended presently to use and enjoy said way, claiming the right to do so under said deed from his codefendant, Woodley.

Upon these facts the restraining order was properly continued to the hearing. The deeds from Gregory to Broughton and from Broughton to Woodley conveyed the land therein described and a right of way over the remaining portion of the tract to Matthews Street. It was, however, a right of way appurtenant to the land conveyed, inuring to Woodley, his heirs and assigns, as owners and occupants of said land, and not otherwise: *Provided,* that even as to them the burden could not be unduly increased. "It may accordingly be stated as a general principle that if an easement has become appurtenant to an estate, it follows every part of the estate into whatever hands the same may come by purchase or descent. *'Quacumque servitus fundo debetur, omnibus ejus partibus debetur': Provided,* the burden upon the servant estate is not thereby increased." Washburne on Easements (3d Ed.), p. 36. This being the extent of his right over plaintiffs' lands, Woodley had no power to convey to Stokes either a right of way in gross or a right of way appurtenant as owner of an entirely distinct and separate parcel of land.

In Jones on Easements the doctrine is stated as follows:

"SEC. 28. An appurtenant easement cannot be conveyed by the party entitled to it separate from the land to which it is appurtenant. It can be conveyed only by a conveyance of such land. It adheres in the land and cannot exist separate from it. It cannot be converted into an easement in gross." And further, at section 360: "One having a right of way appurtenant to certain land cannot use it for the benefit of other land to which the right is not attached, although such other land is within the same inclosure with that to which the easement belongs. Except for this rule the burden upon the servient estate might be increased at the pleasure of the owner of the dominant estate. This rule is, therefore, applicable whether the way was created by grant, reservation, prescription, or as a way of necessity. In either case the way is created by grant, either express, presumed, or implied. The way is granted for the

benefit of the particular land, and its use is limited to such land.
(20) Its use cannot be extended to other land, nor can the way be converted into a public way without the consent of the owner of the servient estate."

The deed of W. J. Woodley, therefore, conveyed to defendant Stokes no right of way over plaintiffs' land.

On the facts as they now appear, the threatened exercise of such right was properly enjoined. 23 A. & E. (2 Ed.), p. 35.

There is no error, and the judgment continuing the restraining order to the hearing is

Affirmed.

Cited: Hales v. Railroad, 172 N. C., 107.

W. H. AND J. S. ELKS v. ADAM HEMBY AND WIFE.

(Filed 25 September, 1912.)

1. Deeds and Conveyances — Mortgages—Fraud—Usury—Issues — Equity—Cancellation—Decrees.

The vendee of lands, an ignorant man, applied to plaintiff for the loan of $1,900 to complete his purchase, and, with evidence to the contrary, there was evidence tending to show that plaintiff took a mortgage on the land to secure the loan, with an excess of $1,100, making the amount of the mortgage debt $3,000; that thereafter it was agreed that defendant's vendor should convey the lands to the plaintiff, who was to receive back the mortgage for the $3,000, and defendants went into the possession of the lands; that thereafter plaintiffs declined to make the arrangements unless the mortgage was executed for $3,800, which was given, and when the note it secured fell due the plaintiff began proceedings to foreclose, and a temporary injunction was issued. As to whether the second transaction was a resale of the land for $3,800, secured by a mortgage: *Held,* (1) Issues were properly submitted: was the real transaction a purchase of the lands by defendant from the original vendor with a loan of money from the plaintiff for their payment, and as to the amount and interest of the loan? (2) A decree was proper, upon affirmative findings to the issues, that the payment of the sum found to be due would be a full satisfaction of the mortgage debt and declaring the cancellation of the excess. (3) Evidence was competent to show the circumstances under which plaintiff acquired his deed, and the understanding of the parties at the time.

2. Deeds and Conveyances—Mortages—Fraud—Burden of Proof—Opening and Conclusion—Practice.

The burden is upon the defendant, who has admitted giving a note and mortgage, to show that it was excessive and procured by plaintiff's fraud, when he relies upon this defense, with evidence tending to support it; and he has the opening and concluding arguments to the jury.

3. Appeal and Error—Lower Court—Opening and Concluding Speeches.

The determination of the lower courts as to which party litigant should open and conclude the argument to the jury is not appealable.

APPEAL by plaintiff from *Foushee, J.*, at March Term, 1912
(21) of PITT.

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

Jarvis & Blow for plaintiffs.
H. Skinner and F. G. James & Son for defendants.

CLARK, C. J. This is an action to foreclose a mortgage. The defendant, Adam Hemby, who is an ignorant colored man, applied to the plaintiffs, who owned a store in the neighborhood, to lend him $1,900 to assist in purchasing a tract of land. The plaintiffs agreed to do so, but required, as defendants allege, a bonus of $1,100 and a mortgage for the $3,000 payable in ten annual installments, with interest. Subsequently, the vendor, on the suggestion of the plaintiffs and with the assent of the defendant, conveyed the land directly to the plaintiffs, with an understanding, as the defendants contend, that the plaintiffs were to convey same to Hemby and receive back the mortgage for $3,000 as aforesaid, and the defendants went into possession of the land. But subsequently the plaintiffs declined to make the arrangements unless the mortgage was executed for $3,800. This was given, and when the first note fell due the plaintiffs brought this action to foreclose the mortgage. The defendants immediately applied for a restraining order and asked an accounting, and alleged that all of the debt in excess of $1,900 was
(22) void because usurious. The injunction was continued to the hearing.

The plaintiffs contended that the transaction was a straight sale of the land to the plaintiffs for $1,900 and a resale by them to the defendants for $3,800 secured by mortgage. The jury found upon the conflicting evidence, on the issues submitted to them, as follows:

1. Was the real transaction stated in the pleadings a purchase of land by Adam Hemby and wife from Mark Wilkes, and a loan of money by plaintiffs to defendant Adam Hemby, to pay for such land? Answer: Yes.

2. If so, how much money did plaintiffs loan to Adam Hemby? Answer: $1,900, with 6 per cent interest from 8 January, 1910.

Thereupon the court rendered judgment for that sum, and appointed commissioners to advertise and sell if said amount and interest was not paid in sixty days. It was further decreed that the payment of such sum, with interest, should be in full payment and satisfaction of the debt, and all in excess thereof was declared null and void and canceled.

This decree is in accordance with the verdict. *Riley v. Sears,* 154 N. C., 516; *Doster v. English,* 152 N. C., 339; *Bennett v. Best,* 142 N. C., 168; *Erwin v. Morris,* 137 N. C., 50; *Ward v. Sugg,* 113 N. C.,

489. The error is not in favor of the defendants, who could have had all interest struck off and recovered the penalty, if he had asked for it. Revisal, 1951.

Exceptions 1 and 13 are to the opening and conclusion, which were properly held to be upon the defendant. The defendant having admitted the execution of the notes and mortgage, the burden was upon him to show the matters alleged in avoidance. Besides, as to the argument, the ruling was not appealable. Rules of Superior Court No. 6, 140 N. C. Exceptions 3, 5, 6, and 8 were to the admission of evidence which was offered to show that the vendor, Mark Wilkes, contracted to sell his land, not to plaintiffs, but to Hemby, and under what circumstances he conveyed to plaintiffs, and the understanding of the parties at the time. This evidence was both pertinent and relevant.

The exception to the form of the issues cannot be sustained. They properly presented the issue which arose upon the pleadings (23) as to the "true inwardness of the transaction," and, if found with the defendants, then the amount of money loaned. *Williamson v. Bryan,* 142 N. C., 81; *Gray v. Jenkins,* 151 N. C., 80.

The court properly refused to nonsuit the defendant as to the matters set up in his counterclaim, and also properly refused a motion *non obstante veredicto. Doster v. English,* 152 N. C., 339; *Shives v. Cotton Mills,* 151 N. C., 291.

The other exceptions are abandoned.

No error.

FIRST NATIONAL BANK OF LUMBERTON *v.* J. P. BROWN.

(Filed 16 October, 1912.)

1. Negotiable Instruments—Due Course—Fraud—Burden of Proof.

When the defense to an action brought by a holder upon a negotiable note acquired by him in due course, for value, before maturity, is that he had procured the note to be given to the payee by false and fraudulent representations made to the defendant, the burden is on the defendant to show that the transaction was fraudulent, and that the plaintiff knew of the infirmity of the paper at the time he acquired it. Revisal, sec. 2208.

2. Same—Evidence—Questions of Law—Principal and Agent.

The defendant having been requested with glowing representations to purchase shares of stock in an insurance company, sought information from the cashier of the plaintiff bank as to the value of the shares, and was truthfully informed by him that he, himself, had purchased some of

these shares, and told of other prominent people who had likewise done so. The defendant purchased some of the shares, and gave his negotiable note therefor, which was subsequently purchased by plaintiff bank, in due course, for value, and before maturity. In plaintiff's action upon the note, the defense was interposed that the defendant had been induced to purchase the shares and give the note upon the plaintiff's fraudulent misrepresentations. The burden of proof being upon the defendant, it is *Held*, that the evidence was insufficient to show fraud on plaintiff's part, or on the part of its cashier.

APPEAL by defendant from *Peebles, J.*, at April Term, 1912, of ROBESON.

(24) Action tried upon certain issues, of which the following is the first:

Did the plaintiff purchase the note described in the complaint for a valuable consideration and before maturity, in good faith and without any knowledge of any fraud in its execution? Answer: Yes.

McIntyre, Lawrence & Proctor for plaintiff.
McLean, Varser & McLean for defendant.

BROWN, J. Plaintiff seeks to recover upon a promissory note for $750, dated 3 July, 1908, interest from date due 10 December, 1908, signed by defendant, payable to and indorsed by himself.

The defendant pleads that said note was given for stock in the Seminole Security Company; that the stock was worthless, and that he was induced to subscribe to said stock by the false and fraudulent representations of H. M. McAllister, cashier of plaintiff.

There are forty-one assignments of error, thirty-eight of which relate to the rejection and admission of evidence. We have examined them all, and find no error of sufficient importance to necessitate another trial. Very many of the exceptions are taken to rulings which, if erroneous, constitute only harmless error at best.

It is contended that the judge erred in instructing the jury, if they believed the evidence, to answer the first issue "Yes." Taking any view of the evidence, the plaintiff is a holder in due course. Revisal, sec. 2208; *Bank v. Hatcher,* 151 N. C., 359.

The defendant gave the note to Shaw, who discounted it before maturity to the plaintiff for value. Plaintiff issued its certificate of deposit to Shaw for the net sum and paid it.

The burden is then cast upon the defendant to show infirmity in the paper and knowledge upon the part of the plaintiff at time the note was discounted of such facts as will make out a case of bad faith upon

the part of the plaintiff in taking the paper. Revisal, sec. 2205; (25) *Bank v. Fountain,* 148 N. C., 590; *Bank v. Burgwyn,* 108 N. C., 62; *Manufacturing Co. v. Summers,* 143 N. C., 102.

Assuming, for argument's sake, that the bank is bound by the acts of its cashier, McAllister, we find no evidence of fraud or bad faith on his part. According to defendant's testimony, he purchased the stock from Edwards & Shaw, the Seminole Company's agents, and gave his note for it. Their representations were of a very glowing promissory character (*Williamson v. Holt,* 147 N. C., 515), such as promoters frequently indulge in when "boosting" their enterprises. *Cash Register v. Townsend,* 137 N. C., 652. According to his own admission, defendant did not rely upon their statements, but asked McAllister's opinion.

The latter gave defendant names of many persons, presidents of banks, cashiers, and others who had invested in the stock, and stated that he had personally subscribed for some of it himself. There is no evidence whatever that the cashier's statements to defendant were false, much less knowingly so.

Even the evidence for defendant shows that they were true. One of the trustees was president of the largest bank in Columbia; another was a bank president and chairman of the State Democratic Executive Committee; another was ex-president of a large woman's college and president of a large printing establishment. The Insurance Commissioner of South Carolina, a witness for defendant, said: "The standing of these parties was the very best financially, socially, and religiously." It was shown that over 150 bankers and business men had indorsed the proposition and that their company had over 1,200 stockholders.

The fact that the Seminole Company was wrecked by its officers six months later is no evidence of bad faith or fraud upon the part of McAllister.

No error.

Cited: *Bank v. Exum,* 163 N. C., 203; *Latham v. Rogers,* 170 N. C., 240.

(26)

W. L. BAGGETT ET AL. v. D. D. JACKSON ET AL.

(Filed 30 October, 1912.)

1. Partition—Dower—Procedure—Interpretation of Statutes.

Partition of lands and the allotment of dower therein may be had in the same proceedings. Revisal, sec. 2517.

2. Partition—Petition—Necessary Parties—Deemed Immaterial—Procedure—Costs.

The presence of an unnecessary party, in proceedings for partition of lands, will be regarded as immaterial, except as affecting costs.

3. Partition—Clerk—Superior Court—Transfer in Term—Jurisdiction.

The Superior Court acquires jurisdiction over proceedings to partition lands upon their being transferred by the clerk thereto, in term, and may proceed therewith and fully determine all matters in controversy.

4. Partition—Life Estate—Remaindermen—Actual Division—Interpretation of Statutes.

Revisal, sec. 2508, provides, among other things, that "The existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common shall be deemed seized and possessed as if no life estate existed. But this shall not interfere with the possession of the estate": *Held*, that by the change in the terms from "a sale of partition" to the "purposes of partition," with the cautionary provision that it shall not interfere with the possession of the life tenant, it is construed to include actual partition by the remaindermen, as well as sale for division by them.

5. Deeds and Conveyances—Interpretation—Intent.

In construing a deed to lands, form must yield to substance, and the intent of the parties should be ascertained as embodied in the deed, giving effect to each and every part thereof if it can be done by any fair and reasonable construction.

6. Deeds and Conveyances—Interpretation—Life Estates—Reservation in Deed.

In a deed to lands only a remainder passes to the grantee, by the grantor and his wife therein using the expression, "We do except our lifetime on said lands."

7. Deeds and Conveyances—Infants—Voidable Deeds—Reasonable Time—Affirmance.

A deed to lands made by an infant is voidable only and not void, and he is held to his election to affirm or disaffirm the conveyance within a reasonable time after becoming of age; and it is held in this case that three years is a reasonable time within which he must act. *Weeks v. Wilkins*, 134 N. C., 521, cited and applied.

APPEAL by defendant from *Carter, J.*, at August Term, 1912, (127) of SAMPSON.

This proceeding was commenced before the clerk, and on issue joined was transferred to the Superior Court at term to be tried.

The petitioners are seven children of Charles Baggett, including Anson Baggett, who allege that as heirs of Charles Baggett they are tenants in common of two tracts of land, one containing 42 acres and the other 11¾ acres, subject to the dower right of the widow of Charles Baggett, the defendant M. A. Baggett.

They further allege that Anson Baggett is not entitled to any part of said land, because he had been fully advanced by the conveyance to him by Charles Baggett and wife of 42 acres of land, not described in the petition; that the other defendant, D. D. Jackson, who is the son of M. A. Baggett by a former marriage, has no interest in said land; that he and his mother are in possession of all of said land, and that this possession is wrongful as to all except so much thereof as may be set apart for dower; and they ask that the dower be allotted and the land divided, subject to the dower, into six shares, one share to be assigned to each of the petitioners except Anson Baggett, who joins in the petition.

The defendants deny the material parts of the petition, and allege that the defendant M. A. Baggett is the owner of a life estate in said land, and that the defendant D. D. Jackson is the owner in fee of the remainder.

When the proceeding was called for trail, and before any evidence was introduced, the defendants moved to dismiss, "for that this court has no jurisdiction to hear this proceeding, as it was started before the clerk for partition, and plaintiffs allege that they are not in possession of said land." His Honor overruled the motion, and defendants excepted.

It was admitted that prior to 24 August, 1897, Charles Baggett was the owner in fee of the land described in the petition, and that the petitioners are his heirs, and the defendant M. A. Baggett his (28) widow.

On 24 August, 1897, the said Charles Baggett and wife, M. A. Baggett, conveyed said land in fee to the defendant D. D. Jackson, by deed, in which appears the following clause, immediately after the description of said land: "We do except our lifetime on said land."

On 13 July, 1906, the said D. D. Jackson and wife executed a deed to the said Charles Baggett, by which they purported to reconvey said land to him in fee, which deed was duly registered on 15 August, 1906.

It was also admitted that D. D. Jackson became twenty-one years of age on 19 September, 1908; that Charles Baggett died on 10 June, 1910, and that this proceeding was commenced on 27 September, 1911.

The defendant Jackson testified as follows: "I was living with Charles Baggett when he died; made a crop there that year. Frank Williams stayed there 1909. I helped him once in a while when wanted. I lived on Mr. Martin Tew's land. I helped wait on Charles Baggett until his death. I left once for nine months; first at Robert Jackson's place, and then in Johnston County. In that time I did not work on the land; but I went with Charles Baggett to see a doctor and paid the doctor's bill. While I was off, my brother stayed there, and I went back. Charles Baggett knew I was going, and did not object. When I went off this time, two of the girls were married and moved off. Only one single, and she married during that nine months. A few years later I moved off on Mr. Tew's place, and tended one crop and moved back. I gave in the land for taxes after Charles Baggett died, and paid the taxes since."

Cross-examination: "I used what was made in 1910, supporting the family. I shot Mr. Aulsey Tew's hog and paid him $5 for it, and left and went to Johnston County. I came back a great many times."

Redirect examination: "I administered on Charles Baggett's estate. Mr. Cooper was my lawyer. I paid all the heirs their part of the personal property."

(29) There was no evidence of a disaffirmance of the deed of D. D. Jackson other than that set out.

His Honor being of opinion that the defendant M. A. Baggett was not the owner of a life estate under the exception in the deed from Charles Baggett and wife, but was entitled to dower, and that the defendant Jackson having failed to disaffirm his deed for three years after he became twenty-one years of age, before the commencement of this proceeding, directed the jury to so find, and the defendants excepted.

Judgment was rendered declaring the interests of the parties and appointing commissioners to allot dower and to divide the lands.

The defendant again excepted, upon the ground that if the plaintiffs had any interest in the land, it was a remainder interest after a life estate, and that such interest was not the subject of an actual partition.

George E. Butler for plaintiffs.
Faison & Wright for defendants.

ALLEN, J. The motion to dismiss was made before the introduction of evidence, and was necessarily based on the allegations of the petition, which is fully authorized by the provisions of section 2517 of the Revisal, allowing dower to be alloted and a partition among tenants in common in the same proceeding. The presence of the other defendant,

Jackson, if not shown to be a necessary party by the petition, was immaterial except as affecting costs. *Ormond v. Insurance Co.,* 145 N. C., 142.

If, however, the proceeding was improperly instituted before the clerk, to which we do not give our assent, when it was transferred to the Superior Court in term, that court had jurisdiction to fully determine all matters in controversy. *Faison v. Williams,* 121 N. C., 153; *Roseman v. Roseman,* 127 N. C., 496; *Luther v. Luther,* 157 N. C., 502; *Williams v. Dunn,* 158 N. C., 402.

We are also of opinion that his Honor held correctly that, although the defendant M. A. Baggett might be the owner of a life estate in the lands described in the petition, the petitioners could have actual partition of the remainder. The law was otherwise prior to chapter 214 of Laws 1887, section 2 of which is copied in section 2508 (30) of the Revisal, which reads as follows: "The existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common shall be deemed seized and possessed as if no life estate existed. But this shall not interfere with the possession of the life tenant during the existence of his estate."

The first part of the section is susceptible of the construction contended for by the defendants, that it applies only to cases of sales for partition and not to actual partition, but the change in the use of terms in the statute from "a sale for partition" to "purposes of partition," and the cautionary provision, "But this shall not interfere with the possession of the life tenant during the existence of his estate," shows that it was intended to cover both sales for partition and actual partition, and it has been so held. *Gillespie v. Allison,* 115 N. C., 544.

In the *Gillespie case* there was a life estate in two tracts of land, and the judge of the Superior Court ordered a sale of one tract, because in his opinion this course would be beneficial to the parties, and an actual division of the other, and on appeal this Court said: "The second section provides for the actual partition of the other tract, not to interfere with the possession of the life tenant or her assignee during the existence of her estate."

This brings us to the consideration of the effect of the clause in the deed of Charles Baggett and wife, M. A. Baggett, to D. D. Jackson, "We do except our lifetime on said land," and of the subsequent deed of Jackson to Charles Baggett.

We have recently held in a number of cases that in the construction of deeds form must yield to substance; that the end to be attained is to find the intent of the parties as embodied in the deed, and that effect must be given to each and every part of the deed, if this can be

done by any fair and reasonable construction (*Davis v. Frazier,* 150 N. C., 451; *Triplett v. Williams,* 149 N. C., 394; *Acker v. Pridgen,* 158 N. C., 337; *Midgett v. Meekins, post,* 42), and we have ap-
(31) plied the rule to clauses in deeds very much like the one before us. *In re Dixon,* 156 N. C., 26; *Thomas v. Bunch,* 158 N. C., 179.

In the last case, the clauses in the deed in the *Dixon case* and in the *Thomas case* are set out, and the conclusion reached by the Court stated as follows: "Language of similar import and almost identical with that in the deed before us was considered in the case of *In re Dixon,* 156 N. C., 26, and it was there held that the grantee took an estate in remainder after the death of the husband and the wife. In this deed the language is, 'and a life estate is hereby reserved by said Asa Cooper and S. A. Cooper, his wife,' and in the deed in the *Dixon case,* 'I, the said R. A. L. Carr, reserving a life interest for myself and wife, Sarah A. L. Carr, in the above described land,' and it was said in the latter case: 'The reservation in the deed is valid, and said deed did not become effective till after the death of the grantor and his wife'; and again: 'Construing the whole deed as written, there is here a reservation of the whole for the life of the grantor and his wife, with remainder in fee to their daughter.' If there is any difference in the meaning of the clauses in the two deeds, there is stronger reason for saying that the deed in this case conveys an estate in remainder to the grantee, because in the deed in the *Dixon case* the husband alone was the grantor, and a life *interest* was reserved, while in this the husband and wife are the grantors, with the reservation of a life *estate.* . . . We conclude that a life estate was reserved to Asa Cooper and S. A. Cooper, and that Charles B. Bunch was, at the time of his death, the owner of an estate in remainder, the said S. A. Cooper being then alive, and that the widow of said Bunch is not entitled to dower or a homestead therein."

In the case before us, the use of the words "we" and "our" clearly indicate an intent to reserve a life estate for the husband and wife, which should not be defeated by construction, but sustained.

The deed of Jackson to Charles Baggett, Jackson being under twenty-one years of age at the time of its execution, was not void, but voidable, and the law required of him that he should disaffirm it within three years after he became of age; otherwise he was bound by it as an executed conveyance. *Weeks v Wilkins,* 134 N. C., 521.
(32) The rule is not unjust to the infant, because he is given ample opportunity after he attains his majority to let it be known that he repudiates his deed, and it is necessary for the protection of purchasers, as the infancy of a grantor in a deed is not disclosed by the record.

In *Weeks v. Wilkins, supra,* the question is fully considered and *Justice Connor* quotes with approval 1 Devlin on Deeds, section 91, that, "The most reasonable rule seems to be that the right of disaffirmance should be exercised within a reasonable time after the infant attains his majority, or else his neglect to avail himself of this privilege should be deemed an acquiescence and affirmation on his part of his conveyance. The law considers his contract a voidable one, on account of its tender solicitude for his rights and the fear that he may be imposed upon in his bargain. But he is certainly afforded ample protection by allowing him a reasonable time after he reaches his majority to determine whether he will abide by his conveyance, executed while he was a minor, or will disaffirm it. And it is no more than just and reasonable that if he silently acquiesces in his deed and makes no effort to express his dissatisfaction with his act, he should, after the lapse of a reasonable time, dependent upon circumstances, be considered as fully ratifying it."

Again, on page 524, he considers the effect of the pendency of a life estate, and says: "But it is said that Mrs. Hester Weeks owned the life estate, and that, pending such estate, he had no right of action to sue for the possession of the land. We do not think this material. His right to disaffirm his deed was entirely independent of his right to the possession of the land. He could easily have disaffirmed by returning the purchase money or by some other unequivocal act which would have put innocent purchasers on notice. He could have brought his action to remove a cloud from his title, under Laws 1893, ch. 6."

Upon an examination of the record we find no disaffirmance of his deed by Jackson, and hold that he is bound by it.

There are several exceptions in the record, which we have examined, but it is not necessary to discuss them, as the facts set out are determinative of the rights of the parties.

The decree entered in the Superior Court will be modified in (33) accordance with this opinion, by adjudging that M. A. Baggett is the owner of a life estate in the lands described in the petition, and, as thus modified, it is affirmed.

Modified and affirmed.

Cited: *Brown v. Brown,* 168 N. C., 14; *Chandler v. Jones,* 172 N. C., 575.

P. A. NICHOLSON ET AL. V. EUREKA LUMBER COMPANY.

(Filed 11 September, 1912.)

1. Deeds and Conveyances—Probate in Another State—Female Probate Officer—Comity of Laws.

When it appears from the probate of a deed in the chain of title of a party to the action claiming the lands in dispute, that it was probated before "Delia Sadler, Notary Public" in another State, the position cannot be maintained that the probate is fatally defective, being taken by a woman, if such were made to appear, for it will be assumed that the notary was rightfully appointed in the State in which the deed was probated, and her act will be recognized as valid here.

2. Deeds and Conveyances—Identity of Grantor—Correspondence—Handwriting.

In a controversy involving title to lands, wherein a deed from Mrs. D., the grandchild and heir at law of W., was relied on in the chain of title of a party, there was testimony tending to show that W. was dead and all of his children had died without descendants, except L., who married T., who died leaving two children, one of whom died and the other married D., who lived in Waco, Texas; that the witness had received several letters from Mrs. D. from Texas, about this land, which was correctly located in the boundaries of the disputed deed from her: *Held*, (1) evidence sufficient to be submitted to the jury that the conveyance was made by Mrs. D., the grandchild and heir at law of W.; (2) testimony of the witness that he had received and answered letters from Mr. D. concerning the lands, though he did not know of her husband except from the letters and had never seen her write, was competent under the attendant circumstances.

3. Deeds and Conveyances—Variation of Magnetic Needle—Instructions—Appeal and Error.

In an action involving title to disputed lands, an exception that the charge of the court ignored or disregarded evidence tending to show that a proper allowance for the variation of the magnetic needle would have given the land a somewhat different placing, cannot be sustained, it appearing that this theoretical variation was controlled to some extent by an old and marked line, without anything of record to show that the location would have been varied; and, further, that his Honor charged that the course should "be determined by the lines of the grant and the proper variation for the difference in time."

CLARK, C. J., did not sit.

(34) APPEAL by defendant from *Webb, J.*, at May Term, 1912, of BEAUFORT.

Trespass to try title to realty. The jury rendered the following verdict:

1. Are the plaintiffs the owners of the land described in the complaint? Answer: Yes; all the lands lying east of the lines E down to 3, then to A.

2. Did defendant trespass on said land, as alleged? Answer: Yes.

3. If so, what damages are plaintiffs entitled to recover? Answer: Seven dollars and fifty cents ($7.50).

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

B. B. Nicholson and E. A. Daniel, Jr., for plaintiff.
Rodman & Rodman and Ward & Grimes for defendant.

HOKE, J. Both parties claimed title to the land in controversy under Ruel Windley, deceased, the plainttiff by deed purporting to be from Sadie Delany and her husband, the said Sadie, *née* Sadie Tooker, being the grandchild and only heir at law of James Windley, to whom Ruel Windley had devised it. This deed, admitted in evidence over defendant's objection, was from Sadie Delany and her husband, Thomas, to P. A. Nicholson, plaintiff, bore date of 12 December, 1908, and had been duly registered in Beaufort County on acknowledgment formally correct as follows:

STATE OF TEXAS—MCLENNAN COUNTY.

I, Delia Sadler, a notary public in and for the said county of McLennan, do hereby certify that Thomas Delany and wife, Sadie Delany, personally appeared before me this day and acknowledged the due execution of the within deed of conveyance; and the said (35) Sadie Delany being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and notarial seal, this the 14th day of December, 1908.

DELIA SADLER,
Notary Public, McLennan County, Texas.

It was chiefly urged for error by defendant that there was no testimony amounting to legal evidence that the Sadie Delany, grantor in said deed, was the Sadie Delany, *née* Tooker, who was the grandchild and heir at law of James Windley, deceased; but on the facts in evidence the position cannot be sustained. On this question, a witness, William Draper, testified in substance that James Windley was dead and all of his children had died without descendants except Lovey, who married one Captain Tooker. That she died leaving two children;

one was drowned in a millpond and Sadie Tooker, the surviving child, married Thomas Delany, and was now in Waco, Texas. That he had received several letters from her and answered them, which he had at home, the letters being about this land. There was other testimony from this witness as to this 100 acres, the land in controversy, which was the James Windley land, and as to its correct location. On cross-examination the witness stated that this Sadie Tooker was named Sadie Delany before she ever left Bath, N. C. That he had never seen her husband and had never seen Sadie Delany write in her life. Didn't know her husband except what was said about him in these letters. "That he answered the letters he received from Mrs. Delany and received replies from her; that he got the replies out of the postoffice, and had them at home now." A motion to strike out this testimony was properly overruled, and the identity of name, the subject-matter of the correspondence, and attendant circumstances, were, in our opinion, amply sufficient to justify the conclusion, as stated, that
(36) the grantor in plaintiff's deed and Sadie Delany, the sole surviving grandchild and heir at law of James Windley, were one and the same person. *Freeman v. Loftis,* 51 N. C., 524; 1 Greenleaf, sec. 43a (16th Ed.); Lawson on Presumptive Evidence, p. 309; 16 Cyc., 1055.

It was further objected that the acknowledgment is invalid because taken by a woman. The only evidence that the officer taking this acknowledgment was a woman is the fact that the certificate is signed "Delia Sadler, a notary public in and for said county of McLennan," and in favor of the stability of titles and the regularity of judicial proceedings we might, if required, rest the case here, on the position that it does not sufficiently appear that this notary was a woman, but whether man or woman, we think it entirely safe to hold that, having been entrusted by the State of Texas with a notarial seal and having acted and professed to act in that State as a notary public, it will be assumed that she was rightfully appointed to that office and that she acted rightfully in taking this probate, until the contrary is made to appear. As an open question, this would be so from convenience, and the position is, we think, in accord with authority. *Piland v. Taylor,* 113 N. C., 1; Jones on Evidence, sec. 41 (2d Ed.); Elliott on Evidence, sec. 103.

The controversy between these litigants was really one of boundary, dependent largely on the correct location of plaintiff's deeds, "Beginning on an oak at or near the head of Ashe Branch" and thence various specified courses and distances inclosing the property. Under a comprehensive charge the jury have established the location as contended for by plaintiffs, and after careful examination we find no good reason for disturbing their verdict.

The objection made, that the court in its charge ignored or disregarded evidence tending to show that a proper allowance for the variation of the magnetic needle would give the land a somewhat different placing, is without merit. It would seem from the testimony that the theoretical variation was controlled to some extent by an old and marked line, and, further, there are no data in the record from which the Court could determine that any substantial change in the location would have (37) resulted.

Apart from this, a perusal of his Honor's charge will disclose that he directed the jury to make the allowance for the variation which the facts would require, the language of the court in reference thereto being in part as follows: "The burden is upon the plaintiff to satisfy you by the greater weight of the evidence that the defendant has cut within their lines, the course of which will be determined by the lines of the grant and the proper variation for the difference in time."

We find no reversible error in the record, and the judgment in plaintiffs' favor is affirmed.

No error.

CLARK, C. J., did not sit in this case, being related to some of the parties; but on the collateral question as to whether the certificate of a notary public in Texas to a legal instrument is valid here or not, because it appears that she was a woman, observes:

That each State or country is sole judge of the qualifications for voters and for office therein, and that such matter cannot be inquired into in any other jurisdiction. In Great Britain seven times the Chief Executive—two of them its longest and most brilliant reigns, Queen Victoria and Queen Elizabeth—was a woman, and the same is true even of Russia, Austria and Spain, whose most brilliant reigns were those of Catherine the Great, Maria Theresa and Isabella.

In ten States of this country, and in many foreign nations, women have now equal suffrage with men, and usually the right of suffrage carries with it the right to hold office. While the women have the full right of suffrage in only ten States of this country, they vote in school matters and on local assessments in most of the other States.

These are matters for each jurisdiction to settle for itself, and when the certificate of a notary public is sent to this State from another under a notarial seal, our courts cannot go back of it to inquire into the qualifications of the officer. It may be that under our present statute a notary public is a public office here, but "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." Const. U. S., Art. IV, sec. 1. (38)

At common law in England, women have not only seven times

held the highest office, as Queen, regnant, but also that of Lord Chancellor, sheriff (1 Bl. Com., 339n) and others. Very few courts in this country (and none in England) have held that at common law she could not be a notary public. 29 Cyc., 1068, 1071, where the matter is fully discussed.

NOTE.—Laws 1913, ch. 12, authorized the appointment of women as notaries in this State.

Cited: *S. v. Knight,* 169 N. C., 339; *Allen v. R. R.,* 171 N. C., 343.

LUCY TAYLOR v. N. D. WHITE.

(Filed 3 October, 1912.)

1. Marriage and Divorce—Prior Marriage—Living Wife.

An action brought to annul a marriage on the ground that the defendant had a living wife at the time is not technically one for divorce, though in a general way it comes under that heading to the extent that alimony *pendente lite* may be allowed.

2. Same—Suits—Statutory Affidavits—Interpretation of Statutes.

An action for an annulment of marriage upon the ground that the husband had a living wife at the time will not be dismissed for the failure of the plaintiff to make the affidavit prescribed by Revisal, sec. 1563, that the facts "must have existed to the plaintiff's knowledge at least six months prior to the filing of the complaint," or for "failure to file a petition for divorce within ninety days after the expiration of that time," the reasons for these provisions not applying to a void marriage.

3. Marriage and Divorce — Former Marriage — Living Wife — Judgment — Fraud and Collusion—Procedure.

A decree in the Superior Court, declaring the defendant's marriage with a former wife void *ab initio*, duly entered subsequently to the ceremony with the plaintiff, who is suing for divorce on the ground that the defendant had a living wife at that time, establishes the fact that the defendant was single at the time of the second marriage sought to be annulled, and cannot be attacked unless impeached by direct proceedings for fraud and collusion.

4. Marriage and Divorce—Former Marriage—Voidable—Living Wife—Compulsion—Assent—Judgment.

In proceedings for divorce it appeared that the plaintiff was compelled to marry the defendant against his will; that the marriage was void, and that he had never lived with her as her husband after the alleged marriage, and a decree was entered declaring the marriage null and void *ab*

initio: *Held*, though the marriage was at first only voidable, he had not ratified it, and it was therefore void *ab initio* by the decree; or by the act of the party without the necessity for the decree of nullity, by his not giving his subsequent assent.

5. Marriage and Divorce—Children Legitimate—Interpretation of Statutes.

The children of a marriage which subsequently has been decreed as annulled are made legitimate by our statute. Revisal, sec. 1569.

APPEAL by defendant from *Allen, J.*, at February Term, 1912, (39) of SAMPSON.

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

Fowler & Crumpler for plaintiff.
George E. Butler and N. D. White for defendant.

CLARK, C. J. This is an action brought by the plaintiff in her maiden name for the annulment of her marriage to the defendant upon the ground that it was void because the defendant at the time of the ceremony had a living wife.

This is not technically an action for divorce, though in a general way it comes under that heading to the extent that alimony *pendente lite* may be allowed. *Lea v. Lea,* 104 N. C., 603. We must deny the motion made by the defendant to dismiss for failure to give the affidavit required by section 1563, for that applies strictly to divorces, for the requirement that the facts must "have existed to the plaintiff's knowledge at least six months prior to the filing of the complaint," and that on "failure to file a petition for divorce within ninety days after the expiration of that time" the plaintiff shall forfeit the right of action, is intended to prevent hasty action for divorce and to give the parties opportunity for reconciliation and to prevent bad faith and collusion. *Holloman v. Holloman,* 127 N. C., 15; *Nichols v. Nichols,* 128 N. C., 108. Those reasons do not apply to a void marriage.

It is true that such action for annulment and declaring a mar- (40) riage void *ab initio* under Revisal, 1560, comes under the general head of divorce in The Code, ch. 31, and is so styled in *Johnson v. Kincade,* 37 N. C., 470; yet it has broad features of difference from the general action of divorce which, technically speaking, is based upon a valid marriage.

In this case, the ground for annulment is the allegation that the defendant at the date of his marriage to the plaintiff in December, 1910, was the husband of one Georgia A. White. The judgment roll of the Superior Court of Edgecombe County at September Term, 1911, was placed in evidence, showing that "in a properly constituted action be-

tween said N. D. White and his alleged former wife, Georgia A. White, upon issues submitted to the jury, it was found that said N. D. White had been compelled to marry the defendant Georgia A. White against his will; that said marriage was void, and that he had never lived with her as her husband after said alleged marriage," and thereupon judgment was entered that—

The marriage ceremony performed by which N. D. White and Georgia A. White were declared man and wife is, and was, absolutely void, and that said bonds of matrimony are hereby annulled and declared null and void *ab initio.*

G. W. WARD,
Judge Presiding.

It is true that said decree was entered subsequently to the marriage of N. D. White to this plaintiff, but as the decree decides, and cannot be controverted, there was never any valid marriage between N. D. White and Georgia A. White, and he was a single man at the time of his marriage to this plaintiff. While this plaintiff was not a party to that action, the decree declaring the status of the parties to that action is conclusive unless impeached by a direct proceeding, for fraud or collusion.

"All marriages procured by force or fraud, or involving palpable error, are void, for here the element of mutual consent is wanting, so essential to every contract. The law treats a matrimonial union of this kind as absolutely void *ab initio* and permits its validity to be questioned in any court at the option, however, of the injured party."
(41) Schouler Dom. Rel. (3 Ed.), 38. The marriage between the defendant and Georgia A. White being void, he was free to marry the plaintiff, for "a void marriage imposes no legal restraint upon the party imposed upon from contracting another." *Patterson v. Gaines,* 6 How. (U. S.), 591.

Though the decree of annulment of defendant's first marriage was rendered after his marriage to the plaintiff, he had always treated the first marriage as void, and the decree declared it void *ab initio.* Though it was voidable and not void, he did not ratify it, and it was therefore void *ab initio* by the decree. "A marriage is voidable on the ground of fraud, duress, or error, and not absolutely void; but it is voidable by the acts of the party without the necessity of a decree of nullity." Tiffany Dom. Rel., 14, 35.

"A decree annulling a marriage is final and conclusive and not open to collateral impeachment, although it may be vacated or set aside for good cause on proper application. Its effect is to make the supposed or pretended marriage as if it had never existed, and hence it restores both

parties to their former status and to all rights of property as before the marriage. Hence also, its effect is to make any children of the marriage illegitimate unless their legitimacy is saved by a statute, as is now the case in several States." 26 Cyc., 920. Such is the case in this State. Rev., 1569; *Setzer v. Setzer,* 97 N. C., 252; *Sims v. Sims,* 121 N. C., 297.

The position of the plaintiff is inconsistent. She asks to have her own marriage declared void *ab initio,* but wishes to deny that effect to a decree of the court declaring her husband's marriage to Georgia A. White also void *ab initio.* It is true that her ground is the allegation that her husband was incapacitated to marry by reason of an existing marriage, but the ground of the decree obtained by him is that he never entered into the marriage, having been forced into it by duress. In neither case was there a valid marriage, if the allegations were found to be true. The subsequent assent of the husband would have made his voidable marriage valid; but as that was not given, it was void *ab initio,* and imposed no obligation on him.

The alleged marriage of the defendant with Georgia A. White not being ratified by him, was never a *de facto* marriage, as (42) plaintiff's attorneys claim, while that of the plaintiff and defendant was a *de facto* marriage, if that term can be applied to a marriage at all.

There was no legal impediment on defendant at the time of his marriage to plaintiff, and their marriage is valid.

Error.

Cited: *Watters v. Watters,* 168 N. C., 414.

THOMAS P. MIDGETT v. ROSA MEEKINS ET ALS.

(Filed 11 September, 1912.)

1. Deeds and Conveyances—Clauses Irreconcilable—Intent—Interpretation.

While a subsequent clause in a conveyance of land which is irreconcilable with a former clause therein will generally be set aside, the principle is in subordination to another one, that the intent of the grantor as embodied in the entire instrument will control in its construction, and each and every part thereof must be given effect if it can fairly and reasonably be done.

2. Same—Estates—Limitations—Reverter.

A conveyance to the grantor's wife "and her heirs" of certain described lands, with habendum "to her and her heirs as long as she lives and remains a widow after my death, and at her death or remarriage" to the

children of the grantor who have "been or may hereafter be born to her," etc., with provision that should the wife predecease the grantor, the property to revert to him: *Held*, the clauses in the deed were reconcilable, and it was the intent of the grantor that his wife, remaining unmarried, and living after his death, should hold a life estate in the lands, remainder to the children in fee; and in the event of the grantor living longer than his wife, the lands would revert to him in fee.

APPEAL by plaintiff from *Webb, J.*, at Spring Term, 1912, of DARE.

Action to remove a cloud from title and for general relief. On the trial it was made to appear that on 28 April, 1898, plaintiff Thomas P. Midgett executed a deed for two tracts of his land, the grantees being his then wife, Sarah H. Midgett, and the children of the mar-
(43) riage; the terms of the deed relevant to the inquiry being as follows:

"This deed, made this 29 April, 1898, by Thomas P. Midgett, of Manteo, Dare County, North Carolina, of the first part, to Sarah H. Midgett, of Manteo, Dare County, North Carolina, of the second part, witnesseth:

"That said Thomas P. Midgett, in consideration of one dollar and other valuable consideration to him paid by the said Sarah H. Midgett, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents do bargain, sell, and convey to said Sarah H. Midgett and her heirs two certain lots or parcels of land, situated in the town of Manteo, county of Dare and State of North Carolina, bounded as follows, viz:" [Here follows description of land in detail.]

"To have and to hold the aforesaid lots or parcels of land and all privileges and appurtenances thereto belonging, to the said Sarah H. Midgett and her heirs as long as she lives and remains a widow after my death, and at her death or remarriage I do hereby convey the aforesaid lots or parcels of land, with the privileges and appurtenances thereto belonging, to my children that has been or may hereafter be born of her, the said Sarah H. Midgett, by me, the said Thomas P. Midgett, to their only use and behoof forever.

"*Provided, however*, that should the said Sarah H. Midgett die before I, the said Thomas P. Midgett, does, then and in that event the said property shall revert to me, the said Thomas P. Midgett."

That the wife having died, the children, the other grantors of the deed, made claim to the land, subject to a life estate of the grantor, their father. On issues submitted and under charge of the court construing the deed, the jury rendered the following verdict:

Is the plaintiff the owner in fee of the land set out and described in the complaint? Answer: "No."

What interest, if any, has the plaintiff in the land set out in the complaint? Answer: "A life estate."

There was judgment on the verdict declaring the children the (44)
owners of the land subject to a life estate in the grantor, their father, and plaintiff excepted and appealed.

B. G. Crisp for plaintiff.
E. F. Aydlett and J. C. B. Ehringhaus for defendants.

HOKE, J., after stating the case: In *Davis v. Frazier,* 150 N. C., 451, the Court said: "It is an undoubted principle that a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract will be set aside. This was expressly held in *Jones v. Casualty Co.,* 140 N. C., 262, and there are many decisions with us to like effect; but, as indicated in the case referred to and the authorities cited in its support, this principle is in subordination to another position, that the intent of the parties as embodied in the entire instrument is the end to be attained, and that each and every part of the contract must be given effect, if this can be done by any fair or reasonable interpretation; and it is only after subjecting the instrument to this controlling principle of construction that a subsequent clause may be rejected as repugnant and irreconcilable. *Jones v. Casualty Co., supra;* Lawson on Contracts, secs. 388, 389; Bishop on Contracts, secs. 386, 387."

This decision was cited and approved in *Refining Co. v. Construction Co.,* 157 N. C., 280, and by *Allen, J.,* in *Hendricks v. Furniture Co.,* 156 N. C., 569, and the general principle has been directly applied to deeds conveying realty in several recent and well-considered decisions of the Court. *Acker v. Pridgen,* 158 N. C., 337; *In re Dixon,* 156 N. C., 26; *Triplett v. Williams,* 149 N. C., 394; *Featherston v. Merrimon,* 148 N. C., 199.

In our opinion, these authorities are decisive and are against the defendants' position as to the interpretation of the present deed.

From a perusal of the entire instrument, and giving to every clause its reasonable effect, we think it clear that the grantor had in mind the two conditions or events, one in case he survived his wife and the other if she survived him. In the latter case the land is in effect conveyed to her during her life or widowhood and then to the children of the marriage in fee, and in the former, "The property shall revert to me." There is nothing in the instrument to indicate that the grantor in- (45)
tended only a life estate should revert, as in *Dixon's case, supra,* but by correct and reasonable interpretation, in case he survived his wife, the property and all interest in it should revert. Revisal 1905, sec. 946. There is therefore no irreconcilable conflict in the different clauses of the deed, and on the facts and evidence and under the authori-

ties cited the grantor should be declared the owner of the property in fee. In *Fortune v. Hunt,* 152 N. C., 715, and in *Wilkins v. Norman,* 139 N. C., 40, it was held that the former and the latter clauses of the deeds were in irreconcilable conflict, and the Court applied the familiar principle that in such case and as to deeds the former should prevail.

For the error indicated, the plaintiff is entitled to a

New trial.

Cited: Baggett v. Jackson, ante, 30; *Jones v. Sandlin, post,* 155.

T. P. ASHFORD v. JOHN A. PITTMAN.

(Filed 3 October, 1912.)

1. Livery Stables—Bailee for Hire.

One who stables and feeds horses for others for pay is a bailee for hire.

2. Same—Damages by Fire—Evidence—Negligence—Rule of Prudent Man—Questions for Jury.

In an action to recover damages from the defendant, engaged in keeping a stable for keeping and feeding horses of others for pay, there was evidence tending to show that the defendant built a large fire on his premises, around a pot of heating water for killing hogs, within 30 feet from the stable wherein he kept the horses of plaintiff and others, wherein was stored a large quantity of hay and other combustible matter, when a strong wind was blowing from the fire in the direction of the stables, so that sparks could easily have been thus carried there; that there was no other fire around or near the stables; that the defendant immediately left the fire at the pot burning and unprotected, and a short while thereafter the stables caught and were destroyed, including the plaintiff's horse: *Held,* (1) though the evidence was circumstantial, it was sufficient to be submitted to the jury upon the question of the defendant's actionable negligence; (2) should the jury find that the fire at the pot was the cause of plaintiff's loss, it would be for them to determine whether, under the facts and circumstances of the case, a man of ordinary prudence would have built such a fire at the place, and left it there unprotected.

APPEAL by plaintiff from *Ferguson, J.,* at Spring Term, 1912, (46) of ONSLOW.

Action to recover damages for the alleged negligent death of the plaintiff's horse by burning. At the close of the evidence a motion to nonsuit was sustained, and the plaintiff appealed.

D. E. Anderson for plaintiff.
D. L. Ward and Frank Thompson for defendant.

BROWN, J. The plaintiff's horse was stabled with the defendant for safekeeping as a bailee for hire. The defendant's stables were on his premises in the town of Swansboro, and in them the defendant had been keeping horses for stabling and feeding for pay for the plaintiff and others.

On 13 December, 1910, the stables were burned and the plaintiff's horse was destroyed by fire, caused, as alleged, by the negligence of the defendant.

The liability of a bailee for hire for the failure to use ordinary care in the keeping of the property committed to his charge is too well settled to need the citation of authority. Jones on Bailments, 5; 3 A. & E. Enc., 742.

The only assignment of error presents the question as to whether there is any evidence of negligence.

The evidence tends to prove that on the morning when the stables were burned the defendant caused to be built a large fire around a pot to heat water for hog killing; that this fire was built within 30 feet of the stables in which the defendant had stored a large quantity of hay and other combustible matter; that a strong wind was blowing at the time very nearly in the direction of the stables, so that sparks from the fire could easily reach them; that there was no other fire around or near the stables except the one built around the pot; that immediately after building the fire the defendant went away and left it unproteced and unguarded; that after the defendant went into his house, in (47) some little while the cry of "Fire" was heard, and the defendant ran out and found the stables on fire. The plaintiff's horse was burned to death in the stables.

No evidence is offered which tends in the least to explain or throw any light upon the cause of the fire unless it caught from the fire around the pot built within 30 feet of the stables. It is true that the evidence does not prove conclusively that the stables caught from the fire built so near them, but we think the evidence is of such circumstantial character that it should be submitted to the jury to be determined whether the building the fire around the pot caused the burning of the stables.

Circumstantial evidence has frequently been allowed to determine matters of much greater consequence, both criminal and civil. There are a number of cases in our reports where the evidence of circumstances has been allowed to go to the jury as bearing upon the origin of a fire. *McMillan v. R. R.*, 126 N. C., 726; *Aycock v. R. R.*, 89 N. C., 327; *Simpson v. Lumber Co.*, 133 N. C., 101.

If the jury shall determine that the building of the fire around the pot was the cause of the burning of the stables and the plaintiff's horse, then it will be a question under the peculiar circumstances and facts of this case for the jury to say whether a man of ordinary prudence would have built such a fire in such a place and under such circumstances.

New trial.

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(48)

H. K. HAMILTON, ADMINISTRATOR, v. HINES BROTHERS LUMBER COMPANY.

(Filed 16 October, 1912.)

1. Railroads—Logging Roads—Negligence—Contributory Negligence — Presumptions—Consistent Verdict—Determinative Findings.

In an action for damages for the wrongful killing of plaintiff's intestate, the verdict of the jury upon the issues of negligence and contributory negligence, being "no" to the former and "yes" to the latter, is not inconsistent, for though the answer of "yes" to the second issue presupposes negligence on the part of the defendant, it does not include proximate cause, which is necessary to be found; and the answer upon the second issue being conclusive, it becomes unnecessary on appeal to consider the plaintiff's exceptions arising upon the first one.

2. Evidence—Cross-examination—Harmless Error.

The erroneous admission of evidence on direct examination is held not to be prejudicial when it appears that on cross-examination the witness was asked substantially the same question and gave substantially the same answer.

3. Assumption of Risks—Instructions—Issues—Master and Servant—Duty of Master—Rule of the Prudent Man.

A requested instruction upon the doctrine of assumption of risks is properly refused when no issue thereon has been submitted to the jury. The charge in this case is upheld, upon the duty of an employer to furnish a safe place to work and reasonably safe appliances, etc., and upon that of the employee to act under existing conditions within the rule of the reasonably prudent man.

4. Instructions—Contributory Negligence—Pleadings—Facts at Issue.

In an action for damages for the alleged negligent killing of plaintiff's intestate, who was employed as a brakeman on defendant's logging train, the negligence complained of was the failure of the defendant to furnish proper cars over which the intestate was required to pass to uncouple them. The defendant pleaded contributory negligence, alleging that the intestate's act of negligence occurred after he had performed this duty, by placing himself in an unnecessarily dangerous position on one of the cars while the train was in motion: *Held*, the plaintiff's requested in-

struction upon the theory that the intestate was killed while uncoupling the cars was properly refused, the contributory negligence alleged being the act of the intestate occurring thereafter.

APPEAL by plaintiff from *Peebles, J.*, at March Term, 1911, of LENOIR.

This is the second appeal by the plaintiff in this cause, the first being from a judgment of nonsuit at the close of the plaintiff's evidence, and is reported in 156 N. C., 519. This appeal is from the jury's verdict, the usual issues of negligence, contributory negligence, and (49) amount of damage being submitted to the jury without objection.

The defendant lumber company maintains certain logging or tramroads, operated exclusively for the purpose of bringing its logs from its logging woods out to its main line. The tramroad upon which the accident occurred, for which this action is brought, connects with its main line of road and runs from it out into the timber woods. The train consisted of twelve or thirteen log cars, two of which, about midway the train, were loaded with feedstuff for the camp. The object was to place the empties upon the spur and thus connect all the empties, and then proceed to the camp with the engine and loaded cars alone.

The log cars in use by the defendant were such as are in general and common use by lumber companies. They were skeleton log cars, with four stringers, about 6 x 6, six inches apart, running lengthwise down the middle of the cars, across which there was a bolster at either end of the car about 3 feet from the coupling. The cars were coupled together with link and pin, and in addition to the bolsters at either end of the car there was a beam about 4 x 6 inches across the car between the bolster and the coupling. The bolsters are about 12 inches in width, and extend in length over beyond the wheels. The top of the box of the wheel (called the journal box) is of a flat surface (about 8 inches square), and is about 2 feet from the bolster, and could be used in stepping on and off the car.

The plaintiff's intestate was employed by defendant, as fireman, on Friday before he was killed. It was a part of his duty to couple and uncouple and to do the switching. The work desired of the intestate upon the day of the injury was to uncouple certain cars while the whole train was backing, then to get off the car after so uncoupling, go to the switch below, getting there in time to change the switch (after the cars he had uncoupled had gone into the switch) before the next cars, which were to be uncoupled, had reached the switch, so that the latter cars cut off by the witness Emmerson would go straight down the track. Then the switch was again to be changed to let the other cars go therein. The two loaded cars, about the middle of the train, were to go straight

down the track, and the empties in front of and behind the two
(50) loaded cars were to be placed in the spur. There was no standard or arms on the car from which the intestate was to alight. The engineer was backing at a rate of somewhere from 5 to 8 miles per hour, and it was a slight down grade, and when the cars were uncoupled they separated and ran down the track of their own motion. It is undisputed that the plaintiff was ordered to do this work, and it is not denied that the method set out was the method adopted and used by the defendant.

It is admitted that there are two ways that this shifting of cars could be accomplished; one by the method above set out, that is, not stopping the motion of the train; and the other by backing the cars into the spur, stopping, uncoupling, then moving out, backing straight down the track, stopping, uncoupling the cars desired to be left on the main track, then moving up and backing the other cars into the spur, and stopping, uncoupling, and leaving them. Plaintiff's witnesses testified that the loss of time by the use of the latter method is from three to five minutes, while the defendant's witnesses estimate as much as fifteen minutes loss thereby.

It is not disputed that plaintiff had to go out from the engine over the moving skeleton log cars on the stringers, sit down on the beam and pull out the pin, so as to uncouple, then get off the car in order to proceed with his duties, and change and rechange the switch.

The intestate fell from the car and was killed by the car running over him.

The plaintiff contended that he fell while pulling out the pin, and the defendant contended that he had finished uncoupling the cars, and that he unnecessarily stood up on the bolster and fell from that position. Evidence was introduced to sustain both contentions.

The jury returned the following verdict:

1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint? Answer: No.

2. Did the plaintiff's intestate contribute to his death by his own negligence, as alleged in the answer? Answer: Yes.

(51) 3. What sum is plaintiff entitled to recover? Answer: (No answer).

Judgment was rendered upon the verdict in favor of the defendant, and the plaintiff appealed.

George V. Cowper and Y. T. Ormond for plaintiff.
Loftin & Dawson and Rouse & Land for defendant.

ALLEN, J. Admitting, for the purposes of this appeal, that the defendant was negligent, the controversy on the first issue was reduced to the question of proximate cause, and on the second to the inquiry whether the plaintiff was negligent, and, if so, was this the real cause of death.

If it was dangerous and negligent to require the plaintiff's intestate to pass over a skeleton car while in motion, or to use the link and pin coupler, or to lean over between the cars to uncouple, those facts, while evidence of negligence, were of the past, and could not have been the proximate cause of death, provided the intestate passed over the car, leaned over and completed the uncoupling in safety, and, after doing so, unnecessarily placed himself in a dangerous position on the bolster, when there was another safe way for him to leave the car.

It became, then, most important to ascertain the position of the plaintiff at the time he fell, and if the defendant was negligent and the intestate was also negligent, in unnecessarily going into a place of danger, both concurring in causing death, the negligence of the plaintiff was proximate, and it was proper to answer the first issue in the negative and the second in the affirmative. *Pinnix v. Durham,* 130 N. C., 360; *Curtis v. R. R.,* 130 N. C., 440; *Harvell v. Lumber Co.,* 154 N. C., 262.

In the last case cited, the Court states the rule as follows: "If, however, the plaintiff was negligent, and this negligence caused him to stumble and fall, he could not recover, although the defendant was also negligent, because this would present a case of concurrent negligence, and it is well settled that when the plaintiff and defendant are negligent, and the negligence of both concur and continue to the time of the injury, the negligence of the defendant is not in the legal sense proximate."

This view is not in conflict with the statement that contributory negligence presupposes negligence on the part of the defendant (52) (*Whitley v. R. R.,* 122 N. C., 989; *Graves v. R. R.,* 136 N. C., 9), because in the first issue two facts are involved: (1) negligence, (2) proximate cause; and it cannot be said that contributory negligence presupposes proximate cause. If it did so, the second issue would be a vain and useless thing.

It follows, therefore, that there was a phase of the evidence which supported the findings of the jury, and that the verdict is not condemned as inconsistent, which rests "upon the ground that there are two responses to different issues, one of which would support a decree for the defendant, while the other would entitle the plaintiff to recover." *Stern v. Benbow,* 151 N. C., 463.

In *Baker v. R. R.,* 118 N. C., 1017, the jury answered the first and second issues "Yes," and awarded the plaintiff $1,000, and the Court held the finding upon the second issue determinative, and that the defendant was entitled to judgment, and in *Harris v. R. R.,* 132 N. C.,

162, the three issues of negligence, contributory negligence, the last clear chance, were answered "Yes" and damages were awarded, and upon these findings a judgment in favor of the plaintiff was sustained.

The jury, in the case before us, has answered the first issue "No" and the second issue "Yes," and as we have seen that these findings are supported by the evidence, and are not inconsistent, and as the plaintiff cannot recover as long as the answer to the second issue stands, it is not necessary for us to consider the exceptions (about thirty in number) arising upon the first issue, if no error is shown affecting the second issue. *Ginsberg v. Leach,* 111 N. C., 15; *Allen v. McLendon,* 113 N. C., 325.

There are several exceptions bearing on the second issue.

The first is to permitting a witness for the defendant to say there was a safer way to get off the car than by walking on the bolster. If this was erroneous, it is not prejudicial, because, on cross-examination, the witness was asked substantially the same question and gave the same answer.

The other exceptions on this issue are to the refusal to give cer-
(53) tain prayers for instructions, and to parts of the charge as given.

The first prayer for instruction was properly denied, because it relates to assumption of risk, as to which no issue was submitted to the jury, and it also appears that his Honor substantially instructed the jury as to the degree of care required of the intestate, as the plaintiff requested, when he said: "While the law requires an employer to furnish a reasonably safe place for its employee to work, and reasonably safe appliances with which to do his work, it requires of the employee, the servant, to go about his work in a reasonably prudent manner. While he may trust that his employer or master has furnished a reasonably safe place and appliances in which to do the work, provided the danger is not so obvious that a reasonably prudent man would see that in doing the work he was in greater danger of getting hurt than not getting hurt, he may go about the work, but he is required to exercise reasonable caution and prudence himself, because it is his duty to take notice of the conditions which surround him, and he must exercise the care of a reasonably prudent man. This the defendant contends the plaintiff did not do, and that he was careless in getting up and getting on the bolster, and not careful to take care of himself so as to stoop down as he might have stooped down by exercising reasonable care."

The material part of the second prayer is also covered by the above excerpt from the charge, but the instruction is also objectionable, upon the ground that it is predicated upon the theory that the intestate was killed while uncoupling the car, while the contributory negligence al-

leged and relied on was that the uncoupling had been finished, and that he negligently stood on the bolster when it was unnecessary for him to do so.

His Honor stated distinctly to the jury that the contention of the defendant was that the intestate was negligent in getting up and standing on the bolster, which was not a method employed by the defendant. In other words, the plaintiff said that his intestate was required to pass across a skeleton car while in motion, to sit on a beam, to lean over and uncouple, and that while performing this duty he fell and was killed, and requested his Honor to charge the jury upon this (54) theory he would not be guilty of contributory negligence, unless the danger was so apparent and obvious that a reasonable person would have refused to attempt to do the work, while the defendant did not contend that he was guilty of contributory negligence if injured in this way, but that after he had uncoupled he negligently stood on the bolster and was injured.

The other exceptions on this issue are to parts of the charge which follow approved precedents.

We have examined the exceptions to the first issue and do not intimate that any were well taken, but as we find no error on the second issue, which determines the appeal, it is not necessary to discuss them.

No error.

Cited: *Sasser v. Lumber Co.*, 165 N. C., 243; *Carter v. R. R., ib.*, 255; *Holton v. Moore, ib.*, 551.

R. E. WILKINS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 16 October, 1912.)

1. Carriers of Goods—Damaged Shipment—Duty of Consignee—Entire Loss.

While ordinarily the consignee should accept a shipment of goods damaged by the carrier's negligence, and minimize the loss so far as it can reasonably be done, the principle does not obtain when the loss is entire; and, in this case, the consignee was not required to accept a keg of molasses he had bought for his own use when by the delay of the carrier the molasses had soured and become worthless, and although the keg, an incident to the shipment, might, perhaps, have been worth 25 cents to a person desiring one.

2. Carriers of Goods—Penalty Statutes—Shipment Refused—Entire Loss—Damages Established.

A consignee may recover the penalty provided by Revisal, sec. 2634, for the failure of the carrier to pay a claim for damages to a shipment

of goods, within the specified time, notwithstanding he may have refused to accept the shipment, when it appears that the loss was entire and he has established his damages as being the value of the goods shipped, according to his demand.

3. Carriers of Goods—Contracts—Bill of Lading—Demand—Knowledge of Agent—Computation of Four-months Period.

The clause in a carrier's bill of lading requiring that written demand for damages be made within four months after delivery of the shipment or within four months after the goods should have arrived, will not bar the consignee of his right to recover when it appears that the shipment arrived in a damaged condition, and all the facts and circumstances were fully known to the carrier's agent upon its arrival; and the time wherein the consignee was misled by the carrier's agent as to the time of the arrival of the goods will not be counted against the consignee in computing the four-months period stipulated for by the carrier in the bill of lading.

(55) APPEAL by defendant from *Allen, J.*, at June Term, 1912, of LENOIR.

This action was instituted for the recovery of $4.85 damage to a keg of syrup shipped from Bamberg, South Carolina, to the plaintiff at Kinston, North Carolina, and for $50 penalty for failure to pay the claim within the time allowed by statute. The defendant denied liability and denied that the claim was ever properly filed, or that claim was filed within the time allowed by the contract or by law.

On the trial plaintiff testified in his own behalf in substance as follows: "I bought 10 gallons of an especially fine grade of syrup for table use, in Bamberg, S. C., on 31 March, 1910, paying in cash 42½ cents per gallon for the syrup and 75 cents for the keg. The bill of lading was sent four or five or six days later. This is the bill of lading. [Bill of lading is introduced by the plaintiff.] Bill of lading is dated 31 March, 1910, and is made out in plaintiff's proper name. I made inquiry at both depots to know if the syrup had come. I made continuous effort to get the syrup. Some days after I had gotten home—it may have been three weeks—I asked if it had come, and kept it up, inquiring every time I came home. Sometimes I stayed maybe five weeks. I found out it had not been delivered. I went down to see both agents. I went to the A. C. L. depot once or more times. I also asked them many times over the phone, and also went personally. The A. C. L. notified me some time the latter part of August or in September, 1910, by card, that it was there. When I made inquiry to get it out, they said it was
(56) not there. I asked what became of it. The agent said it had been delivered. I said, 'Who to?' I said, 'Look again.' He looked and found it, and I went down and examined it and found it was sour. I refused to take it. It was in bad condition and sour and of no value to

me, and I so stated to defendant's agent, and he helped sample it. I filed claim in writing with Mr. Cleary, agent of A. C. L. Railroad Company in Kinston. The exact date I filed the claim in writing is 22 November, 1910, being the date the agent gave me receipt for bill of lading. Agent wanted bill of lading to go in the claim filed. He wanted me to give it over to him. I said no, that the syrup was in his hands. I would not give it to him until he said, 'We would rather you would,' and I said, 'Out of courtesy to you, I will do it; but I don't have to do it.' My claim was for damages to the syrup—$4.85, actual cost of syrup and keg. The claim has not been paid.

"I filed claim for syrup and keg, which is $4.85. I paid 75 cents for the keg. I don't know that keg was in good order, and keg soured with the contents. So far as I know, the keg was intact, and the trouble was the sour liquid. Syrup was of absolutely no value. I don't know that it would make vinegar. It was syrup I bought. I didn't want it otherwise. It was August or September. It must have been September. It was the latter part of August or September. I would not know the date, except for this receipt [witness holding receipt for bill of lading in his hand]. I presented claim for $4.85—$4.10 for the syrup and 75 cents for the keg. The bill of lading was not the claim. I presented written claim. I remember presenting separate written claim, other than bill of lading. It was the bill of cost of the syrup, and I presented the claim with the bill of lading. I refused to take it. I refused to take the keg. It would not have paid me to take it. A sweet keg, I suppose, is worth 75 cents and a vinegar keg 25 cents.

"Bamberg is 150 or 200 miles on the Southern from Kinston, the Southern being a connecting carrier on the A. C. L. Railroad Company."

Defendant offered in evidence bill of lading, and the station agent at time of trial testified that he was unable to say from (57) records in the office that the keg of syrup had arrived at Kinston on 12 April, 1910, and on the waybill was consigned to A. E. Williams and showed a delivery from Southern to A. C. L. at Columbia, S. C.

The court, among other things, charged the jury:

"If the keg could have been utilized in any way, so as to save anything to the company, it was his duty to do it; but if the whole thing was worthless, so there would have been no saving to the railroad company, then he would not be responsible for not taking it out. The burden is upon the plaintiff to show by the greater weight of the evidence that he has been damaged, and to what extent, and to what amount. So, if you find by the greater weight that they did receive this syrup and retained it till it was worthless—the claim is that it was there from April to August, and during the summer it soured and became worthless—and if

you find that it is so, and the syrup was worthless, then you will say that the value is $4.10 and 75 cents, making $4.85, or a less amount. Whatever you find to be the amount of his damages, so answer it in figures, whatever you find that amount to be."

Defendant excepted to the charge, and, after verdict, entered motion as follows:

"Upon the admission of the plaintiff that a reasonable time for the arrival of the shipment in controversy was ten or fifteen days from 31 March, 1910, and the evidence of the plaintiff being that the shipment did arrive at Kinston on 12 April, 1910, and the plaintiff further admitting that he filed the claim sued on with the defendant on 22 November, 1910, the defendant moved the court to adjudge that the plaintiff was not entitled to recover the penalty demanded in this action."

W. D. Pollock and G. V. Cowper for plaintiff.
Rouse & Land for defendant.

HOKE, J. Section 2634, Revisal, in effect provides that every claim for loss or damage to property in shipment by a common carrier shall be adjusted as to intrastate shipments within sixty days from time of filing same with the company's agent and within ninety days in
(58) case of shipments from without the State, under penalty of $50 for "each and every such failure," and with proviso that the penalty is not enforcible unless the party aggrieved in his action shall recover the full amount of the claim. Defendant resists recovery:

1st. Because the amount of the claim should be reduced by the value of the keg.

2d. By reason of a clause in the bill of lading in terms as follows: "Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

But on the facts in evidence, we are of opinion that neither position can be sustained.

In contracts of affreightment, the consignee under an ordinary bill of lading may not, as a general rule, reject the goods because the same have been wrongfully damaged in the course of shipment. Under usual conditions he must receive the goods and hold the company for the injury done, and he is required further to do what good business prudence would dictate in the endeavor to minimize the loss. The principle, however, does not obtain when the "entire value of the goods has been destroyed and the injury amounts practically to a total loss." In such

case the consignee is justified in refusing the goods, and may sue for the entire amount. Hutchison on Carriers (3d Ed.), sec. 1365; *Manufacturing Co. v. R. R.*, 62 Wis., 642; *Brand v. Weir*, 57 N. Y. Supp., 731; 5 A. and E. (2d Ed.), 384.

And so it is here. This was a shipment of syrup, and the evidence justified a verdict for the entire loss. The keg was only an incident, too small to be regarded—25 cents at the most—and the claimant testified that it would not pay him to try and utilize it. And we do not think on the facts as presented that the restrictive stipulations in the bill of lading afford protection for defendant. There is authority to the effect that on these facts, when the goods are in evidence, rejected on account of their damaged condition and all the facts and circumstances (59) fully known to the company's agent, the provision relied upon should be held to have no application whatever. *Kime v. R. R.*, 156 N. C., 451; 6 Cyc., p. 507; Moore on Carriers, p. 337. And in any event we are of opinion that the time which elapsed while the goods were in the defendant's depot and when the consignee was misled as to their placing by assurances to the contrary, on the part of defendant's agents, should not be counted to the claimant's prejudice. Under these circumstances, the offer to deliver in August should be held as the time of delivery under the first clause of the bill of lading, if the same applies, and to waive or displace the requirement contained in the second clause, that the "claim be filed within four months after a reasonable time for delivery has elapsed." Hutchison on Carriers, sec. 444; Moore on Carriers, pp. 335-336.

In any aspect of the matter, therefore, we are of opinion that the stipulations of the bill of lading do not affect the result, and the objections urged to the validity of plaintiff's recovery must be overruled.

No error.

Cited: *Baldwin v. R. R.*, 170 N. C., 13; *Schloss v. R. R.*, 171 N. C., 352; *Whittington v. R. R.*, 172 N. C., 503.

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(60)

W. E. BATEMAN v. E. B. HOPKINS.

(Filed 20 November, 1912.)

1. Contracts to Convey Lands—Judgments—Appeal and Error—Rents and Profits—Accounting—Interest.

When a contract to convey lands requires of the grantee, as a part of the consideration, that he shall pay off an outstanding mortgage on the lands, amounting to $5,000, and $1,000 in cash to the mortgagor, and it

has been so decreed by the Superior Court and affirmed by the Supreme Court, an order rendered at a subsequent term of the Superior Court that the $6,000 be paid into the office of the clerk of the Superior Court and thereupon grantor's deed to the land be delivered by the clerk to the grantee, is erroneous; and on the second appeal it is further *Held*, (1) that as the vendee had failed to comply with the terms of his contract, he was not entitled to an accounting by the vendor, in possession, of the rents and profits; (2) that under the judgment first rendered the vendee was obligated to discharge the mortgage indebtedness, including interest thereon, and therefore the vendor should not be held accountable for the interest thereon.

2. Appeal and Error—Judgments—Collateral Attack.

When, in an action for the specific performance of a contract to convey lands, it has been decreed that the plaintiff comply with his part of the contract by relieving the defendant's land from the outstanding lien of a mortgage thereon, the plaintiff cannot for the first time on appeal show by affidavit that the mortgage secured several notes, payable by installments, the last of which had not matured, when no such matter was stated in the record; and the judgment may not he thus attacked collaterally.

3. Contracts to Convey Lands—Pleadings—Judgments—Merger.

In an action to enforce specific performance of a contract to convey lands, it was alleged in the complaint, and denied in the answer, that the plaintiff was "at all times ready, willing, and able to perform the contract on his part"; and by the defendant, which was denied by plaintiff, that he had not executed the contract sued on. It was established by the verdict and judgment that the contract had been made, but that there were certain conditions in the contract forming a material part of the consideration, which the plaintiff had not performed: *Held*, the issue raised by the pleadings had merged in the judgment.

4. Appeal and Error—Erroneous Judgments—Motion to Dismiss.

The plaintiff, in an action to enforce specific performance of a contract to convey lands, paid the money into court upon a decree entered in the Superior Court under a misconception of an adjudication by the Supreme Court on a former appeal, affirming the judgment rendered in the lower court. *Held*, a motion by defendant to dismiss the cause on the ground that the plaintiff had not complied with the former judgment of the Superior Court will be denied.

ALLEN, J., dissenting; CLARK, C. J., concurring in dissent.

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

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

(61) *W. M. Barnes and Meekins & Tillett for plaintiff.*
M. Majette and E. F. Aydlett for defendant.

WALKER, J. This case was before us at Fall Term, 1911, and is reported in 157 N. C., 470. The facts are therein fully stated. By judgment of the Superior Court of Tyrrell County at Spring Term, 1911, *Judge O. H. Allen* presiding, the plaintiff was required to file with the clerk of the court a proper release of the $5,000 debt and mortgage, "discharging the defendant, E. B. Hopkins, and his real estate from liability for the said $5,000," and further, "to deposit with the clerk the sum of $1,000 for the use of E. B. Hopkins," the clerk being required to deliver the release and pay the money so deposited with him to defendant Hopkins, and to deliver Hopkins' deed, which was required to be duly executed by the latter and deposited with him, to the plaintiff.

The only modification of the judgment by this Court consisted in a clause giving reasonable time for a compliance with the judgment and requiring strict performance by the plaintiff of his part of the contract, and denying him a sale of the land. It was not intended, and it clearly appears not to have been intended, to change the former judgment in any other substantial respect. It is nothing but fair and just, and is something demanded by an equitable consideration of the rights of the parties, that the plaintiff should release and discharge the defendant from any and all liability for the debt of $5,000, and, besides, this is "nominated in the bond." When this is done, and the clerk has received the release and the $1,000 and the defendant has executed and delivered to the clerk for the use of the plaintiff his deed for the land in dispute, the clerk will then deliver the papers and pay the money as directed by the judgment.

The judgment of the Superior Court, as last rendered, does not, in form or substance, contain those provisions, one of which was that the plaintiff should release the defendant from the liability on the mortgage debt, and his land from its lien, and the other that he should pay him, in addition, $1,000. He had been directed by *Judge Allen* to do these things, and, without changing that part of the judgment, we also distinctly required him to "pay the money ($1,000) into court, and otherwise comply with his part of the contract within a reasonable (62) time." It is perfectly plain, therefore, that he must do all that is necessary to release the defendant from the indebtedness and the mortgage securing it, and also pay the $1,000; but the last judgment of the Superior Court only requires him to pay $6,000, which may not be sufficient for the purpose, as interest had accrued on the debt. It is recited in this judgment that the former judgment only required the payment of $6,000 by the plaintiff, but this is clearly an oversight, as we have shown. The plaintiff was required to have the debt and the lien of the mortgage released, and this he must do.

In the complaint (section 11) it is alleged that plaintiff had arranged with the holder of the mortgage debt to relieve defendant's property from the lien of the same, but this is denied in the answer, and there is no finding in the verdict with respect to it. It is stated, in an affidavit filed at this term by the defendant, that the mortgage debt was payable by installments, the last of which will mature January 1, 1916, and interest will continue to accrue; but we can take no notice of this allegation, as there is no such fact stated in the record, and the judgment cannot be attacked collaterally or amended or modified in the way suggested. But it may not be a practical question, as the former judgment, as we interpret it, requires the plaintiff to cancel the debt and mortgage and relieve the defendant from all liability therefor. If it appeared that plaintiff had obtained a sufficient release and made a tender of it and the mortgage notes to the defendant, or had caused the mortgage to be canceled on the record and tendered the notes to the defendant, who rejected the tender, the question of defendant's liability to account for rents after the tender might have arisen, but no such question is presented in the record.

It is suggested that defendant should account for rents and profits of the land received by him since the appeal was taken, as he has thus delayed a final settlement of the matter. If by this is meant that he should account for them from the date of the first appeal, the answer is that the defendant was simply exercising a legal right when he prose-

(63) cuted an appeal to this Court to test the validity of the court's rulings, and there is no rule of the law, or special rule of this Court, as there is in some appellate courts, under which he can be penalized for so doing, even if the appeal was merely for delay. The first appeal was by no means a frivolous one, as serious questions were presented for our consideration, and the solution of them was not free from difficulty. As to the second appeal, we have decided with the defendant, and certainly he should lose nothing because he succeeded in it. But the more conclusive answer is that the plaintiff did not comply with the conditions of the contract, that he should release the land from the mortgage debt, before this suit was brought, nor has he since complied therewith. The judgment, signed by *Judge Allen,* required him to release the mortgage debt—plainly so—and we affirmed that judgment and specially directed that he must "pay the money due (which was $1,000) into court" and "otherwise comply with his part of the contract" —that is, release the mortgage debt, for there was nothing else to do. If and when he performed his part of the duty, the defendant was required to execute and deposit the deed, and upon his doing so, he was to receive the money from the clerk and surrender the possession of the land. The plaintiff was not entitled to the possession of the land, and

consequently not to the rents and profits, until he had complied fully with the judgment of the court, and surely the defendant cannot be made to pay damages, in the way of rents and profits, for a delay caused by plaintiff's own failure to obey the order of the court. It is well to add that, while we have deemed it proper, under the circumstances, to discuss the question as to the rents, it is not presented in the case by any exception or otherwise. The plaintiff did not appeal, and we are not at liberty to decide matters not before us.

But it is suggested that defendant agreed to sell land to plaintiff for $1,000, and to release the mortgage only *"to the extent of $5,000 on that and other lands."* If by this is meant that the plaintiff was required to pay only $6,000, that is, the $1,000 in cash and $5,000 towards liquidating the mortgage debt, it is not by any means sustained by the *admitted* facts, nor is it true that plaintiff "has, at all times, been ready, willing, and able to perform the contract on his part, and that defendant refused to perform his part." The plaintiff alleged (64) that he was ready to perform his part of the contract, in his complaint, but this is squarely denied in the answer. (Record, p. 5, and 7th section of the complaint, and p. 7, and sections 7 and 8 of the answer.) This allegation and denial made up an issue, and there is not a shred of evidence in the case to show that plaintiff ever offered to comply with his contract, by tendering the release, as expressly stipulated in the contract and as required by the first judgment, which was affirmed by us. This feature of the case was not overlooked in the former opinion, but distinctly observed and considered. It is also now alleged that defendant not only refused to perform the contract, but denied its execution. True, he denied it, as he had the legal right to do, and the jury, upon evidence clearly preponderating in favor of defendant, as it seems, found against him, and we are not permitted to review their verdict. But all this prolonged controversy, so much emphasized as chargeable against the defendant, was merged in the judgment of *Judge Allen,* which required—and we quote the language again—not that the plaintiff should pay $6,000 into the court, but that "he should deliver to said clerk *proper paper-writings releasing the real estate of the defendants from its mortgage indebtedness* to the extent of $5,000, and discharge the defendant Hopkins and his real estate from liability for said $5,000, and also deposit with the clerk the $1,000 (cash payment) for use of defendant Hopkins," and when this is done, "the clerk shall deliver the deed of Hopkins to the plaintiff Bateman." And what is next: And he shall also "deliver said release of indebtedness and said $1,000 to defendant Hopkins." Plaintiff has never tendered *any kind of release,* and this is the gist of the matter. How could such a judgment mean

that plaintiff should pay $6,000 into court, unless that amount was accepted by the mortgagee as a payment of his entire claim, and he should thereupon execute and deliver to the defendant, or to the clerk of the court, his release of the debt and mortgage? Is not the expression, "to the extent of $5,000," merely descriptive of the principal of the debt and of the amount secured by the mortgage? This is made too plain for discussion by what follows, to wit, "and *discharging* the defendant (65) Hopkins and his real estate from liability for said $5,000." It is perfectly manifest that the money to be deposited with the clerk was the $1,000, the cash payment, and the other requirement was that plaintiff should have the mortgage *released.* But all this is made absolutely clear by the plaintiff's own allegation in his compaint. The allusion to the $5,000 is to the principal of the debt, which, of course, in law, carries interest, as will appear from the following extract taken from the complaint:

"SECTION 4. By the terms of said contract plaintiff was to assume the payment of certain notes outstanding, which had been executed by said defendant, being secured by a deed of trust or mortgage deed executed by E. B. Hopkins and wife, Lula M. Hopkins, to C. W. Tatem and Ella G. Tatem, dated 12 March, 1906, and recorded in the office of the Register of Deeds of Tyrrell County, North Carolina, in Deed Book 53, page 425; said notes aggregating the sum of $5,000, said mortgage securing the same, conveying several certain other parcels of land than that parcel described in section 1, and said plaintiff was to pay said defendant $1,000 in cash, in addition, in consideration of (plaintiff) *assuming the payment of said notes (which, of course, includes interest) and canceling and relieving said mortgage liens upon said defendant's property.*"

It would seem to be sufficient to say that *Judge Allen's* judgment required, in express and positive terms, that plaintiff should file a release of the encumbrance as a condition precedent to his right to have the deed, and we affirmed *that* judgment, and not only did we affirm it, but ourselves expressly required plaintiff to do so, in unmistakable language; and that was a unanimous decision. The money required to be paid into court was the $1,000, and not the $5,000, for that would not "release or discharge the mortgage," being only the principal of the debt. Who could reasonably suppose that a creditor would receive less than his claim? and unless he did so, how could the debt and mortgage be "released and discharged"? It was further at the option of the creditor to release, and defendant was not required by the contract to take this chance, but the plaintiff. We have held that the judgment (66) directing plaintiff to pay into court $6,000 was erroneous, because

it was a clear departure from *Judge Allen's* judgment, affirmed by this Court. To decide otherwise would be to make the defendant give up his home, not only upon questionable evidence, but directly contrary to the written words and spirit of the contract.

To put the case succinctly, plaintiff is simply required to perform the contract as it is written, and not as it has been reformed by the last judgment. The whole argument to the contrary is based entirely upon a mistaken assumption of fact, not at all sustained by any of the evidence.

It is first assumed that plaintiff will be required to pay interest, when that is what he promised to do, as the creditor is entitled to receive it, and cannot be forced to release his mortgage until he does. The defendant has never received any money, or had the use of any, and the plaintiff is not entitled to the deed and possession of the land until he tenders, not money, but the release called for in the contract. If he persists in refusing to make the proper tender, he must take upon himself the penalty, that is, he must pay, not to defendant, but to the mortgage creditor, the interest accrued by reason of his plain default.

The defendant has not broken the contract, but merely insists, as he has a right to do, on its performance. It is the plaintiff who seeks to benefit by its breach. The facts are all that way in the record, and cannot be changed by construction or argument. The defendant never agreed to sell the land for $6,000, but for $1,000 and a release of the mortgage, and whatever it takes to procure this is the measure of plaintiff's liability. He must deal with the mortgage creditor and get the release, and not with defendant. The plaintiff is in the wrong and seeks to take advantage of it, and, we think, most inequitably. We have already gone to the very verge of the law, and the facts, to enforce the contract in plaintiff's favor, and we should not advance a step beyond.

It is of no use to argue that, generally, in foreclosure and redemption suits, rents and profits should offset interest. That is not this case, and bears no resemblance to it. The defendant has not delayed the execution of the agreement, and could not be put in default until (67) plaintiff had performed his part of the same by paying the $1,000, *and tendering* a good and sufficient release. If interest accumulated on the principal of $5,000, it was, as we have said, his fault. The contract, the judgment of *Judge Allen* and the judgment of this Court, explicitly told him what his obligation was, and he has failed, so far as the case discloses, even by any attempt, to comply with it. He cannot escape by pleading an erroneous judgment rendered below upon our certificate.

It is strange to contend that the interest has accumulated by defendant's default, even in the best view for plaintiff, as defendant, by his appeals, was merely pursuing the course which the law allowed to him

in the vindication of his rights. This is the first time it has been suggested, we think, that a litigant must be penalized for appealing to this Court to review and correct alleged errors below, especially when we have modified one judgment and reversed the other.

The increase of the sum to be paid, by adding the interest, is no change of the amount of the debt, which was $5,000, the interest being only an incident and given to the creditor by his contract and by the law. This not infrequently happens in every appeal, and is one of the necessary results or concomitants of litigation. But the conclusive answer to all these suggestions is, that no such point is raised in the record, the defendant having appealed and not the plaintiff, and the latter nowhere, in the whole course of the litigation, has ever, in a legal sense, claimed the right, now for the first time urged in his behalf, that the defendant should account for the rents.

The plaintiff's claim that rents should be paid by defendant is based entirely upon a misconception of the relations of the parties. It is said the defendant denied the contract, and the jury found against him, and this constitutes a breach. Not at all; and this false premise or assumption has led the plaintiff into the error of supposing that defendant is in the wrong. The plaintiff is required to do more than merely show a contract; he must also show performance on his part, as he seeks to enforce it, or, at least, a tender of performance, before he can put
(68) defendant in the wrong; and this he has not done. The jury said that he was ready and able to pay off the mortgage indebtedness, but he had not tendered performance as to either. His readiness to perform is not what the law or the first decree required of him, but the actual payment of $1,000, and the actual tender of the release. The rights and duties of the parties were ascertained and declared in the first decree, and that distinctly required the payment of $1,000 and the tender of the release, and, moreover, was affirmed by us. So it will not do to argue that defendant is in the wrong and, therefore, should pay the rents, because the tender of the release by plaintiff was a condition precedent to the execution of the deed and the surrender of possession by defendant. It is sufficient to say, in answer to plaintiff's contention, that plaintiff himself is in the wrong, because he has never complied with the decree of the Court, and defendant cannot be in the wrong so long as plaintiff fails to do so.

It is not a case of having "both money and land," for the promise of plaintiff (vendee) was not to pay money alone, but to pay money ($1,000) and to file a release, the latter of which he has not done, nor does he pretend to have done it. The stipulation is joint and entire, and the whole must be performed before the time comes for defendant to give up the deed and the land.

Again, defendant has had no use of the money, actually or constructively. Plaintiff paid $5,000 into court, and he now asserts that it is the same as depositing a release, which it clearly is not, and both *Judge O. H. Allen* and this Court have said so, and for the reason that it is not so stated in the bond. The money would not buy the release, as the debt and mortgage will not mature for some years, and interest has accrued and will accumulate, and therefore it is that the vendor (defendant) contracted specifically for a release, and not for the money. So that it cannot possibly be gainsaid that plaintiff has been in default from the beginning, and certainly since the first judgment of the lower court, by which he is bound and concluded, not having appealed therefrom, he not having complied with its essential and chief mandate, that he should file a release of the debt and mortgage, which are (69) liens on the other lands of defendant. An apt statement of the law will be found in *Bostwick v. Brock,* 103 N. Y., 423:

"The purchaser is entitled to the rents and profits from the time when, according to the terms of the contract, possession should have been delivered, or, if the vendor has remained in possession, he is chargeable with the value of the use and occupation for the same period, and the purchaser is chargeable with interest on the purchase money, if it remained in his hands unappropriated." But this presupposes that the purchaser was not only able, ready, and willing to perform, but had actually tendered performance, for of course he would not be entitled to possession, or the duty of defendant to deliver up the possession to him would not have arisen until plaintiff performed his full part of the contract and thereby put the vendor in default.

In this case, as matter of law, the plaintiff has not been ready, able, and willing to perform, as it is admitted that he has never obtained the mortgagee's release to this day. The principle of equity, "that specific performance is a matter, not of absolute right, but of sound discretion," has no application here, for the purpose of showing that this plaintiff was not entitled to it, if defendant had not broken his contract. The first decree merely required the parties respectively to perform the contract, each his part of it, plaintiff's part being to pay the $1,000 and to exonerate the defendant's land from the mortgage lien by having the same released, and his failure to obey the order of the court is what puts him, and not defendant, in default. His right to specific performance was fully explained in the first opinion, and requires no further comment from us. Plaintiff, in his present contention, advanced for the first time, without any exception to present it, loses sight of the fundamental fact in the case, that he has never tendered the release, and, in fact, has never been ready to do so, as it is not in his possession or

under his control, and never has been, and he can take nothing from the last and erroneous decree of the court, because it is founded upon the same misconception.

Let the case proceed hereafter in accordance with the opinion of this Court affirming the judgment rendered by *Judge Allen.* As their
(70) rights have now been finally determined, the parties may be able to adjust their difficulties without further litigation, as plaintiff's counsel intimated in the argument that the necessary release could be easily secured by him.

The defendant's motion to dismiss, as plaintiff had not complied with the former judgment, is denied. He did what the last judgment required him to do, and should not be held to have forfeited his right to a specific performance, as already decreed, because that judgment was erroneous, nor can he profit by it in any way to the prejudice of the defendant.

Error.

ALLEN, J., dissenting: On 8 January, 1910, the defendant agreed, in writing, to convey to the plaintiff the land described in the complaint, upon the payment to him of $1,000 and the release of a mortgage to J. C. Meekins, Sr., in full, or to the extent of $5,000 on that and other lands.

The plaintiff has at all times been ready, willing, and able to perform the contract on his part, and the defendant not only refused to do so, but he also denied that he had made the contract.

This statement is based on the verdict of the jury, which has never been disturbed, and is as follows:

1. Did the defendant execute the contract set out in the complaint? Answer: Yes.

2. Did the plaintiff Bateman tender the defendant Hopkins the $1,000, part purchase money of the lands described in the complaint? Answer: No.

3. If not, was it waived by defendant Hopkins? Answer: Yes.

4. Was the plaintiff Bateman ready, willing, and able to pay off the indebtedness of said Hopkins to J. C. Meekins, Sr., and to pay the defendant Hopkins, in addition, the $1,000 balance of the purchase money? Answer: Yes.

5. What is the yearly rental value of the same? Answer: $150.

It therefore became necessary to bring this action to compel specific performance, and it was adjudged herein, upon the verdict, at
(71) Spring Term, 1911:

"First. That the defendant, E. B. Hopkins, execute a deed conveying to the plaintiff, W. E. Bateman, in fee simple, the tract of land and improvements thereon described in complaint in this cause, and deliver said deed to the clerk of this court.

"Second. That as soon as plaintiff Bateman delivers to said clerk proper paper-writings releasing the real estate of the defendant Hopkins from its mortgage indebtedness to the extent of $5,000, and discharging the defendant Hopkins and his real estate from liability for said $5,000, and also deposits with said clerk the sum of $1,000 for use of defendant Hopkins, said clerk shall deliver said deed to plaintiff Bateman, and deliver said release of indebtedness and said $1,000 to said defendant Hopkins."

The defendant refused to abide by this decree, and appealed to this Court, where the same was affirmed, the Court saying in the course of the opinion: "In this case the defendant will be fully protected in the enjoyment of every right he should have by requiring the payment of the money into court for his benefit, before he is called upon to part with his deed. This is all he had a right to expect under the circumstances. The decree in this case conforms to established precedents, except, perhaps, in one respect, and that objection to it can be cured by amendment. It should have set a time, say sixty days after the adjournment of the court, for the payment of the money into court by the plaintiff, and then directed, if it was not paid by the expiration of that time, the suit should be dismissed with costs, which, of course, would deny to the plaintiff any right to an enforcement of the contract, by reason of his own default after notice and reasonable time to pay or perform his part of the agreement."

When the cause again came on for hearing in the Superior Court, it was adjudged "that the plaintiff pay the money due as adjudged in the former judgment into this court, to wit, $6,000, on or before 15 June, 1912; and upon failure of the plaintiff so to do, his rights under said former judgment shall be denied and this action dismissed; and upon compliance herewith by the plaintiff within the time above stipulated, it is adjudged that the defendant execute a good and (72) sufficient deed for the premises, properly acknowledged and proven, and the same deposit with the clerk of this court within fifteen days after notice to him of payment and deposit of said money, to wit, $6,000, as aforesaid; and as thus modified the former judgment is in all particulars confirmed."

The plaintiff paid $6,000 into the clerk's office, as required by the last judgment, and the defendant again appealed.

It is now held that his Honor was in error in requiring the plaintiff to pay $6,000, and that he must pay $1,000 to the defendant, and in ad-

dition must secure the release of the $5,000 mortgage, which will require him to pay $5,000 and interest thereon from 8 January, 1910, or a total of $6,550 to 8 November, 1912.

During all this time the defendant has been in possession of the land, the annual rental value of which is $150, and it is said that he must not account for the rents. If the position of the Court is sound, and sustained by legal principles, it pays to break a contract, because the defendant has undoubtedly gained the rental of the land for two years by refusing to perform his.

It also has the effect of requiring the plaintiff to pay $6,550 for land which the defendant agreed to sell him for $6,000, and this is brought about by the conduct of the defendant in the effort to repudiate his contract.

This seems to me to be a complete reversal of the doctrine that one cannot take advantage of his own wrong.

In my opinion, the Court misconceives the terms and effect of the original judgment, and holds the plaintiff to a contract which he has not made.

The plaintiff was not required by that judgment to pay the defendant $1,000, and to have satisfaction of the mortgage entered, but to pay $1,000 and to release the real estate of the defendant from the mortgage indebtedness *"to the extent of $5,000,"* which imposed no greater obligation than the payment of $6,000.

(73) This judgment was affirmed by this Court, and the judge of the Superior Court then directed $6,000 to be paid into court by the plaintiff, which he did, and this is in accordance with the statement in the opinion upon the former appeal, that "the defendant will be fully protected in the enjoyment of every right he should have by requiring the payment of the money into court for his benefit, before he is called upon to part with his deed."

If there is error, it is because of faithfully following our judgment.

I think, however, the last judgment rendered, requiring the plaintiff to pay $6,000, is not erroneous, as his liability was fixed by the first judgment to pay $1,000 and to release the lands from the mortgage to the extent of $5,000.

No interest should be charged, because the delay has been caused by the defendant, and he has been in possession of the land.

"In the absence of an express agreement to pay interest, if there is a delay in the performance of the contract, due to no fault of the purchaser, he is not liable for interest on the purchase money during such delay, unless he is in possession of the property sold." 39 Cyc., 1570.

"Now, it is obviously inequitable, in the absence of express and distinct stipulation, that either party to the contract should at one and the

same time enjoy the benefits flowing from possession of the property and those flowing from possession of the purchase money. The estate and the purchase money are things mutually exclusive. 'You cannot,' said Knight Bruce, (then) V. C., in a case arising out of the sale of some slob lands in Chicester harbor, 'have both money and mud.' And so neither party can at the same time be entitled both to interest and to rents." Fry Spec. Per., sec. 1399.

"Where the interest is much more in amount than the rents, and the delay in completion is clearly made out to have been occasioned by the vendor, the court, to prevent the vendor from gaining an advantage by his own wrong, gives him no interest, but leaves him in possession of the interim rents." Fry Spec. Per., sec. 1404.

In some courts this rule is not followed, but when interest is charged against the vendee the vendor in possession is chargeable (74) with rents, upon the ground that the vendee becomes the equitable owner of the land upon the execution of the contract. *Marx v. Oliver,* 246 Ill., 316; *Bostwick v. Brock,* 103 N. Y., 423.

In the last case the Court says: "Where the purchaser is ready and willing to perform, and the delay is on the part of the vendor, the purchaser is entitled to the rents and profits from the time when, according to the terms of the contract, possession should have been delivered, or, if the vendor has remained in possession, he is chargeable with the value of the use and occupation from the same period, and the purchaser is chargeable with interest on the purchase money if it has remained in his hands unappropriated. But where it has been appropriated, and notice thereof given to the vendor, and the purchaser has received no interest thereon, he is not liable to pay interest to the vendor. (Fry on Specific Performance, 481, 483, 889; *Dias v. Glover,* 1 Hoff. Ch., 71, 78; Story's Eq., sec. 789; *Worrall v. Munn,* 38 N. Y., 137, 142.)"

Under the opinion of the Court, the vendee must pay interest and the vendor receives the rents, and this ruling is attempted to be justified by the statements that, "The defendant has not broken the contract, but merely insists, as he has the right to do, on its performance. It is the plaintiff who seeks to benefit by its breach. The facts are all that way in the record, and cannot be changed by construction or argument. The plaintiff is in the wrong, and seeks to take advantage of it, and, we think, most inequitably. We have already gone to the verge of the law and the facts to enforce the contract in plaintiff's favor, and we should not advance a step beyond."

If this is a correct interpretation of the record, we have, in the former opinion, not only gone "to the very verge," but we have taken the fatal step, as we have affirmed a decree for specific performance against a

defendant who has not broken his contract, and in favor of a plaintiff who is in the wrong and seeks to take advantage of it most inequitably.

Specific performance is not decreed in behalf of plaintiffs who (75) are in the wrong and who have acted inequitably. *Justice Connor* in *Boles v. Caudle,* 133 N. C., 534, quotes from *Judge Gaston,* that "The specific performance of a contract in equity is a matter not of absolute right in the party, but of sound discretion in the court. Although it be valid at law, and, if it had been executed by the parties, could not be set aside because of any vice in its nature, yet if its strict performance be under the circumstances hard and inequitable, a court of equity will not decree such performance, but leave the party claiming it to his legal remedy"; and *Justice Walker* says, in *Wool v. Fleetwood,* 136 N. C., 472, that granting relief by compelling specific performance "is a matter of sound judicial discretion, controlled, it is true, by established principles of equity, but exercised only upon a consideration of all the circumstances of each particular case."

I do not think, however, the statements are sustained by the record. The plaintiff alleged the execution of the contract in his complaint, and the defendant denied it, and refused performance.

The jury found that the defendant made the contract. These facts undoubtedly constitute a breach of the contract by the defendant. The jury also found that the defendant had waived the tender of the $1,000, which was to be paid by the plaintiff, and that the plaintiff was ready, able, and willing to perform the other parts of the contract. This does not put the plaintiff in the wrong.

It will also be seen by reference to the original decree in this action, which has been affirmed, that the first act required to be done by either party was the execution of the deed by the defendant, which he has not done.

CLARK, C. J., concurs in this dissent.

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(76)

J. L. MAYO v. F. L. DAWSON.

(Filed 20 November, 1912.)

1. Evidence—Nonsuit—Courts.

The rule requiring the evidence to be considered in the light most favorable to the plaintiff, on a motion to nonsuit, does not permit of a construction that would in effect supply evidence in support of his contention.

2. Contracts—Assignor and Assignee—Moneys Collected—Evidence—Nonsuit.

In an action to recover, as assignee of certain organ leases, moneys alleged to have been collected and not accounted for, it is necessary for the plaintiff to show that the moneys had been collected subsequent to the time of the assignment, and in the absence of evidence to this effect, a judgment of nonsuit is properly allowed.

3. Executors and Administrators—Devisees—Parties—Nonsuit.

An action should be brought by the executor to recover moneys alleged to have been collected and not accounted for by the defendant to the deceased on certain piano leases, and an action by the devisee of these leases in his own name cannot be sustained.

APPEAL by plaintiff from *Bragaw, J.*, at February Term, 1912, of BEAUFORT.

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

The plaintiff is the son of L. R. Mayo. According to the allegations in the complaint, the defendant, prior to the death of L. R. Mayo, was engaged in selling pianos and organs, as agent for the said Mayo, his compensation being a percentage of profits from the business. The plaintiff claims that Dawson, the defendant, collected certain moneys and failed to account, which is denied by the defendant Dawson, and he brings this action to recover the same.

The plaintiff claims that he is the owner of leases taken on sales of pianos and organs, and the balance due on accounts growing out of the business. He contends that his father gave or sold him the leases and accounts, and that, if this is not true, he is entitled to them under the will of his father.

It is alleged in the complaint, and admitted in the answer, that the defendant made sales to certain persons, and that he collected (77) certain amounts on the sales, but no date is stated as to the time of the sales or of the collections.

The plaintiff introduced the will of L. R. Mayo, bequeathing to him all his interest, and all claims and accounts, in the piano and organ business.

The plaintiff testified as follows: "I am son of L. R. Mayo. My father died in April, 1908. This book contains accounts of organs sold in 1905 and 1906. I have had it in my possession since after January, 1908. The entries are in the handwriting of L. R. Mayo. It represents accounts of organs sold and leases turned over to my father. [Book here offered in evidence.] The sales were made by E. L. Dawson and W. S. Whitson. I received the leases and book at the same time. I had conversations with Dawson about the accounts in this book, first in the latter

part of 1907 or early part of 1908. I had a conversation with him a short time after I came in possession of the book. I asked Dawson about the accounts and balances due and if any collections had been made on them. He said, 'No, except what had been reported.' Either in that or a later conversation I told Dawson all accounts had been turned over and belonged to me. He said nothing to this. After my father's death I again asked Dawson about the accounts. I received the book and leases at the same time prior to my father's death. He then gave me an account of the transaction with my father, stating that he (Dawson) was to sell the pianos and organs and my father was to furnish the money to purchase them, and they were to divide the profits. My recollection is that Dawson said he was to get one-half of the commission out of the first money that came in. I do not remember whether he was to have all of the first money that came in. He was to get the balance out of the last payment. Accounts in the book show the commissions due him and the commission paid him, except the J. W. Oden transaction. I have made demand for settlement twice. The first time he said nothing; the second time he claimed there was something due him on old business relations with my father, which terminated at the time of organization of the North State Piano Company."

Cross-examination: "Dawson never asked me for this book. (78) He and I went over this book together, and he admitted the correctness of these amounts. I never refused to exhibit this book to him. I did refuse to exhibit the old book of transactions had between Dawson and my father, terminating three years or more before the North State Piano Company was organized. I never did admit anything due on old business. Dawson never claimed that the profits of the North State Piano Company business should be applied in any way on the old business."

At the conclusion of the evidence judgment of nonsuit was entered, and the plaintiff excepted and appealed.

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

ALLEN, J. This action is to recover certain money, which it is alleged the defendant collected on sales made by him, under an agreement with L. R. Mayo, deceased.

The plaintiff contends that he is entitled to recover, because L. R. Mayo, who was the owner, prior to *his* death transferred to him the accounts and leases held against persons to whom sales had been made, or, if this is not established, that he is the owner of the leases and accounts under the will of L. R. Mayo.

There is no suggestion in the evidence that L. R. Mayo transferred to the plaintiff any claim against the defendant for any money collected prior to the time it is alleged the accounts and leases were transferred, and it therefore became necessary for the plaintiff, in order to sustain his allegation of ownership, other than under the will, to offer evidence of an assignment to him prior to his father's death, and that the defendant had collected money on the accounts and leases after such assignment.

The testimony of the plaintiff of his possession of the books, accounts, and leases, and of his conversations with the defendant, furnishes some evidence of ownership, but there is no evidence that the defendant collected any money after the plaintiff became the owner.

It is true the defendant admits certain collections, which he says he accounted for, but no dates are given, and it is impossible for us to see that they were made when the plaintiff had the right to demand payment of him, and the rule requiring us to consider the evidence (79) in the light most favorable to the plaintiff on a judgment of nonsuit does not authorize us to supply evidence.

We are of opinion, therefore, the plaintiff cannot maintain his action on this title, and he is not entitled to recover under the will, because if the accounts and leases were not transferred prior to the death of L. R. Mayo, the right to recover thereon is in his executor. *Blankenship v. Hunt,* 76 N. C., 377; *Rogers v. Gooch,* 87 N. C., 442.

Affirmed.

SHERMAN PRITCHARD v. I. H. SMITH.

(Filed 18 September, 1912.)

1. Equity and Law—Deeds and Conveyances—Mortgages—Fraud—Damages—Election.

Under the equitable jurisdiction of our courts, where actions at law and suits in equity are administered in the same tribunal, the plaintiff may elect to sue for the value of lands or his equity of redemption therein, alleged to have been obtained by fraud, or to cancel deeds and mortgages or transactions which culminate in the alleged fraudulent acquisition of the title.

2. Deeds and Conveyances—Fraud—Undue Influence—Payments—Charge Upon Lands.

A conveyance obtained by one whose position gave him power and influence over the grantor, without proof of actual fraud, shall not stand at

all, if without consideration; and where there has been a partial or inadequate consideration, it shall stand only as a security of the sum paid or advanced.

3. Deeds and Conveyances — Mortgage — Fraud—Presumptions—Burden of Proof.

In this case it is *Held*, that the holder of a note secured by mortgage on lands having procured, under certain conditions, a deed absolute to the lands from the mortgagor, it raises a presumption of fraud against him, to be considered by the jury with other facts and circumstances in evidence bearing upon the transaction, with the burden upon him to rebut it.

4. Deeds and Conveyances — Mortgagee — Purchaser — Equity—Reimbursement—Charge on Lands.

Having taken a mortgage on certain lands, the mortgagee became aware of an outstanding prior mortgage on them, and bought the lands from the purchaser at the sale under the first mortgage: *Held*, the purchaser under the second mortgage did not acquire an absolute title to the lands, but only an equity to be reimbursed for his expenditures, charging the lands for its payment in preference to the trusts expressed in the mortgage.

5. Same—Innocent Purchaser.

A mortgagee taking subject to and with knowledge of a prior mortgage on lands received from the mortgagor a fee-simple deed upon the consideration expressed in the mortgage, and thereafter took another deed from the purchaser at a sale under the first mortgage, the total sum expended being much less than the real value of the land. The *locus in quo* having come into the hands of an innocent purchaser for value: *Held*, equity and law being administered and enforced in the same tribunal under our statute, the heirs at law of the mortgagor may recover a money judgment for the loss caused by the mortgagee's fraud, ascertained upon the equitable principles of deducting all proper items expended by the mortgagee in acquiring his liens on the lands.

6. Deeds and Conveyances—Mortgages—Fraud—Series of Transactions—Inadequate Price—Values—Evidence.

When there is a series of transactions in acquiring mortgages and deeds to lands tending to show fraud in the procurement of the title to lands in dispute, it is competent to consider all of them in order to arrive at the intent of the party thus charged with the fraud, and to determine the true nature of the transaction; and the real value of the land, in connection with the price paid, is also competent.

(80) APPEAL by defendant from *Foushee, J.*, at February Term, 1912, of CRAVEN.

This is an action by the heirs at law of Benjamin Pritchard, deceased, to recover the sum of $1,000 for the fraudulent purchase and subsequent sale of land, and for the cancellation of deeds alleged to have been

fraudulently procured by the defendant from plaintiff's ancestor. The case was tried before *Foushee, J.*, and a jury, at the February Term, 1912, of CRAVEN.

Benjamin Pritchard was an old and ignorant negro, who could not read or write. He had frequent dealings with the defendant in 1889 and in 1903, their relations in each instance being that of (81) mortgagor and mortgagee. The defendant, as appears from his own testimony, is a money lender, and a man of intelligence and shrewdness, being far superior, in that respect, to Benjamin Pritchard. Benjamin Pritchard's land was advertised to be sold under a mortgage for $90 to J. W. Stewart, on 22 April, 1903. On 10 April, 1903, he executed a mortgage to Smith, covering the same land. On the same day, after the execution of the mortgage, Benjamin Pritchard made a deed to defendant Smith for the same land. On 22 April the land was sold under the Stewart mortgage and bought by Stewart's wife. On 24 April, two days later, Smith obtained from Stewart and wife a deed for the same land. On 24 October, 1904, Benjamin Pritchard and wife executed to Smith a deed for twenty-five acres of land, which recited a consideration of $100, which Smith said he paid for the dower right of his wife. This was a portion of the land covered by the deed from Stewart to Smith and by the mortgage and deed from Pritchard to Smith. Later, 21 November, 1904, Benjamin Pritchard executed a mortgage to Mark Dissoway, covering this same land and containing a warranty against encumbrances. This mortgage was witnessed by S. F. Faison, Smith's confidential clerk, who had witnessed the mortgage of Pritchard to Smith on 10 April, 1903, and the deed between the same parties on the same day. The note secured by the mortgage to Dissoway was indorsed by Smith, who afterwards paid it for Pritchard. Benjamin Pritchard died 17 June, 1905, being about 70 years of age.

The mortgage from Pritchard to Smith, dated 10 April, 1903, was probated on the evidence of the witness Faison, before the clerk of the court, on 11 April, 1903, but it was not recorded until 13 January, 1906, two years and nine months after its execution and nearly seven months after Pritchard's death. The deed executed the same day, covering the same land, was also probated 11 April, 1903, before the clerk, on the evidence of the same witness. This deed was not recorded until 15 January, 1909, five years after its execution and three years and six months after Pritchard's death. The defendant, in 1906, advertised the land for sale under the power in the mortgage of 10 April, 1903, (82) but the sale was stopped by the attorney of one of the plaintiffs. Defendant conveyed the land to Lon M. Gilbert, 19 April, 1909, who was a purchaser for value and without notice. The letters written by the defendant to the widow of Benjamin Pritchard, and other evidence,

tended to show that the defendant claimed to hold the land as security for his debt. He demanded payment of the debt, that she might save her land, and alluded to the other mortgage on the land, held by Dissoway. The letters to Pritchard and wife were written prior to the time that the land was advertised for sale by the defendant under his mortgage of 10 April, 1903.

There was evidence by the defendant's witness that on 10 April, 1903, after the mortgage of Pritchard to Smith was executed, Smith discovered that Stewart held a mortgage on the land and had advertised the land for sale, and thereupon requested Pritchard to cancel the mortgage and restore the money which he had received, which Pritchard declined to do, and it was then agreed that Pritchard should make an absolute deed for the land to Smith, which was done on that day, and the notes and mortgages given by Pritchard to Smith were then canceled, the consideration of this transaction being the surrender by Smith to Pritchard of certain personal property conveyed by the mortgage. There was evidence as to the amount advanced by Smith to Pritchard, from time to time, in the various transactions between them, covered by the notes, deeds, and mortgage, and also evidence that Smith had received payments from Pritchard by the collection of the latter's pension warrants.

At the close of the evidence the defendant moved to nonsuit the plaintiff. Motion denied, and defendant excepted.

The court submitted to the jury an issue as to whether the deed for the land had been procured by the fraud of Smith, and as to the damages. The jury returned a verdict in favor of the plaintiff on both issues, and assessed the damages at $170. The court charged the jury fully upon the question of fraud, and upon the issues as to the damages,

(83) but instructed them to ascertain how much had been advanced by the defendant to Benjamin Pritchard, and how much the defendant had received from him, and further to ascertain the value of the land and to deduct therefrom the amount, if any, due by Pritchard to Smith, and also the value of the interest of one of the heirs, which Smith had purchased, and other items mentioned in the charge, and strike the balance. Judgment was entered upon a verdict for the plaintiff, and the defendant appealed.

H. C. Whitehurst and R. E. Whitehurst for plaintiff.
R. W. Williamson for defendant.

WALKER, J., after stating the case: The plaintiffs have elected, in this case, to sue for the value of the land or their equity of redemption therein, instead of canceling the entire transactions which culminated in the fraudulent acquisition of the title to the several tracts of land

belonging to the ancestor, Benjamin Pritchard; but the settlement between the parties has been conducted, under the perfectly fair and benign charge of the learned judge, upon principles obtaining in chancery, where the jurisdiction exercised is more flexible and tolerant than it would be strictly at law. *Clements v. Nicholson,* 73 U. S., 299. Plaintiffs have acquiesced in this adjustment, and defendant certainly has no right of objection to it. It has the clear merit of being favorable and just to him and an exemplification of the advantage in the new procedure, under which the legal and equitable rights of litigants are more carefully guarded and enforced than under the former system.

A close examination of the testimony in the case satisfies us that Benjamin Pritchard, at the time the deeds were executed, was enfeebled by old age and physical infirmities to such an extent that his mental faculties were greatly impaired, and he was not able to take care of his interests in any dealing with the defendant, and that the latter took advantage of his weakness and imbecility to effect an advantageous bargain for himself. He was evidently the master of the situation and held the will of his victim in complete subjection to his own. It further appears that the consideration for the deeds was not fair or adequate, the real value of the land far exceeding the outlay by Smith. It must be noted also that he held a mortgage with power of sale, executed by (84) Pritchard to him, and stood, therefore, in a confidential relation toward Pritchard. By their verdict the jury have found these facts, and others disclosed by the evidence, which show weakness and dependence on the one side and shrewdness and unfettered domination on the other.

"It is an established doctrine, founded on a great principle of public policy, that a conveyance obtained by one whose position gave him power and influence over the grantor, without proof of actual fraud, shall not stand at all, if without consideration, and that where there has been a partial or inadequate consideration, it shall stand only as a security for the sum paid or advanced." *Bellamy v. Andrews,* 151 N. C., 256, citing the following cases: *Huguenin v. Basely,* 14 Vesey, Jr., 273; *Harvey v. Mount,* 8 Beavan, 437; *Dent v. Burnett,* 4 Myl. & Cr., 269; *Buffalow v. Buffalow,* 22 N. C., 241; *Mullins v. McCandless,* 57 N. C., 425; *Futrill v. Futrill,* 58 N. C., 64, and *s. c.,* 59 N. C., 337; *Franklin v. Ridenhour,* 58 N. C., 421.

It has been said that a deed will be set aside on the ground of undue influence, which is a species of legal and moral fraud, only where the influence is such that the grantor has no free will, but stands *in vinculis* (*Conley v. Nailor,* 118 U. S., 127), and this rule, if applied to the facts of the case, would equally condemn the transactions assailed by the

plaintiffs. But the defendant was mortgagee, with a power of sale, which added much to the power he held over his weak adversary.

Approving what is stated in Bigelow on Fraud, p. 160, the Court (by *Justice Ruffin*) said, in *McLeod v. Bullard,* 84 N. C., 516, that there are certain relations, termed *relations of confidence,* from the existence of which the law raises a presumption of fraud in any dealings that may take place between the parties, because of the undue advantage which the situation itself gives to one over the other. Of these "relations of confidence" he enumerates eight in number and in the following order: Attorney and client; principal and agent; partners; trustees and *cestuis que trustent;* guardian and ward; executors and administrators; mortgagor and mortgagee; parent and child. Thus he places the relation of mortgagor and mortgagee with the other well-defined and
(85) universally acknowledged *fiduciary relations.* Upon principle this should be so. It is due to good faith and common honestly that such a presumption should arise in every case where confidence is reposed and the property and interests of one person are committed to another. To every such person his trust should be a sacred charge, not to be regarded with a covetous eye. The Court, in that case, adopted as a correct statement of the law the following language of *Chief Justice Pearson* in *Whitehead v. Hellen,* 76 N. C., 99: "Courts of equity look with jealousy upon all dealings between trustees and *cestuis que trustent;* and if the mortgagor had by deed released his equity of redemption to his mortgagee, we should have required the purchaser to *take the burden of proof* and satisfy us that the man whom he had in his power, manacled and fettered, had without undue influence and for a fair consideration released his right to redeem." The same principle was announced in *Lee v. Pearce,* 68 N. C., 76. The cases, therefore, have established this rule as to the fiduciary relation: "Where a mortgagee buys the equity of redemption of his mortgagor, the law presumes fraud, and the burden of proof is upon the mortgagee to show the *bona fides* of the transaction." *Jones v. Pullen,* 115 N. C., 465.

It follows that when the defendant took a deed absolute for the property, on which, at the same time, he held a mortgage, there arose a presumption of fraud against him, which was evidence for the jury to consider in connection with the other circumstances, and the jury have found that the presumption has not been met by the defendant and the *bona fides* of the transaction shown, but that the very truth of the matter is in accordance with the presumption.

The purchase by the defendant from the wife of Stewart, who sold under a prior mortgage, does not help his case to the extent, as he contends, of vesting an unimpeachable title in him. It was held in *Taylor*

v. Heggie, 83 N. C., 244, that a second mortgagee has no right to buy the estate of his mortgagor at a sale to satisfy a prior encumbrance, but he has a clear equity to be reimbursed for any expenditure to relieve the estate of any encumbrances, and the property in his hands is charged therewith in preference to the trusts expressed in the (86) mortgage deed.

When defendant bought from the Stewarts, he only increased the indebtedness of Pritchard, the mortgagor, to him, by the amount of his payment to them for their interest, and acquired a lien upon the land for the additional amount so advanced. We find a felicitous statement of this doctrine in *Taylor v. Heggie, supra,* approving what is said by *Judge Gaston* in *Boyd v. Hawkins,* 37 N. C., 304: "'We hold it to be clear,' said *Gaston, J.,* 'that the defendant cannot take to himself the benefit of the purchase from Robards. A trustee, without the unequivocal assent of the *cestui que trust,* cannot act for his own benefit in a contract on the subject of the trust. It is established upon the soundest principles that, if he should so contract expressly for himself, he shall not be suffered to turn the speculation to his own advantage.' While, then, the trustee is disabled from acquiring a paramount title in another to the trust estate for his personal advantage, and in disregard of the equitable interests of those represented by him, he has a clear right to reimbursement of the moneys expended in making the purchase or removing the encumbrance; and the estate in his hands is charged therewith in preference to the trusts expressed in the deed."

These principles fit into this case, when we recall the facts. Defendant took a mortgage on the land, subject to Stewart's prior mortgage. The same day he took an absolute deed for the property, upon the same consideration as expressed in his mortgage, with knowledge of the prior mortgage of Stewart and the fact that the latter had advertised the land for sale. He afterwards buys from the Stewarts and withholds all the deeds from registration until some time after Pritchard's death. He then buys other land from Pritchard and takes deeds therefor, there being evidence that the consideration for the several deeds was inadequate and for much less than the real value of the land. He offered the evidence of his confidential clerk to prove that the deed of 10 April, 1903, to him was given with the understanding that he should surrender certain personal property belonging to Pritchard, upon which he had a lien, and cancel the mortgage of the same date; and yet, in (87) 1906, he has the mortgage registered and advertises the land for sale under it, and in other ways he indicated by his conduct that he regarded the mortgage as still on foot and the relation of mortgagor and mortgagee as still subsisting. It is impossible to scan the evidence and not conclude from these facts, virtually uncontroverted, either that the

defendant had practiced a fraud upon Pritchard by which he procured title to his land or that he must be considered as still a mortgagee by his own words and conduct. Either view leads to substantially the same result and sustains the verdict and judgment as to the cause of action.

We have indicated that plaintiff could elect to sue for damages at law, or proceed in equity to have the deed canceled. But it appears that the land had passed to a *bona fide* purchaser for value and without notice of the fraud, and in such a case it is clear that, as the plaintiff cannot recover the land in specie, he can have a money judgment for the loss caused by the defendant's fraud. *Sprinkle v. Wellborn,* 140 N. C., 163. It was there said that "Wellborn, having sold the land to a *bona fide* purchaser, and thereby deprived his vendor of the land itself, and having received the price, he must, by reason of his fraudulent disposition of property, which he is considered to have held in trust, and of its conversion into money, be held responsible for the amount of the consideration paid to him. The money in his hands stands for the land. Wait Fraud. Conv. (3 Ed.), sec. 178; *Holland v. Anderson,* 38 Mo., 55; *Lawrence v. Bank,* 35 N. Y., 320; *Dilworth v. Carts,* 139 Ill., 508; *Hazen v. Bank,* 70 Vt., 543. But the administration of this relief is eminently proper under the reformed procedure, where the rights of parties are settled and determined in one action, the distinction between actions at law and suits in equity having been abolished. 1 Pom. Eq. Jur., sec. 242."

The actual loss to plaintiff was ascertained upon equitable principles, all pertinent items having been brought into the account, leaving, therefore, no ground for complaint to the defendant.

(88) The evidence as to the fraudulent character of the deeds, other than the mortgage, was clearly competent, as they were all but parts of one and the same series of acts to effect a common object. It was proper to consider all of them in order to arrive at the intent of the defendant and to determine the true nature of the transaction. *Gilmer v. Hanks,* 84 N. C., 317. The value of the lands was relevant evidence upon the question of fraud. There was no error in refusing the plaintiff's motion to nonsuit. This is a clear deduction from what we have already said in regard to the general question involved in this case.

No error.

Cited: Fields v. Brown, post, 297; *Daniel v. Dixon,* 161 N. C., 381; *Torrey v. McFadyen,* 165 N. C., 239, 241; *Owens v. Mfg. Co.,* 168 N. C., 399.

JOSEPH BRILEY v. ATLANTIC COAST LINE RAILWAY COMPANY.

(Filed 7 November, 1912.)

Railroads—Negligence—Master and Servant—Safe Place to Work—Safe Appliances.

In an action by an employee to recover damages of his employer for the failure of the latter to furnish him a reasonably safe place to work, and with safe, proper, and necessary tools, such as are adopted and in general use for doing the work, and for his failure to use reasonable care and precaution for the safety of the employee engaged therein, it appeared from the entire evidence that the defendant railroad company's passenger train, for some unexplained reason, careened slightly over the track, crossing a trestle, while slowly running within the limits of a town, twisting the rails on one side so that it became necessary to free the angle bars, used for uniting the rails at their ends, in the work of clearing the track for an expected train to pass. Owing to the position of the twisted rails, it became necessary to knock off the heads of the bolts fastening the angle bars to the rail ends, with a hammer, and then knock the rails to free the angle bars, which had been bolted in their hollows. This was being done by the plaintiff and two other employees under the direction of the section master, and while knocking a rail to free an angle bar, the bar flew off, for some unexplained reason, and struck the plaintiff on the head: *Held*, (1) there was no evidence of negligence of the defendant in failing to provide the plaintiff with a safe place to work, under the surrounding conditions; (2) the plaintiff's injury was the result of an accident which ordinary foresight and judgment could not guard against, and a motion to nonsuit was properly allowed.

APPEAL by plaintiff from *O. H. Allen, J.*, at Fall Term, 1912, (89) of PITT.

The plaintiff sued to recover damages for injury alleged to have ensued from negligence of defendant. Motion to nonsuit was sustained. The plaintiff appealed.

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

Julius Brown for plaintiff.
Harry Skinner for defendant.

BROWN, J. The engine of defendant's passenger train, for some unknown reason, careened slightly over the track crossing a trestle at Greenville, while running very slowly within the town limits. The passengers did not know of the accident until informed by the conductor.

All the evidence shows the careening of the engine twisted the rails on one side. The angle bars are pieces of steel bolted in the hollow of the

rails and holding ends of two rails together. The twisting of the rails left the nuts of the bolts of angle bars next to the ground so they could not well be reached by a wrench. The section master, with plaintiff and two other hands, undertook to repair the track and get passenger train on its way as speedily as possible.

They were knocking off the bolt heads with a hammer when the released rail suddenly sprang up in an unaccountable manner and hit plaintiff on the head. His own evidence shows he was not seriously hurt.

The grounds of negligence alleged and set out in brief are: That the defendant did not furnish the plaintiff a reasonably safe place to work; that it did not furnish the plaintiff with safe, proper, and necessary tools, such as are adopted and in general use; and that it failed to use reasonable care and precaution for the safety of plaintiff and the other employees.

1. The first ground of negligence is so untenable that it need not be discussed. It was the duty of the defendant to relieve its passenger train and forward the passengers on their journey as speedily as it rea-
(90) sonably could be done. It is manifest from all the evidence that the section master and his hands were working in the only place in which it was possible for them to do the work.

2. We will consider the other two specifications of negligence together.

In the twisted condition of the rails, it was necessary to unjoint the ends of two rails by removing the connecting angle bars. This could only be done by removing the nuts or heads of the bolts. Ordinarily the nuts could have been unscrewed with a wrench, but owing to the twisted condition of the rail the workmen could not get at the nuts with a wrench, so it became necessary to knock off the heads of the bolts (instead of unscrewing the nuts) with a hammer. After the bolts, which went through the hollow of the rail and angle bar, were removed, either by unscrewing the nuts or breaking off the heads, it became necessary to remove the steel angle bar (2 feet long) from the hollow of the rail before the rail could be disconnected from the end of the other rail.

In order to remove the angle bars, it was necessary to knock the rails with a hammer, and all the evidence shows that while the other two section hands were hammering the rail to get out the angle bar, the rail accidentally flew up and hit the plaintiff.

We quote from examination of plaintiff on this point:

Q. The engine was just bent over; it was not entirely off the track? A. The engine was off where I could see when I got there; it was lying down; the tender was practically off.

Q. That had occasioned the twisting of the rails? A. Yes, sir.

Q. Was not the rail in such a condition that wrench could not be used? The bolts were held down and could not be removed with a wrench? A. I don't know, because we didn't try to.

Q. As a matter of fact, could the angle bars have been removed in any other way than by knocking, the way Mr. Whitehurst asked you to do? A. No, sir; the angle bars could not, but the bolts could; the nuts could have gotten out. (91)

Q. If the nuts were down in such a way that a wrench could not get at them, how could they be removed? A. The upper side we knocked on.

Q. The bolts were turned under, and what Mr. Whitehurst told you was to knock so as to break it loose? A. Yes, sir.

Q. And you knocked a while and Henry knocked a while, and after a while Henry struck a lick and unexpectedly the angle bar sprang up and hit you on the head? A. Yes, sir.

Q. Can you explain what you call an angle bar, when you say you knocked up the angle bar? A. It is a bar that couples the rails together; the two rails come together, and it clamps the two rails together.

Q. And you use the same kind of a hammer? A. Yes, sir; we have a hammer so as to tighten them up.

Q. How long is the angle bar? A. Two feet.

Q. You say you have had considerable railroad experience. Is it not customary to break the heads of bolts off in this manner and loosen the angle bar; is not that the usual way to knock them off when they are tight? A. If you go to take them off and nothing is the matter, you go and screw them off; if they are worn, you break them off.

Q. How do you break them off? A. You knock them off with a hammer.

Henry Daniels, a witness for plaintiff, testifies:

Q. What did Mr. Whitehurst tell you and Joe Briley to do? A. I don't remember his language; he told us to go and knock the rail and try to get the angle bars off and get it straight so we could let the freight from Kinston go by. They were going to uncouple the tender from the cars. Joe Briley and me went and knocked the rail with the hammer.

Q. Tell what happened. A. I don't know how long we worked; one would knock a while and the other would knock a while. I think Briley and Matt knocked and I took hold of the hammer and knocked. When I went to knock the bar flew up and struck me on the hand and struck Briley on the head; it hurt me pretty badly.

This is all the evidence offered by plaintiff bearing on the cause (92) of the alleged injury.

All the remaining testimony, offered by defendant, shows conclusively that the section master was using the only practicable means to unjoint the twisted rail and relieve the train.

We are unable to find any evidence of negligence upon the part of the section master or the defendant.

All the evidence shows that plaintiff's hurt was the result of an accident which ordinary foresight and judgment could not guard against.

"Accidents cannot be eliminated by law; all that the law has done is to say that the employer shall exercise reasonable care to prevent an accident, and the courts hold him responsible when he fails to exercise such care. The employer is not responsible for an accident simply because he hires, but only when he has contributed to it by some act or omission of duty." *Douglas, J., in Bryan v. R. R.,* 128 N. C., 390.

The twisted rail might have unexpectedly "popped up" and hit plaintiff had the bolts been removed by unscrewing the nuts instead of knocking off the heads of the bolts with a hammer.

The rail could not spring up as long as the angle bar was in place in the hollow of the rail, and all the evidence shows that it could only be removed by hammering on the rail after the bolt heads were knocked off. What caused the rail to spring up is unexplained by the evidence.

In *Raiford v. R. R.,* 130 N. C., 598, a case in all respects very much like the one under consideration, it is said that "An accident is an 'event from an unknown cause,' or an 'unusual and unexpected event from a known cause'; 'chance, casualty.' "

We are of the opinion under this definition of the word "accident" that plaintiff's hurt was accidental. The cause of the injury is known, but the event was most unusual and unexpected. See, also, *Keck v. Tel. Co.,* 131 N. C., 277; *Brookshire v. Electric Co.,* 152 N. C., 669; *Martin v. Mfg. Co.,* 128 N. C., 266; *Lassiter v. R. R.,* 150 N. C., 483; *Noble v. Lumber Co.,* 151 N. C., 77; Black's Accident Cases, sec. 8.

(93) In concluding this opinion we can quote with profit the language of *Mr. Justice Hoke* in *House v. R. R.,* 152 N. C., 398: "The rule requiring a reasonably safe and suitable place to work obtains in cases of machinery more or less complicated and more especially driven by mechanical power, does not apply to ordinary conditions requiring no special care, preparation, or prevision; the defects readily observable and the injury unlikely to be anticipated; in the latter class the element of proximate cause is ordinarily lacking."

We are of opinion that the learned judge of the Superior Court properly sustained the motion to nonsuit.

Affirmed. Action dismissed.

Cited: Wright v. Thompson, 171 N. C., 91.

T. H. PIGFORD v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 25 September, 1912.)

1. Master and Servant — Dangerous Work — Sufficient Help — Contributory Negligence—Assumption of Risks.

A servant is not barred of his recovery against the master, in his action to recover damages for an injury negligently inflicted, because he continues to do the dangerous work which occasioned the injury, unless the danger of his doing so is so obvious and imminent that he therein fails to exercise that degree of care for his own safety that he should have done under the rule of the prudent man.

2. Master and Servant—Dangerous Work—Master's Negligence—Assumption of Risks—Proximate Cause.

When a servant is injured within the scope of his dangerous employment by a negligent act of the master in not furnishing him sufficient and competent assistance, and the master's negligence is the proximate cause of the injury inflicted, the servant is not held to have assumed the risk of the master's negligent act; and his action is not barred unless his own negligence contributed to the injury as the proximate cause. Revisal, sec. 2646.

3. Master and Servant—Contributory Negligence—Assumption of Risks—Mixed Law and Fact—Questions for Jury.

Upon issues of negligence, contributory negligence, and assumption of risks, no invariable rule of law can be laid down which will be fully controlling, as the issues are usually of mixed law and fact, but only general principles to guide the jury in applying the evidence to the issues of the particular case under their consideration.

4. Master and Servant—Assumption of Risks—Contributory Negligence—Burden of Proof—Interpretation of Statutes.

While there is a marked distinction between the doctrines of assumption of risks and contributory negligence, it is proper, in pertinent cases, to consider the application of the law relating to an assumption of risk under the issue of contributory negligence, with the burden of proof on the defendant pleading it. Revisal, sec. 483.

5. Master and Servant—Dangerous Work—Proper Help—Duty of Master—Delegated Authority—Respondeat Superior.

The duty of the master to provide the servant with reasonably safe means and methods of work, such as proper assistance for performing his task, as well as a safe place and proper tools and appliances for the purpose, is one which he cannot delegate to another and escape responsibility.

6. Master and Servant—Dangerous Work—Relative Duties—Rule of Prudent Man—Negligence—Contributory Negligence—Assumption of Risks.

In measuring the extent of the master's duty to the servant in furnishing safe methods, reasonable assistance, etc., for the latter to do dangerous work entrusted to him, the jury should consider their situation and op-

portunities, their comparative ability to know and realize the attendant perils and dangers, and all matters pertinent to the principal question of negligence and its proximity to the injury inflicted, under the rule of the prudent man.

7. Master and Servant—Dangerous Work—Insufficient Help—Simple Appliances—Contributory Negligence—Assumption of Risks.

The plaintiff was injured while employed by the defendant to help load a gondola car with iron rail. There was evidence tending to show that the rails had been crooked or twisted in a wreck, so as to make them more difficult to handle in loading, and that plaintiff asked his supervisor or superior officer for more help, and was told to go ahead and do the best he could with the help which had been furnished; that the plaintiff was injured in consequence by the turning of a crooked rail while he was loading it: *Held*, it was not necessary that the work should have been of a complicated character for the jury to find the defendant negligent under the evidence in this case.

8. Witnesses, Expert—Hypothetical Question—Sufficiency.

A hypothetical question asked an expert witness which substantially combines all of the facts and is sufficiently explicit for him to give an intelligent and safe opinion, which would justify a finding of all of these facts by the jury, is sufficient.

9. Attorney and Client—Jury—Improper Remarks—Prejudice—Appeal and Error.

For improper remarks made by opposing counsel while addressing the jury to be held for reversible error on appeal, it must appear that they have prejudiced the objecting party.

(95) APPEAL by defendant from *Justice, J.*, at April Term, 1912, of CRAVEN.

Action for injuries alleged to have been caused by negligence. Plaintiff was employed by defendant and, at the time he was hurt, was instructed by J. D. Spradlin, the supervisor and his superior officer, to load a gondola car with iron rails, which had been twisted and bent in a wreck and were very crooked. Defendant told Spradlin that he would want more help. The situation may be better described in his own words: "I told him I would want more help. I told him I had three men and my boy working with me, and I didn't think I had help enough to load it. He said, 'Go and try; do the best you can; it is the engineer's orders.' I went down and tried to load it, but I could not, and got hurt. We were loading up the rail on a slide; that car was about 7 feet high. We had laid some pieces of rail for a slide, and was putting it up that way. The rail was top-heavy. I was in the center of it, and we got it up about 4 feet high, and it turned over on me, and I felt something tear loose. I had hold of the rail.

"Q. Why did something tear loose? A. Because I was holding the rail with all my strength; that is about all. I got hurt, and we laid the rail down on the ground.

"Q. State why you got hurt. A. Because I was trying to hold the rail; it was crooked and the rail was about to turn over in the center—about to fall; both ends were about to fall, and if it fell it would turn over on the men, and I got hurt because I was trying to hold it up in that position" (indicating what he meant).

Plaintiff suffered a rupture, which was progressive in its nature, and resulted in serious and permanent injury. After he was first (96) hurt, Spradlin furnished the help asked for, and he then performed the work assigned to him. Three issues were submitted to the jury as to negligence, contributory negligence, and damages. There was nothing said in the answer, nor was there any issue, as to assumption of risk. The court charged the jury as to the duty of defendant to provide for its employees reasonably safe means and sufficient help to perform his work, and that if it had failed in this duty—the special act of negligence being the failure to furnish necessary or adequate help—and this was the proximate cause of plaintiff's injury, they would answer the first issue "Yes"; and that if plaintiff undertook to do the work, after Spradlin had failed, upon proper application, to give him more help, and that a man of ordinary prudence would not have undertaken the performance of the task under the circumstances, or if plaintiff did not exercise ordinary care in the manner of doing the work, and either act of carelessness proximately caused the injury, they would answer the second issue "Yes," the burden as to the first issue being upon the plaintiff, and as to the second, upon the defendant. There was a verdict for plaintiff, and defendant appealed from the judgment thereon.

Guion & Guion and D. L. Ward for plaintiff.
Moore & Dunn for defendant.

WALKER, J., after stating the case: The duty of the defendant to supply help sufficient for the safe performance of the work allotted to the plaintiff is not questioned by the appellant, but it is contended that if it failed to do so, the plaintiff was guilty of such negligence in going on with the work, after the refusal to comply with his request, as bars his recovery, it being an act of contributory negligence on his part, which was the proximate cause of the injury to him. We cannot assent to this proposition, except in a qualified sense. The doctrine of assumption of risk is dependent upon the servant's knowledge of the dangers incident to his employment and the ordinary risks he is presumed to know. But extraordinary risks, created by the master's negligence, if

he knows of them, will not defeat a recovery, should he remain in
(97) service, unless the danger to which he is exposed thereby is so obvious and imminent that the servant cannot help seeing and understanding it fully, if he uses due care and precaution, and he fails, under the circumstances, to exercise that degree of care for his own safety which is characteristic of the ordinarily prudent man. 26 Cyc., 1196-1203. We consider the rule to have been settled by this Court in *Pressly v. Yarn Mills,* 138 N. C., 410, and subsequent decisions approving it. *Justice Hoke,* for the Court, in that case, approving what had formerly been decided in *Hicks v. Manufacturing Co.,* gave this clear statement of the rule, as deduced from the authorities: "While the employee assumes all the ordinary risks incident to his employment, he does not assume the risk of defective machinery and appliances due to the employer's negligence. These are usually considered as extraordinary risks which the employees do not assume, unless the defect attributable to the employer's negligence is obvious and so immediately dangerous that no prudent man would continue to work on and incur the attendant risks. This is, in effect, referring the question of assumption of risk, where the injury is caused by the negligent failure of the employer to furnish a safe and suitable appliance, to the principles of contributory negligence; but it is usual and in most cases desirable to submit this question to the jury on a separate issue as to assumption of risk, as was done in this case. When the matter is for the jury to determine on the evidence, it may be well to submit this question to their consideration on the standard of the prudent man, in terms as indicated above. The charge on the third issue substantially does this, and the language used is sanctioned by the authorities," citing *Sims v. Lindsay,* 122 N. C., 678; *Lloyd v. Hanes,* 126 N. C., 359; *Coley v. R. R.,* 129 N. C., 407; *Marks v. Cotton Mills,* 135 N. C., 287.

There is a clearly marked line of divide between assumption of risk and contributory negligence, the former being confined to the ordinary perils of the service, and the servant could not be held by his contract, or upon any other ground, at least, in a technical sense, to have assumed the risk of his master's negligence, as the contractual relation is the other way; the master impliedly undertaking, by the contract
(98) of service, to exercise proper care for the servant's safety by selecting reasonably fit and safe tools and appliances, and providing a reasonably safe place and a sufficient and competent force for the performance of the work, and, perhaps, other duties not necessary to be here enumerated. " 'He complies with the requirements of the law in this respect if, in the selection of machinery and appliances and the employment of sufficient help, he uses that degree of care which a man

of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable, not a mere error of judgment. We believe this is substantially the rule which has been recognized as the correct one and recommended for our guide in all such cases. It measures accurately the duty of the employer and fixes the limit of his responsibility to his employee,' citing *Harley v. Mfg. Co.*, 142 N. Y., 31. So that the liability of the employer to the employee in damages for any injury the latter may receive, while engaged in his work, depends upon whether the employer has been negligent. *Avery v. Lumber Co.*, 146 N. C., 592; *Barkley v. Waste Co.*, 147 N. C., 585." *Cotton v. R. R.*, 149 N. C., 227. If, therefore, the master is culpably negligent and the servant receives an injury which the law will impute to that negligence as its proximate cause, the master will be held liable in damages, because the master's breach of duty was not by any means an ordinary peril of the service within the scope of the contract, but an extraordinary one, for which the master is liable, unless the servant's own negligence contributed to the injury, and is considered to be its proximate cause. If the master, by his own negligence, has brought about a dangerous condition with which the servant is confronted, the obviousness of the danger and the impression the situation would make upon a man of ordinary prudence and discretion with respect to his own safety would determine the servant's measure of duty to himself which the law will require of him under the circumstances, always bearing in mind that as the question of negligence is composed of law and fact, it is difficult, if not impossible, to extract from the authorities a rule so nicely and comprehensively expressed as to fit all cases. There is no such (99) touchstone in the law by which we can try and test the legal quality of any act of negligence, but with the general principle in hand, each case must be decided upon the facts peculiarly its own.

Subject to the Act of 1897, ch. 56 (Revisal, sec. 2646), the servant assumes only the ordinary and incidental risks of the service, those which necessarily and naturally, in the course of things, accompany it, and which excludes the idea of any negligence of the master, and if the master negligently injures him, he must show negligence of the servant in order to defeat a recovery.

In several recent cases this question has been considered favorably to the views herein expressed. *Justice Allen* said in *Norris v. Cotton Mills*, 154 N. C., 474: "The charge to the jury was, we think, in some respects more favorable to the defendant than it was entitled to, and particularly as to the doctrine of assumption of risk, as the employee never assumes the risk of any injury caused by the failure of the employer

to perform a duty which he cannot delegate, and the duty to provide a reasonably safe place to work is one of them." *Hamilton v. Lumber Co.*, 156 N. C., 519; *Pritchett v. R. R.*, 157 N. C., 88.

It is better for the servant that his case should be decided upon a principle of contributory negligence, as it casts the burden of proof upon the defendant under our law. Rev., sec. 483.

The defendant contended that when the plaintiff's request for more help was refused, and he was directed to go on with the work and do the best he could without it, he should have quit the service and not have exposed himself to the danger which resulted in his injury. This would be a harsh rule to apply in such a case. There are many reasons, some humane, why it should not prevail. The master should be fair and just to his servant. It is best for both that he should be so. The latter is entitled to fair treatment, just compensation, proper facilities for doing his work and reasonable care and protection while engaged in it. The servant is not required to retire from the service or to refuse to go on with his work, unless, as we have said, the danger is
(100) obvious, or he knows and appreciates it. He may know of the risk without fully appreciating the danger. Whether such a situation was presented to him at the time of the injury is a question for the jury, to be decided generally upon the rule of the prudent man.

We cannot do better than to reproduce here the carefully expressed views (by *Justice Hoke*) in *Hamilton v. Lumber Co.*, 156 N. C., at p. 523, as they seem to be specially applicable to the facts of this case:

"On the conduct of the intestate, while we have held that our statute, known as the Fellow-servant Law, Revisal, sec. 2646, applies to these logging roads, we do not think that the terms of the law, giving a right of action to an employee injured by reason of defective 'machinery, ways, or appliances,' refer to conditions as now disclosed in the testimony; the term 'ways,' we think, having reference rather to roadways and objective conditions relevant to the inquiry and which it is the duty of the employer to provide. The negligence, if any, imputable to defendant on the testimony, is by reason of negligent directions given and methods established, by the employer, subjective in their nature and to which the statute on the facts presented was not intended to apply. It is well understood, however, that an employer of labor may be held responsible for directions given or methods established, of the kind indicated, by reason of which an employee is injured, as in *Noble v. Lumber Co.*, 151 N. C., 76; *Shaw v. Mfg. Co.*, 146 N. C., 235; *Jones v. Warehouse Co.*, 138 N. C., 546, and where such negligence is established, it is further held, in this jurisdiction, that the doctrine of assumption of risk, in its technical acceptation, is no longer applicable

(*Norris v. Cotton Mills,* 154 N. C., 475; *Tanner v. Lumber Co.,* 140 N. C., 475), but the effect of working on in the presence of conditions which are known and observed must be considered and determined on the question whether the attendant dangers were so obvious that a man of ordinary prudence and acting with such prudence should quit the employment rather than incur them. *Bissell v. Lumber Co.,* 152 N. C., 123; and on the issues, as to plaintiff's conduct, the fact that the particular service was rendered with the knowledge and approval of the employer or his vice principal or under his express directions, (101) if given, also the employee's reasonable apprehensions of discharge in case of disobedience, etc., may be circumstances relevant to the inquiry."

It is as much the duty of the master to exercise care in providing the servant with reasonably safe means and methods of work, such as proper assistance for performing his task, as it is to furnish him a safe place and proper tools and appliances. The one is just as much a primary, absolute, and nondelegable duty as the other. When he entrusts the control of his hands to another, he thereby appoints him in his own place, and is responsible for the proper exercise of the delegated authority, and liable for any abuse of it to the same extent as if he had been personally present and acting in that behalf himself. This principle is well settled. *Shaw v. Mfg. Co.,* 146 N. C., 239; *Tanner v. Lumber Co.,* 140 N. C., 475; *Mason v. Machine Works,* 28 Fed., 228; *R. R. v. Herbert,* 116 U. S., 642; *Shives v. Cotton Mills,* 151 N. C., 290; *Pritchett v. R. R., supra; Holton v. Lumber Co.,* 152 N. C., 68.

It may be assumed that the law does not impose on the master any duty to take more care of his servant than the latter should take of himself, their respective obligations in this respect being equal and the same—that is, to be careful and to adjust their conduct to the standard of the ordinarily prudent man. In measuring the extent of this duty, the jury will always consider their situation and opportunities, their comparative ability to know the peril of the service and to realize the attendant danger and any other circumstance shedding light upon the main or principal question of negligence and its proximity to the injury inflicted.

We cannot say, as matter of law, upon the evidence in this case, that the danger of continuing to load the car with the rails upon the slanting skid, without additional help, was such as to bar a recovery. Whether it was so great and obvious that no man of ordinary prudence would have gone on with the work in its presence was properly submitted by the court to the jury, under what we hold to be correct instructions. The charge in every respect seems to have been as favorable to the defendant as the law permitted or it had any right to expect.

(102) The judge would not have been warranted in practically taking the case from the jury by such a peremptory charge upon both of the issues upon negligence as he was requested to give. It was the province of the jury to find the facts, under instructions of the court as to the law. Nor does it make any difference that the work required of the plaintiff was not complicated, but simple in its nature. He was entitled, in any view of it, to a reasonably sufficient squad of hands to help him perform it. In this connection, we may well consider *Shaw v. Mfg. Co.*, 146 N. C., 235, the facts of which are very similar to those in this case. The plaintiff, Shaw, was told to remove a bed-plate and plunger from one part of the defendant's mill to another, and reported to the superintendent that he needed a large chain-block for the purpose. His request was refused, and he was directed to do the work with his two small chain-blocks. He protested that they were too small, and again asked for a larger chain-block, but was told to go ahead and use the small ones anyway. Shaw also applied for more help, but none was supplied. With reference to these facts, this Court, by *Justice Brown,* said: "The evidence shows (further) that insufficient help was furnished (one man and three inexperienced colored boys), and, upon plaintiff's protesting that such help was insufficient, Constable said he knew the three boys were not 'worth a damn,' but that they were all he had, and he directed plaintiff to go ahead, and promised to furnish more help, which he failed to do. Upon this uncontradicted evidence his Honor would have been justified in charging the jury that, if believed to be true, it proved that the defendant's superintendent had been undeniably negligent in his duty to plaintiff." The only difference between the two cases is that in the *Shaw case* the evidence was held to be uncontradicted, while in this case it was disputed, and the court left it to the jury to find the facts, and they found that plaintiff's version was the true one. This assimilates the cases, and they cannot be distinguished upon the ground that in *Shaw's case* one of the appliances was defective and unusable. The

(103) Court lays no particular stress upon that fact. Sufficient help was just as necessary to safeguard the servant as flawless implements. The two cases, in their essential and controlling facts, are substantially alike, and the same rule must govern both.

Defendant submitted many prayers for instructions. Some of them assumed facts as established which were disputed, and others called upon the court to treat the question of negligence as one of law. Those that were proper in form, and applicable to the case, were substantially given. The hypothetical question put to the expert, Dr. Caton, as to the cause of the hernia, while, perhaps, not as full as it might have been, combined substantially all the facts and was sufficiently explicit for him to

give an intelligent and safe opinion. The evidence would justify a finding of those facts by the jury. This is sufficient. *Summerlin v. R. R.,* 133 N. C., 551; *S. v. Bowman,* 78 N. C., 509; *S. v. Cole,* 94 N. C., 958; *S. v. Wilcox,* 132 N. C., 1120.

There are other exceptions which, upon a careful review of them, we do not think require separate discussion. The central and controlling question relates to the conduct of the plaintiff in the presence of a dangerous situation thrust upon him by defendant's negligence, in ignoring his reasonable request for more help to do the work of lifting the heavy rails, which was made more difficult by their twisted condition. Plaintiff, nevertheless, attempted to do the work by the command of the defendant's superintendent and *alter ego,* Spradlin, who was in authority over him, with power to discharge him for disobedience of the order. The jury did not think the danger was so obvious or menacing that a man of ordinary prudence would not have faced it in the effort to comply with the instruction to go ahead and do the best he could with the help he then had. He was injured seriously in his endeavor to follow Spradlin's direction, and the jury having further found that it was a negligent order and that plaintiff was without fault, the defendant must answer to him in damages for the consequent injury.

The delay in bringing the suit is, by itself, of no legal significance. It was a circumstance for the jury to consider upon the general question, and was explained by the fact that the disease produced by the injury was almost imperceptibly slow in its progress and development.

If the remarks of plaintiff's attorney, in his address to the jury, were improper—though we are not ready to admit it, but (104) rather think they were legitimate—it could not, in our view of the facts, have so seriously affected the rights of appellant as to call for a reversal. There must be prejudice by the offending counsel of one party to his adversary's rights, to induce us to reverse. What counsel said was entirely too mild to hurt, even if it had been not altogether fair in forensic debate, when some latitude must be indulged for the undue heat of argument and the excited zeal of counsel, and sometimes they must give and take, if there is no gross abuse of privilege. *S. v. Underwood,* 77 N. C., 502; *S. v. Bryan,* 89 N. C., 531; *S. v. Suggs, ibid.,* 527; *Devries v. Phillips,* 63 N. C., 53; *S. v. Tyson,* 133 N. C., 692; *R. v. Wette,* 68 Texas, 295.

We have given good heed to the able and learned brief and oral argument of the defendant's counsel, Mr. Moore; but after all has been said, and duly considered, we are unable to say that any error in the case has been discovered.

No error.

Cited: Sasser v. Lumber Co., 165 N. C., 243; *Tate v. Mirror Co., ib.*, 279, 283; *Ammons v. Mfg. Co., ib.*, 452; *Lloyd v. R. R.*, 166 N. C., 33; *McAfee v. Mfg. Co., ib.*, 456; *Cochran v. Mills Co.*, 169 N. C., 61; *Brown v. Foundry Co.*, 170 N. C., 39; *De Ligny v. Furniture Co., ib.*, 202; *Wooten v. Holleman*, 171 N. C., 464; *Dunn v. Lumber Co.*, 172 N. C., 136; *Hollifield v. Telephone Co., ib.*, 725.

L. B. CATON v. DANIEL TOLER.

(Filed 3 October, 1912.)

1. Witnesses, Nonexpert—Fire Damage—Evidence—Facts.

In an action for damages for the burning of plaintiff's land and timber, alleged to have been caused by the defendant's negligence, there was evidence that the fire broke out on plaintiff's lands after some low lightwood stumps, on the defendant's land, where he had been clearing it, had been burning and smoldering for twenty-four hours, about 44 yards from the nearest of these stumps: *Held*, it was competent for nonexpert witnesses, who were qualified from their own observation and experience, to testify as a statement of fact and relative to the inquiry, that lightwood stumps, under the conditions indicated, were not dangerous as to sparks and not likely to throw them any distance.

2. Witnesses—Evidence—Harmless Error—Appeal and Error.

A statement of a witness, that in his opinion sparks from the burning stump would not have carried 44 yards to plaintiff's land where fire originated, will not in this case be held for reversible error: (1) Because the statement went beyond the import of the question asked, and there was no motion to strike it out. (2) Because the witness necessarily nullified the statement or rendered it harmless by immediately saying he had seen sparks from such stumps carry that far.

3. Negligence — Fire Damage — Rule of Prudent Man — Interpretation of Statutes.

In this action for damages for the alleged negligent burning of plaintiff's land by the defendant, Revisal, sec. 3346, in reference to setting fire to woodland, does not apply (*Averitt v. Murrell*, 49 N. C., 322), and the rule of care required of the defendant to prevent the escape of the fire from his own land to that of plaintiff is the ordinary care that a reasonable and prudent person would have exercised under the existing or similar circumstances.

(105) APPEAL by plaintiff from *Whedbee, J.*, at May Term, 1912, of CRAVEN.

Action to recover damages for alleged burning of plaintiff's land and timber by the negligence of defendant. There was verdict for defendant. Judgment, and plaintiff excepted and appealed.

D. L. Ward and D. E. Henderson for plaintiff.
H. C. Whitehurst and R. E. Whitehurst for defendant.

HOKE, J. There was evidence tending to show that defendant had been engaged in clearing a new-ground, burning it off and preparing the same for cultivation, and the fire complained of broke out on plaintiff's land after some low lightwood stumps in the clearing had been burning and smoldering for twenty-four hours, and same originated on plaintiff's land as far as 44 yards from the nearest of these stumps.

Objection was made that several witnesses were allowed to express the opinion that lightwood stumps under conditions indicated were not dangerous about sparks and not likely to throw them any distance. The witnesses had personal knowledge of the facts and attendant circumstances involved in the statement and were shown to be qualified by observation and experience to give an opinion that would aid the jury to a correct conclusion, and we think the ruling of his Honor admitting the testimony is sustained by several decisions of the (106) Court, as in *Murdock v. R. R.*, 159 N. C., 131; *Lumber Co. v. R. R.*, 151 N. C., 217; *Wilkinson v. Dunbar*, 149 N. C., 20, 28; *Tire Setter Co. v. Whitehurst*, 148 N. C., 446; McKelvey on Evidence, pp. 230-231; 1 Elliott, sec. 675.

McKelvey refers to this kind of testimony as follows: "Expert testimony as to facts is nothing more than ordinary testimony as to facts given by witnesses specially qualified by observation and experience to give it." And again, on page 231: "There are two classes of witnesses who are ordinarily spoken of as experts. The one embraces those persons who by reason of special opportunities for observation are in a position to judge of the nature and effect of certain matters better than persons who have not had opportunity for like observations. For example, one who has had opportunity to observe the running of railroad trains may testify as to the speed of an ordinary train. Such witnesses are really not experts in the strict sense of the term; they are only specially qualified witnesses." And further, p. 232: "Expert testimony as to facts really is no exception to the rule which excludes opinion evidence." And in this instance presented, while expressed in the form of opinion, the statement of these witnesses, "that smoldering lightwood stumps were not dangerous about sparks and not likely to carry them any distance," is the statement of a fact relevant to the inquiry.

The only part of the testimony here which has caused us any perplexity is that of the witness J. E. Whitford, who, going beyond the import of the general question, gave it as his opinion that such stumps were not likely to carry fire the 44 yards, the distance from the nearest stump

to the origin of the fire on plaintiff's land. If this were objectionable, however (and this we do not decide), it should not be held for reversible error: (1) Because, as stated, going beyond the import of the question, there was no objection to the answer and no motion to strike out the testimony. (2) Because the witness immediately nullified the effect of his statement by saying that he had seen sparks go that far.

In *Lumber Co. v. R. R., supra,* the evidence was not received (107) but the case recognized the general principle adverted to, and the evidence was excluded because the witnesses were not cognizant of all the facts involved in the proposed statement. And in *Deppe's case,* 154 N. C., 523, the answer sought was a deduction of the witnesses from facts in evidence, and involving clearly an opinion of the witness on the very question the jury were called on to decide.

It was further objected that in preventing the escape of fire from his new-ground, his Honor only held defendant to the ordinary care of a reasonable and prudent person under the circumstances as they existed, plaintiff contending that in this respect defendant was under the absolute obligation to see that the fires were extinguished.

It may be well to note that on the facts in evidence the action cannot be sustained under section 3346 of the Revisal, giving a right of action when an owner sets out fire in his woods without giving written notice to adjoining proprietors. See *Averitt v. Murrell,* 49 N. C., 322.

This being true, we think the position insisted upon by plaintiff is entirely too exigent for the ordinary transactions of everyday life, and that the correct standard of duty is that adopted by the wise and learned judge who presided at the trial—the standard of a "reasonable and prudent man under conditions as they existed."

No error.

Cited: Watkins v. R. R., 163 N. C., 132; *Peyton v. Shoe Co.,* 167 N. C., 282; *McRainey v. R. R.,* 168 N. C., 573; *Renn v. R. R.,* 170 N. C., 142.

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(108)

A. H. STEPHENS v. JOHN L. ROPER LUMBER COMPANY.

(Filed 3 October, 1912.)

1. Principal and Agent—General Agent—Unusual Contracts—Inquiry—Respondeat Superior.

The principal is not bound by the acts of his general agent, unauthorized by him, so unusual and remarkable as to arouse the inquiry of a man of average business prudence as to whether the authority had actu-

ally been conferred; for third persons dealing with the agent may only assume that the agent's acts are authoritative when they are within the scope of the duties ordinarily conferred upon agencies of that character.

2. Same—Contracts to Become Witness—Employer and Employee—Continued Pay—Idleness.

The local superintendent of a lumber company has no implied authority to bind the company to a contract, without its express consent or its knowledge of any facts or circumstances that would put it upon inquiry, to drop an employee from its pay-roll, but continue to pay him a stipulated monthly salary for his idleness, for the reason that he was to be a witness for the company in a lawsuit, and it was considered undesirable that he should appear to be in the company's employment; for such a transaction is of a nature so unusual that the employee would be put upon inquiry to ascertain the actual authority conferred by the company on the superintendent to make a contract of that character.

APPEAL by plaintiff from *Justice, J.,* at April Term, 1912, of PAMLICO. Action to recover $1,400 alleged to be due by contract.

At the close of plaintiff's evidence, on motion, there was judgment of nonsuit, and plaintiff excepted and appealed.

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

A. D. Ward and D. L. Ward for plaintiff.
Moore & Dunn for defendant.

HOKE, J. Plaintiff, a witness in support of his demand, testified in effect as follows: That in November or December of 1907, a short while after the panic, he was an employee of defendant company, and in charge of a logging squad in connection with the plant of said company at Oriental, N. C. That the superintendent of defendant plant at that place was one W. J. Moore, in general charge of same, having power to make contracts, employ and discharge hands, etc. That the general offices of the company were at Norfolk, Va., the general superintendent of defendant lumbering business being one Harriss, and that the employees of defendant company were paid off monthly according to a pay-roll sent to the general offices. That on or about the date specified, November or December, 1907, plaintiff and W. J. Moore, as superintendent of defendant's plant at Oriental, entered into the (109) contract sued on, by the terms of which plaintiff was to be dropped from the company's pay-roll for an indefinite period and cease all regular work for the company, and was to be paid during such time as he was unemployed the sum of $100 per month, and meantime was not to take other employment, but hold himself in readiness to resume work when notified. That pursuant to this agreement, plaintiff remained

practically idle for fourteen months, when he was again given active employment as a boss of company's logging force at $75 per month. That not long after plaintiff resumed work, Moore, the local superintendent, was discharged by the company, and soon thereafter plaintiff was discharged. Shortly after Moore was discharged plaintiff mentioned his claim for $1,400 against the company to Harriss, general superintendent, and same was repudiated and denied by the company, and after his own discharge the suit was instituted. Plaintiff, repelling the suggestion that it was any part of his motive or inducement for entering into the contract, testified further, that W. J. Moore told him at or about the time the same was made that the company wanted him as a winess in a lawsuit, and that he would be dropped from the pay-roll on that account. Plaintiff admitted that he had been paid for all the work actually done for the company, but said that nothing had been paid on the present claim; that the general superintendent was frequently around the works at Oriental, and that plaintiff had never mentioned the subject to him until after the discharge of Moore, but had frequently mentioned the matter to Moore while he was superintendent at Oriental, and was told by Moore not to be uneasy, that he would get his money.

If it be conceded that the evidence was sufficient to establish the contract, and, further, that the reprehensible purpose to impose plaintiff on the court as an entirely disinterested witness when he was in fact an employee of the company was not sufficiently shown as an inducement to the contract on the part of plaintiff to vitiate it (*Martin v. McMillan,* 63 N. C., 486; *Phillips v. Hooker,* 62 N. C., 193), we are of opinion that the judgment of nonsuit has been properly rendered.

(110) It is not claimed that there was any direct authority from the company to make this particular contract, nor is there any evidence of special instructions limiting the powers of defendant's agent incident to his position. This being true, the real and apparent authority of such agent should be held one and the same, and the right of plaintiff to recover in this case depends upon whether the contract declared on was within the scope of W. J. Moore's powers as general superintendent of defendant's lumbering business at Oriental. *Gooding v. Moore,* 150 N. C., 195; Tiffany on Agency, p. 180.

By virtue of his position, then, this superintendent had general power to do what was usual and necessary to carry on the business entrusted to him, and in furtherance of his employer's interest to make all such contracts as were reasonable and appropriate to that end; but this authority is not without limitations. Such an officer is by no means a universal agent, but is restricted, as stated, to "those acts and contracts usually exercised by other agents in the same line of business under sim-

ilar circumstances, and must conduct the particular business of the principal in the manner usually employed by other agents of the same kind." 1 Clark & Skyles on Agency, sec. 203, p. 475.

Again, it is well recognized that a third person dealing with one known to be an agent is not relieved of all obligation in the matter, but is held to the exercise of reasonable prudence, and if an agent, though a general one, departing from legitimate effort in his employer's interests, tenders a contract so unusual and remarkable as to arouse the inquiry of a man of average business prudence, the third party is not allowed to act upon assumptions which ordinarily obtain; he is put upon notice and must ascertain if actual authority has been conferred. 1 Clark & Skyles, Agency, p. 509; Mechem on Agency, secs. 289-290; 31 Cyc., 1340-6.

In 31 Cyc., 1340, it is said: "A general agent, unless he act under special and limited authority, impliedly has power to do whatever is usual and proper to effect such a purpose as is the subject of his employment. Hence, in the absence of known limitations, third persons dealing with such a general agent have a right to presume that the scope and character of the business he is employed to transact is the extent of his authority. This rule, as already stated, does not apply when limi- (111) tations upon the authority of the agent have been brought home to the knowledge of the third person dealing with him, nor when the third person fails to make such inquiry as conditions demand, especially if the facts and circumstances are such as to suggest inquiry. Furthermore, the implied power of any agent, however general, must be limited to such acts as are proper for an agent to do, and cannot extend to acts clearly adverse to the interests of the principal, or for the benefit of the agent personally. And an agent has no implied authority to do acts not usually done by agents in that sort of transaction, nor to do them in other than the customary manner. The most general authority is limited to the business or purpose for which the agency was created."

And in Mechem, *supra:* "Third persons must act in good faith. It is evident that these rules are established for the protection of third persons who act in good faith. As has been stated, every person dealing with an agent is bound to ascertain the nature and extent of his authority. He must not trust to the mere presumption of authority nor to any mere assumpion of authority by the agent. He must at all times be able to trace the authority home to its source. Keeping within the scope of that authority, he is safe and cannot be affected by secret instructions of which he was ignorant. But if he had knowledge of the instructions, or notice sufficient to put him upon an inquiry by which they might have been discovered, he will be held bound by them." And further, sec.

290: "The person dealing with the agent must also act with ordinary prudence and reasonable diligence. If the character assumed by the agent is of such a suspicious or unreasonable nature, or if the authority which he seeks to exercise is of such an unusual or improbable character, as would suffice to put an ordinarily prudent man upon his guard, the party dealing with him may not shut his eyes to the real state of the case, but should either refuse to deal with the agent at all or should ascertain from the principal the true condition of affairs."

The wholesome principles embodied in these citations and nu-
(112) merous authoritative decisions here and elsewhere, applying the same, are in condemnation of this alleged contract, and fully sustain the position denying plaintiff recovery thereon. *Bank v. Hay,* 143 N. C., 326; *Williams v. Johnston,* 92 N. C., 532; *Williams v. Whiting,* 92 N. C., 683; *Bank v. Armstrong,* 152 U. S., 346; *Bank v. Nelson,* 38 Ga., 391; *Craig Selver Co. v. Smith,* 163 Mass., 262; *Upton v. Mills,* 65 Mass., 586; *Nephew v. R. R.,* 128 Mich., 599; *Friedman v. Kelly,* 126 Mo. App., 279; *Skene, Jr., v. Casualty Co*, 91 Mo. App., 121.

In *Williams v. Johnston, supra, Chief Justice Smith,* delivering the opinion, said: "An agency, however comprehensive in its scope, nothing else appearing, contemplates the exercise of the powers conferred for the benefit of the principal. It implies a trust and confidence that the delegated authority will be employed in the honest and faithful discharge of the duties appertaining to the fiduciary relation thus established."

In *Upton v. Mills, supra,* it was held, "That a general selling agent has no authority to depart from the usual manner of accomplishing what he is employed to effect."

In *Friedman v. Kelly, supra,* a well-reasoned case and sustained by abundant authority, the Court held: "Where an agent, such as a traveling salesman, assumes, in the conduct of the sale of goods, authority which he did not in fact have and of such extraordinary character as would put a reasonably prudent man upon his inquiry, such party dealing with him cannot in that case hold his principal on the ground of apparent authority. Where a traveling salesman selling ladies' cloaks for his principal agreed with a purchaser that he might retain the cloaks until after the season was over and then return such as were not satisfactory, this was an agreement so unusual and extraordinary that the purchaser should have taken notice that the agent had no authority to make it, and the purchaser could not claim the right to return the cloaks on the ground that the agreement was within the apparent scope of the agent's authority, especially where the evidence showed that he knew the proposition was extraordinary."

This contract, by which the plaintiff, to use his own language, (113) "was put on the loafing list for fourteen months, doing practically nothing for the company's benefit," and where there was nothing either in the pay-rolls or elsewhere to put the company or its general officers on notice of its existence or its terms, is so very remarkable and unusual and altogether comes in such questionable shape and circumstance that his Honor was clearly right in holding that no recovery should be allowed thereon in a court of justice.

The judgment of nonsuit is

Affirmed.

Cited: Newberry v. R. R., post, 160; *Powell v. Lumber Co.,* 168 N. C., 635; *Ferguson v. Amusement Co.,* 171 N. C., 666; *Furniture Co. v. Bussell, ib.,* 485; *Chesson v. Cedar Works,* 172 N. C., 34.

W. B. HARDY v. HINES BROTHERS LUMBER COMPANY.

(Filed 25 September, 1912.)

1. Railroads—Damage by Fire—Spark Arrester—Foul Right of Way—Negligence—Continuity of Acts—Evidence.

In an action to recover damages against a railroad company for negligently burning over the lands of the plaintiff, evidence is sufficient to be submitted to the jury which tends to show that the defendant's passing locomotive had a defective spark arrester, that its right of way was, at that place, in a foul and inflammable condition, and that a live spark from the locomotive was the cause of the fire, which was communicated continuously to the plaintiff's land over the lands of others.

2. Railroads—Damages by Fire—Unusual Results—Negligence—Presumptions—Peculiar Knowledge—Burden of Proof.

In an action for damages against a railroad company for the burning over of the plaintiff's lands, caused by a spark from a passing locomotive, negligence is deducible from evidence tending to show that the fire would not have occurred if the locomotive had been properly equipped and run over a right of way in a proper condition; and the burden is upon the defendant to show the exercise of reasonable care in the operation of the locomotive, as it was under the defendant's control, and its condition was a matter peculiarly within its knowledge.

3. Railroads — Damages by Fire — Spark Arrester — Foul Right of Way — Negligence—Two Causes—Evidence—Questions for Jury.

When in an action for damages against a railroad company for the burning over of the plaintiff's land caused by a spark from a passing locomotive, there is evidence that the fire originated from a live spark that

fell from the locomotive, that the track and right of way were foul with dry stubble, it is sufficient for the jury to find, upon the issue of negligence, that the fire occurred either on a foul right of way, or that it was caused by a defective locomotive, for it does not require two acts of negligence to make a wrong.

4. Negligence—Damages—Proximate Cause—Independent Cause — Continuity—Result—Questions for Jury.

The proximate cause of damages negligently inflicted is that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which it would not have occurred, and it is a question for the jury when the evidence is conflicting.

5. Same—Railroads—Damages by Fire.

In this action for the negligent burning over of the plaintiff's land by a spark from defendant railroad company's passing locomotive, there was evidence that the fire burnt over other lands to those of the plaintiff, destroying a small portion of his timber, and under the combined efforts of his neighbors and himself was thought to have been extinguished, but "sprang up" again after about twelve days and spread to other timber of the plaintiff and damaged it: *Held*, (1) upon the question of proximate cause, it was for the jury to decide, under proper instructions from the court, whether the second fire was a continuation of the first; (2) that the evidence as to distance, the lapse of time, and the efforts to extinguish the fire is competent upon the question of whether the first fire was the proximate cause of the second, depending upon the unbroken continuity of their sequence, operating together, either successively or concurrently, each being a contributing cause to the final result. *Doggett v. R. R.*, 78 N. C., 305, cited and distinguished.

6. Railroads—Damages by Fire—Contributory Negligence—Pleadings.

In an action for damages to plaintiff's lands from a fire alleged to have negligently been caused by a spark from a passing locomotive of defendant, it is necessary for the defendant to allege, if the defense is available, that the injury thereto was proximately caused by the intervening and independent negligence of the plaintiff in having failed to put it out.

7. Railroads—Damages by Fire—Contributory Negligence—Anticipated Consequences—Instructions—Special Requests—Objections and Exceptions—Appeal and Error.

While in this action to recover damages for the alleged negligent setting fire to and burning over the plaintiff's land, caused by a spark from defendant railroad company's passing locomotive, the court may correctly have instructed the jury to find whether, in the exercise of care, the defendant could reasonably have foreseen that the injury complained of would be the natural and probable consequence of its negligence, the fire having been communicated to plaintiff's land from burning over the intervening lands of others, objection should have been taken by requesting proper prayers embracing these matters and the refusal of his Honor to give them.

8. Railroads—Damage by Fire—Right of Way—Evidence—Questions for Jury.

Testimony of a witness that the fire alleged to have caused the damages to plaintiff's lands through the defendant's negligence in the operation of its train over a foul or inflammable right of way, was seen on defendant's right of way and track, is evidence sufficient upon the question as to whether the defendant owned the right of way where the fire occurred.

APPEAL by defendant from *Whedbee, J.*, at May Term, 1912, (115) of GREENE.

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

Langston & Allen and J. G. Anderson for plaintiff.
Rouse & Land, Loftin & Dawson, and J. P. Frizzelle for defendant.

WALKER, J. These actions were brought by W. B. Hardy and B. T. Hardy against the defendant to recover damages for negligently burning their timber. The allegations as to the burning, they being substantially the same in the two cases, are that the defendant's locomotive engine set fire to combustible material on its track and right of way, which was covered with dry leaves, pine straw, and woods mould, and in a very foul condition, and that the fire spread to the adjoining land, burning over a considerable area. That an effort was made to extinguish the flames, plaintiff taking some part in it, but that some days afterwards the fire, which had been left smoldering in the woods, broke out afresh, extending to the lands of plaintiffs and burning some of (116) their timber. The cases, by consent of all parties, or, rather, without objection, were consolidated by order of the court and tried together, the facts being practically alike.

The fire, as testified by at least two of plaintiffs' witnesses, L. C. Turnage and W. C. Carlyle, was first seen on the track and right of way, just after the train had passed, and there was evidence that the smoke-stack of the engine was defectively constructed, so that large and live sparks could be emitted therefrom, and that the same engine had before caused fires along the track. It is true that there was evidence to the effect that the engine was properly constructed and supplied with an efficient spark arrester and a good ash-pan, save when bad wood was used, but the facts we have stated were fully deducible from some of the evidence, by the jury, and they seem, under a perfectly correct charge, to have accepted them as proven to their satisfaction.

It cannot be disputed that there was evidence sufficient to establish the charge of negligence in either of two aspects, a defective engine and

a foul and dangerous track and right of way, either of which would constitute actionable negligence if it caused the fire in the beginning and was the proximate cause of the damage.

We said recently in *Kornegay v. R. R.*, 154 N. C., 389: "When it is shown that the fire originated from sparks which came from the defendant's engine, the plaintiff makes out a *prima facie* case, entitling him to have the issue as to negligence submitted to the jury, and they were justified in finding negligence unless they were satisfied, upon all the evidence in the case, that, in fact, there was no negligence, but that the defendant's engine was equipped with a proper spark arrester (or ash-pan, and otherwise to prevent the emission of sparks or fire) and had been operated in a careful or prudent manner." This was but a summary of what had been so often decided in former cases. *Williams v. R. R.*, 140 N. C., 623; *Craft v. Timber Co.*, 132 N. C., 151;
(117) *Knott v. R. R.* 142 N. C., 238; *Cox v. R. R.*, 149 N. C., 117; *Deppe v. R. R.*, 152 N. C., 79; *Currie v. R. R.*, 156 N. C., 419.

We early stated the proposition, which seems to be a clear logical syllogism, that "When the plaintiff shows damage resulting from the act of the defendant, which act, with the exercise of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence which cannot be repelled but by proof of care, or some extraordinary accident which makes care useless." *Ellis v. R. R.*, 24 N. C., 138; *Chaffin v. Lawrence*, 50 N. C., 179; *Aycock v. R. R.*, 89 N. C., 321; *Haynes v. Gas Co.*, 114 N. C., 203, and more recently in *Mizzell v. Manufacturing Co.*, 159 N. C., 265.

The rule may be justified, not only on the ground that negligence is a fair and reasonable deduction from the fact of casting the spark from the engine, as ordinarily, when care is exercised, such a result does not follow, but for the further reason that the proof of care can more easily be produced by the defendant, who has control of the engine and should know its true condition, than by the plaintiff, who may be ignorant of it. *Aycock v. R. R., supra.* We do not say that there is no exception to or qualification of the rule, but it applies in this case, and that is sufficient for our purpose.

Referring to this subject in *Deppe v. R. R.*, 152 N. C., at p. 82, *Justice Manning* thus states the rule applicable to the state of facts here presented: "In considering the *origin* of the fire, it is immaterial whether the fire caught on or off the right of way. The place of ignition is important on the second question. The second question presented is, Could the jury find from this primal fact that the plaintiff's property was negligently burned by the defendant? In Sherman & Redfield on Negligence, sec. 676, the learned authors say: 'The decided weight

of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks or cinders (as the case may be) which have already been mentioned as necessary.'" He adds that this is the common law of England, and has been followed in many States, several of which he names, and he cites the follow- (118) ing cases decided by this Court as sustaining it: *Ellis v. R. R., supra; Mfg. Co. v. R. R.,* 122 N. C., 881; *Hosiery Co. v. R. R.,* 131 N. C., 238; *Lumber Co. v. R. R.,* 143 N. C., 324. The evidence in our case, though somewhat circumstantial, tends to show conclusively that the fire was ignited by live sparks or coals that fell from the defendant's engine. This being so, the proof is also clear that the track and right of way were foul with dry stubble, which readily caught from the spark or cinder, and that there and in that way the fire originated. If it caught off the right of way, there is equally strong evidence of negligence against defendant, and it was for the jury to find the fact. The question was fairly submitted to them. It was sufficient for them to find that the fire occurred in either one of the suggested ways, for it does not, in law, require two acts of negligence to make a wrong. *Knott v. R. R., supra.*

But defendant contends that if the fire was negligently caused by the engine dropping a live spark from the smokestack, or a live cinder from the ash-pan, it was apparently extinguished after burning over intervening land for some distance from its track, and while it smoldered in the stumps, and perhaps in other places, it was several days before it broke out again and destroyed the plaintiff's timber. The evidence is, that on 12 June, 1911, and at first, it burned timber on land next to the railroad track before it reached the plaintiffs' timber on that day, a small portion of which was consumed, and that on 23 June, 1911, it "sprang up" again, and spread to plaintiffs' other timber. The evidence also discloses the fact that plaintiffs assisted in the attempt to put out the fire, but it turns out that the combined efforts of all the neighbors failed to extinguish it. But it is argued from these facts that the fire that destroyed the plaintiffs' woods on 23 June, 1911, was not proximately caused by that which started on the defendant's right of way 12 June, 1911. Neither the distance traversed by the fire, though lands of other parties intervened, nor the time elapsing between the initial fire and the final conflagration which destroyed the plaintiffs' property, is conclusive against the existence of proximate cause, that is, that the second fire was proximately caused by the first. (119) The connection of cause and effect must be established; the breach of duty must not only be the cause, but the *proximate cause,* of the

damage to the complaining party. We may thus illustrate and state the rule: The proximate cause of an event is understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which it would not have occurred. This is a general statement of the rule. 1 S. & Redf. on Neg. (5 Ed.), sec. 26. The learned authors add something which is peculiarly applicable to the facts of our case: "Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation, that is, the proximate cause which is nearest in the order of responsible causation." 1 S. & Redf. Neg. (5 Ed.), p. 28. While we do not say that the question of proximate cause may not sometimes, owing to the special facts of the case in hand, resolve itself into one of law, it has been said to be the general and true rule that what is the proximate cause of an injury is ordinarily a question for the jury, the court instructing them as to what the law requires to constitute it, and the jury applying the law to the facts. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. *Scott v. Shepherd* (squib case), 2 W. Bl., 892. "The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong,
(120) is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *R. R. v. Kellogg*, 94 U. S., 469.

What was said by *Justice Strong* in the *Kellogg case* has generally been approved and adopted by the courts as an apt statement and explanation of the rule. *Ramsbottom v. R. R.*, 138 N. C., 39.

Judge Cooley has given us three propositions which further illustrate the application of the general rule, and in which he states it a little differently, but with his usual accuracy:

(1) In the case of any distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary, and proximate result. Here the wrong itself fixes the right of action; we need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence.

(2) When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events and as a proximate result of a sufficient cause.

(3) If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote. Cooley on Torts (Ed. 1879), p. 69.

In substantial agreement with this view of Judge Cooley is the further observation of the Court in *R. R v. Kellogg,* 94 U. S., (121) at p. 475: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty." *Justice Strong* adds that this difficulty must be met and the inquiry answered in accordance with common understanding as applied to the peculiar facts. What would be the proximate cause of an event under some circumstances might not be under other and different facts and surroundings, and our common sense, which is the essence of the law, must be brought into service.

We may now the more readily answer the objection of the defendant to the plaintiffs' recovery, based upon the absence of any proximate

cause for the last fire which can be referred to its original negligence. The intervention of time or distance between the two fires, as when seen, is not fatal to plaintiff, but was proper to be considered by the jury on the question of proximate cause. *Phillips v. R. R.,* 138 N. C., 12; *Black v. R. R.,* 115 N C.., 667; *Poeppers v. R. R.,* 67 Mo., 715; *R. R. v. McBride,* 54 Kansas, 172. If the continuity in sequence of the several events was not broken, and the causes operated together and in connection with each other, either successively or concurringly, each being a contributing cause to the final result, as the jury, by their verdict, evidently found to be the fact, the defendant's act in starting the fire would, in law, be said to have proximately caused the damage to the plaintiff's lands, and a cause of actionable negligence would then be presented. The court charged the jury, in substance, that the burden was on the plaintiff to satisfy them that the same fire which was started on 12 June, 1911, burned the land of the plaintiffs on the 23d,
(122) and if they had failed to do so, they were not entitled to recover; otherwise, they would be. The fire might be so continuous as to form an unbroken chain of causation leading up to the last outbreak which destroyed plaintiffs' trees, although there may have been a considerable interval of time elapsing between the first and the last fire. Its identity was not lost because it died down and smoldered in the stumps and in other burnable matter, and finally was revived and broke out afresh by reason of the contact with the dry pine leaves, which carried it at once to plaintiffs' land.

But the defendant's counsel rely on *Doggett v. R. R.,* 78 N. C., 305, and it must be admitted that, at first blush, there is a seemingly close resemblance between the two cases; but upon further comparison, it is found to be a similarity more apparent than real, and, besides, a critical examination of that case will discover that the two cases are essentially different. In this case the court instructed that they must not answer the issue in favor of defendant unless they were satisfied that the fire of the 12th was the same that burned the plaintiffs' woods on the 23d, it being one continuous fire from the start. There was evidence to support this charge, for the jury might well have inferred from the testimony of the witnesses, Lindsay Brown and others, that the fire had never been extinguished, but continued to burn slowly, or to smolder, until Friday, the 23d, when it reached plaintiffs' trees and destroyed them. In the *Doggett case* the very learned Justice laid stress upon the negligence of the plaintiff, placing the burden upon him to show its absence, and also undertook to decide the question of plaintiff's negligence as matter of law. We know that, in both respects, the law of negligence has since undergone great change by statute and decisions

of this Court. Again, in that case, it was said: "The second burning did not necessarily follow the first, because of the intervening arrest of the progress of the fire. But even supposing that the progress of the flames had been continuous, if there was any intervening negligence in the effort to extinguish the fire either by the intermediate owners of fences or by the neighbors who assembled for that purpose, when their endeavors properly exerted might have been successful, the entire weight of authority is that the plaintiff cannot recover." In our (123) case there is no allegation of negligence on the part of the plaintiffs, in the answer, and no issue as to it was submitted, nor, we believe, is there any suggestion that they did not do their best to stay the progress of the fire—all that the law required of them. In the *Doggett case,* as we have seen, in the words taken from the opinion, the "progress of the fire was arrested," while there is evidence in this record that the fire started on the 12th was not extinguished.

If the defendant wished to rely upon plaintiffs' negligence, or desired any more definite instruction in regard to it, a specific request should have been made, based upon proper averment in the answer and upon the evidence. *Simmons v. Davenport,* 140 N. C., 407, and cases cited in Anno. Ed.

Conceding only for the sake of argument that the judge's charge was somewhat general in its terms, it was in itself correct, and if the defendant thought that some other view of the matter should be presented, or that it should be more pointed or addressed more closely to the particular facts, he should have made his want known to the court in the usual way. So we said, by *Justice Hoke,* in the apposite case of *Gay v. Mitchell,* 146 N. C., 509, when the question of proximate cause was likewise involved. The court might well have asked the jury in our case to inquire and find whether, in the exercise of care, the defendant could reasonably have foreseen that the injury to plaintiffs' property would be the natural and probable consequence of its negligence in dropping sparks in the right of way, and explained more fully the rule of proximate cause, in any view of the evidence presenting the question; but we cannot say that its omission to give the charge is positive or reversible error, in the absence of any special request to do so. The jury have evidently found that the fire was not extinguished, but continued in its progress, though very slowly at times, until the final catastrophe. It may be true that plaintiffs were under the duty to protect their property against a seen or known and threatened danger, and to prevent or minimize the danger by the use of proper care (2 S. & Redf. on Neg., (5 Ed.), sec. 679; *Hocutt v. Telegraph Co.,* 147 N. C., 186, and that their failure to do so would exculpate defendant or dimin- (124)

ish the measure of its liability. But this question is not now before us, and we forbear to discuss it. Nor need we determine whether there was any intervening or independent cause, or evidence of it, which in law, or in the judgment of the jury acting under proper instructions from the court, would insulate the defendant's original negligence or affect its liability. Nor need we inquire as to the nature or intent of such an intervening cause, with respect to its sufficiency for the purpose of breaking or dissevering the sequence of events, that is, whether it should be itself a superseding, responsible, or culpable cause. Suffice it to say that proximity of cause has no necessary connection with contiguity of space or nearness in time. The negligent fire, in its foreseeable, natural, and probable course and progress, to be ascertained by attending circumstances, is regarded as a unity. Cooley on Torts (1879), pp. 76-77, and notes. The intervention of considerable time and space may be considered by the jury on the question of proximate cause, but it is not controlling. 2 Sh. and Redf. on Neg. (5 Ed.), sec. 666, and notes, especially 7 and 8. The pauses in the progress of the fire, and the lapse of time, while matters for the consideration of the jury in determining the continuity of effect, do not enable the Court to say, as matter of law, that the causal connection between the defendant's negligence in firing the right of way and the injury to the plaintiff was broken. It was so said, substantially, in *Haverly v. R. R.,* 185 Pa. St., 50. The damage, it is true, must be the legitimate sequence of the thing amiss, and if the negligent act and the resulting loss are not known by common experience to be naturally and usually in such sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the latter and the damage are not sufficiently conjoined or concatenated, as cause and effect, to constitute actionable negligence, the element of proximate cause being absent. Cooley on Torts, 69.

In this case the jury must have found that it was one and the same fire throughout its various stages, there being no complete cessation of it. With this fact before us, there does not appear to have been any intermediate efficient and adequate cause operating by itself to
(125) break the connection, and the primary wrong must be considered as reaching to the effect, and, therefore, as proximate to it. *R. R. v. Kellogg, supra; Insurance Co., v. Boon,* 95 U. S., 619.

We have declined to enter upon the wide field of investigation which would have opened up to us if we had attempted a critical review of the doctrine of proximate and remote cause, as it is discussed in cases without number, being admonished against the futility of such a course by the words of a wise judge when discussing a similar question: "It

would be an unprofitable labor to enter into an examination of the cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations. One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself, sufficient to stand as the cause of the misfortune, the other must be considered as too remote." *Insurance Co. v. Tweed,* 74 U. S. 44. For the reason given, we do not regard the case of *Doggett v. R. R.* as controlling the decision in this case.

The question raised, as to whether there was any evidence that defendant owned a right of way, and if so, as to its extent, is answered by the language of the witnesses, who testified, in so many words, that the fire was seen on the right of way, and track, which implies, necessarily, that there was a right of way, and, nothing else appearing, this is some evidence of the fact for the jury. A similar question was decided at this term. *Lumber Co. v. Brown.*

No error.

Cited: Aman v. Lumber Co., post, 373; *Ward v. R. R.,* 161 N. C., 184; *Ridge v. R. R.,* 167 N. C., 525; *McRainey v. R. R.,* 168 N. C., 571; *Kemp v. R. R.,* 169 N. C., 732; *McBee v. R. R.,* 171 N. C., 112.

(126)

WILLIAM B. FLANNER, JR., BY HIS NEXT FRIEND, J. A. PATTERSON, v. WILLIAM B, FLANNER.

(Filed 3 October, 1912.)

1. Wills—After-born Child—Descent and Distribution—Intent—Interpretation of Statutes.

Revisal, sec. 3145, providing that when children are born "after the making of the parent's will" and the parent die without making provision for them, they "shall be entitled to such share and proportion of such parent's estate as if he or she had died intestate," etc., is construed as not intending to control a parent as to the provision he should make for the child, but to apply when by inadvertence or mistake the after-born child has not been provided for; and unless the omission was intentional, or provision is made for the child, either under the will or some settlement or provision ultra, the after-born child takes his share, and the statute applies whether there was one or more children.

2. Wills—Married Women—After-born Child — Legislative Acts — Constitutional Law.

The right of married women to dispose of their property by will is a conventional rather than an inherent right, and its regulation rests largely with the Legislature; Art. X, sec. 6, conferring upon married women the right to make a will, etc., "as if she were unmarried," was designed chiefly to remove the common-law restriction on married women in this respect, and was not intended to free such right from every and all legislative regulation. The act in question here is not in conflict with the constitutional provision.

APPEAL by defendant from *Whedbee, J.*, at August Term, 1912, of CRAVEN.

Controversy without action. The facts agreed upon and formally presented are as follows:

1. That William B. Flanner, Sr., and Lizzie H. Flanner were husband and wife, but without children on 16 May, 1891.

2. That on said day Lizzie H. Flanner duly executed her last will and testament in words and figures as follows:

"In the name of God, Amen.

I, Lizzie H. Flanner, being of sound mind and memory, do make this my last will and testament. I give, grant, and devise to my beloved husband, William B. Flanner, all my property of every kind, real, personal, and mixed.

Witness my hand and seal, 16 May, 1891.

(127) LIZZIE H. FLANNER [SEAL].

3. That thereafter, to wit, on 7 February, 1892, the plaintiff, William B. Flanner, Jr., was born unto said William B. Flanner, Sr., and his said wife, Lizzie H. Flanner.

4. That thereafter said Lizzie H. Flanner died seized and possessed of a valuable tract of land lying situate in Craven County, N. C., containing 440 acres, more or less, and being the same land described in the deed of J. F. Clark and wife to W. B. Flanner, dated 24 November, 1886, and registered in the office of the Register of Deeds of Craven County in Book 95, page 114; also an undivided one-sixth part of the whole of certain lands situate in Mecklenburg, N. C.

5. That said William B. Flanner, Jr., was and is the only child of said Lizzie H. Flanner.

6. The said will was probated on 13 November, 1893, and registered in the office of the Clerk of the Superior Court of Craven County in Record of Wills, Book F, p. 102.

Upon said facts the court entered judgment: "This case coming on to be heard before me by consent of all parties upon an agreed state-

ment of facts filed in the record, and upon said statement of facts the court being of the opinion that the plaintiff, William B. Flanner, Jr., is the owner of the real estate fully described and set out in said agreed statement of facts, subject to the life estate of his father, William B. Flanner, Sr., it is therefore ordered, adjudged, and decreed by the court that the said William B. Flanner, Jr., is the owner in fee, subject to the life estate of his father, William B. Flanner, Sr., of the entire real estate described in said agreed statement of facts aforesaid."

Defendant excepted and appealed.

R. A. Nunn for plaintiff.
Guion & Guion for defendant.

HOKE, J. Under the principles of the common law as understood and allowed to prevail in this State, the subsequent birth of a child did not of itself amount to revocation of a testator's will. *McCay v. McCay,* 5 N. C., 447. That case presented at *nisi prius* in (128) Rowan County at October Term, 1808, seems to have attracted the attention of the Legislature, and at November session following a statute was enacted regulating the subject and in terms substantially similar to the provision as it now appears in Revisal 1905, sec. 3145, to wit:

"SEC. 3145. *Void as to after-born children.* Children born after the making of the parent's will and where parent shall die without making any provision for them, shall be entitled to such share and proportion of such parent's estate as if he or she had died intestate, and the rights of any such after-born child shall be a lien on every part of the parent's estate until his several share thereof is set apart," etc.

Construing this and other statutes of like purport, the courts have generally held that they were not designed to control a parent as to the provision he should make for his child, but the correct interpretation should proceed on the theory that the law was only intended to apply when the omission to provide for an after-born child was from inadvertence or mistake, and this position should be allowed to prevail unless the will in express terms showed that the omission was intentional, or unless, as contemplated by the statute, provision was made for the child by the parent either under the will or by gift or settlement ultra, "whether before, contemporaneous with, or after the making of the will." *Thomason v. Julian,* 133 N. C., 309; *Meares v. Meares,* 26 N. C., 192; *Chace v. Chace,* 6 R. I., 407; *Gay v. Gay,* 84 Ala., 38; concurring opinion, *Somerville, J.,* p. 47.

In our opinion, the spirit and proper meaning of the law both require that its beneficent provisions should apply whether there be one or more

children, and we may not approve the position contended for by defendant, that the statute was not intended to control where, as in this case, there was only one child. In the original statute of 1808 the terms were "child or children," and the word child was dropped in the enactment of 68 and 69, ch. 113, sec. 62, no doubt, because the word children was considered sufficiently comprehensive to include the one case or the other,

and the subsequent portion of the section was only so expressed in
(129) order to make the claim of after-born children efficient in cases where there should be more than one.

It was further urged for defendant that the statute cannot be upheld, in that it deprives a married woman of the right to dispose of her property by will pursuant to Article X, sec. 6, of our State Constitution; but the position involves a misconception of the meaning of this provision as applied to the facts of the present case. The section referred to, after providing that the property of a married woman acquired before marriage and all to which she may become entitled afterwards shall remain her sole and separate estate, etc., continues as follows: "and may be devised and bequeathed and, with the written assent of her husband, conveyed by her as if she were unmarried." This right to dispose of property by will is a conventional rather than an inherent right, and its regulation rests largely with the Legislature except where and to the extent that same is restricted by constitutional inhibition. *Thomason v. Julian, supra;* 1 Underhill on Wills, p. 1; 2 Blacksone Common., pp. 488-492.

Being properly advertent to this principle, a perusal of the section relied upon will disclose that its principal purpose in this connection was to remove to the extent stated the common-law restrictions on the right of married women to convey their property and dispose of same by will, and was not intended to confer on them the right to make wills freed from any and all legislative regulation. The right conferred is not absolute, but qualified. She may "devise and bequeath her property and, with the written assent of her husband, convey the same *as if she were unmarried,*" and not otherwise. The laws on this subject presented in the appeal vary somewhat in the different States, and at times require differing interpretations, but in statutes like ours authority here and elsewhere is to the effect that when these provisions for after-born children apply they do not amount to a revocation of the will *in toto,* but only render the same inoperative as to the after-born child for which no provision has been made, and that such child takes, not under the will, but rather against it, and holds by descent or under the statute of distribution, according to the nature of the property; and from this it

follows that the probate of the will works no estoppel against
(130) the claimant, and on the facts presented defendant is entitled to

an estate as tenant by curtesy, the interest awarded to him in the judgment. *Thomason v. Julian, supra; Devane v. Saks,* 32 Me., 268; *Lovieux v. Kellar,* 5 Iowa, 196; Pritchard on Wills, secs. 299-300; 1 Underhill on Wills, sec. 241.

There is no error in the judgment, and the same is affirmed as rendered.

Affirmed.

CLARK MILLINERY COMPANY, INC., v. NATIONAL UNION FIRE INSURANCE COMPANY.

(Filed 3 October, 1912.)

1. Insurance, Fire—Arbitration and Award—Policy Stipulations—Suit in Sixty Days—Denial of Liability—Effect.

The stipulations in a fire insurance policy that "the loss shall not be payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of loss herein required have been received by this company, including an award by appraisers when appraisal has been required," do not apply to the right of the insured to bring his action within that time when, after the award has been made the insurance company through its adjuster has denied the company's liability, erroneously claiming that the award was too indefinite to admit of the insurer's liability thereunder.

2. Same—Nonwaiver—Interpretation of Contracts.

The nonwaiver agreement in a policy of fire insurance which stipulates that the submission to artibration and appraisement of the loss "shall not waive or invalidate any rights of either party to the agreement under the" policy, etc., does not affect the rights of the insured, after the company has refused to pay the amount of the award rendered, to bring his action within the sixty days.

3. Corporations — Receivers — Parties — Insurance, Fire — Suits in Twelve Months.

The receiver of an insolvent corporation may sue in the name of the corporation or in his individual capacity as receiver, and when he has instituted an action against an insurance company, in the name of the corporation, for loss by fire within the twelve months stipulated in the policy, and thereafter joins in the suit as receiver, he does not change the nature of the suit by becoming a party; and in any event this provision of the policy is fully met.

4. Arbitration and Award—Award, How Construed—Terms of Submission—Interpretation.

When it can consistently and reasonably be done, the courts will construe everything in support of an award rendered strictly in pursuance and in uniformity with the submission, and which does not exceed its terms.

5. Same—Intent—Certainty—Presumptions.

An award must be certain and final as to all matters submitted, giving to the words employed their ordinary meaning, and it will be taken to be so unless the contrary appears on its face, every fair presumption being in favor of its validity, and it will be so construed as to put one consistent sense on all its terms, the certainty required being a certainty of a common intent.

6. Arbitration and Award — Award, How Construed — Intention — General Terms—Intent.

An ambiguity appearing in an award should be construed in the way which will best coincide with the apparent intention of the arbitrators; and the courts will thus restrain the general terms thereof to apply to particular words in the submission, so as to connect the particular thing awarded therewith.

7. Arbitration and Award—Conclusion.

An award of arbitrators must speak for itself; and it is not open to proof of any understanding or meaning of the arbitrators, different from the meaning to be gathered from its terms, and the duty of the arbitrators is best discharged by a simple announcement of their decision, or the result of their investigation, without giving any reason therefor.

8. Arbitration and Award—Matters Submitted—Parol Evidence.

Parol evidence is competent to show what matters submitted to the arbitrators were considered by them in making their award.

9. Arbitration and Award — Interpretation — Definiteness — Inaccuracies — Bookkeeping.

Ignorance of bookkeeping and ungrammatical expressions will not avoid an award otherwise regularly found; and in this action to recover damages caused by a fire covered by a policy of insurance, which had been submitted to arbitration under a stipulation therein, the amount of the award, expressly stated, is upheld, though it appears that it was derived by subtracting a certain sum, placed in the wrong column of figures, from the total loss, without observing the mathematical forms in making the calculations.

10. Arbitration and Award—Statements in Award—Interpretation.

The statement of the award under a fire insurance policy, passed upon in this case, that it was an "appraisal and determinor of values," is held to be a mere statement of the process by which the arbitrators came to their conclusion, and does not affect the award expressly found.

11. Arbitration and Award—Total Loss — Damaged Goods — Judgments — Harmless Error—Appeal and Errror.

It appearing that the loss covered by a fire insurance policy is total, damaged goods awarded to the plaintiff were of no value, and a deduction of $257 made by the court from the amount awarded to the plaintiff, found by the arbitrators to whom the matter was submitted, is in defendant's favor, of which it cannot complain as error.

APPEAL by defendant from *Justice, J.*, at January Term, 1912, (132) of WILSON.

This is an action by the millinery company to recover on certain fire insurance policies issued to it by the defendants. The coplaintiff, F. S. Hassell, was appointed receiver of the millinery company, a corporation which had become insolvent, and made a party to the action, at his own request. The property destroyed by fire was a stock of merchandise, consisting chiefly of millinery and notions and store furniture and fixtures. The parties agreed to submit to arbitration the ascertainment of "the sound value of said property and the loss and damage," and a certain method was prescribed for doing so. The agreement of reference to arbitrators contained what is called a "non-waiver clause," by which it was stipulated that the submission and appraisement "shall not waive or invalidate any rights of either party to the agreement under the said policy or policies, or any provisions or conditions thereof." The arbitrators met and appointed an umpire, as they were authorized to do by the terms of the submission, and the three returned the following award:

We, the undersigned, pursuant to the within appointment, do (133) hereby certify that we have truly and conscientiously performed the duties assigned us in accordance with the foregoing stipulations, and have appraised and determined the actual cash value of said property on the .....day of....., 190..., and the actual loss and damage thereto by the fire which occurred on that day to be as follows:

	Sound Value.	*Loss and Damage.*
On	$6,039.53	
On	4,872.62	$1,166.91
On furniture and fixtures	460.80	178.08

Total amount of award $4,872.62 and the damaged stock.

Witness our hands, this 10th day of March, 1910.

Agree as to furniture and fixtures only.

J. I. THOMASON,
Q. E. RAWLS,
Appraisers.
J. T. WILLIAMS,
Umpire.

The jury returned the following verdict:

1. Has there been an appraisal and award, as provided in the policies, as to the amount of damages to which plaintiff is entitled under the policies of insurance attached to the complaint? Answer: Yes (by consent).

2. Did the plaintiff bring this action within less than sixty days from the date of the making of the award by the appraiser? Answer: Yes (by consent).

3. Did Jordan S. Thomas, adjuster, subsequent to said award and while acting as representative of defendant companies, by words, acts, or conduct, deny all liability under said award? Answer: Yes.

4. Did more than one year elapse after the date of the award made by the appraisers and the date that the plaintiff, F. S. Hassell, receiver of the Clark Millinery Company, was made a party to this action? Answer: Yes (by consent).

5. In what amount are the defendants indebted unto the plaintiffs by reason of the said fire and under the policies of insurance set forth in the complaint, and by virtue of the said award? Answer: $3,461.73, with interest from 10 May, 1910, on stock, and (by consent)
(134) $178.08 damage to the furniture and fixtures, with interest from 10 May, 1910.

6. What was the value of the insured property saved from the fire? Answer: $257.

The plaintiffs allege, in the seventh section of their complaint, that the fire occurred on the first day of January, 1910, and "practically destroyed the entire stock" of the millinery company, and this allegation is admitted in the answer. There was no dispute as to the insurance and award, so far as they related to the furniture and fixtures, and that matter is eliminated from the case.

The policies contained the following clauses:

"1. The loss shall not be payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

"2. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured of all the foregoing requirements, nor unless commenced within twelve (12) months next after the fire."

There was a judgment upon the verdict, and the defendant appealed, after reserving certain exceptions, to be hereafter noted.

Woodard & Hassell for plaintiff.
Connor & Connor for defendant.

WALKER, J. The defendant resists recovery upon three grounds:

First. That the action was prematurely brought. It was found by the jury that the company, soon after the award was filed, denied its liability thereunder, through its adjuster, and the finding is fully supported by the evidence. The adjuster, after examining the award, refused to allow the arbitrators to rearrange the figures and place them in their proper columns, and in reply to a request that he permit this

change to be made so that it might appear clearly what was intended, he said: "It is no good. I demand another appraisal. We are not liable for one cent under that award. You cannot hold us for (135) one cent." This language was a strong and unequivocal denial of all liability, and made inapplicable the stipulation for the six weeks extension of time for payment. That clause evidently refers to a proof of loss or an award, the validity of which and the correctness of the amount due thereunder are admitted. The agreement is that the company shall be allowed six weeks to pay, and not six weeks if it has refused to pay and denied liability. Why require plaintiff to wait six weeks to sue for a debt which is disputed, or, to put it in other words, to wait six weeks for payment, when the defendant has emphatically said that it will not pay at the end of the time? It was intended to be merely an extension of credit upon an admitted debt. And so are the authorities. It will be observed that the provision for an allowance of six weeks indulgence is the same as to proof of loss and the award, and we have held in *Higson v. Ins. Co.*, 152 N. C., 206, that a denial of liability will dispense with proofs of loss; and to the same effect are the following cases: *Gerringer v. Ins. Co.*, 133 N. C., 407; *Jordan v. Ins. Co.*, 151 N. C., 340; *Parker v. Ins. Co.*, 143 N. C., 339; *Ins. Co. v. Edmundson*, 104 Va., 486; 19 Cyc., 857, sec. 2, and other authorities cited in *Higson v. Ins. Co., supra.* In *Ins. Co. v. Maackens*, 38 N. J. Law, at p. 571, the same doctrine is stated, and supported by the citation of many cases: "A denial of all liability on the policy and peremptory refusal to pay under any circumstances is also a waiver of the right of the company to have the stipulated time before any suit is commenced. Upon such denial of liability and refusal to pay, an action may be commenced at once. *Trans. Co. v. Ins. Co.*, 6 Blatch. C. C. R., 241; *s. c.*, 34 Conn., 561; *Allgree v. Ins. Co.*, 6 Harr. & J., 408; *Phillips v. Ins. Co.*, 14 Mo., 220; *Ins. Co. v. Loney*, 20 Md., 20; *Ins. Co. v. Maguire*, 51 Ill., 342; *Cobb v. Ins. Co.*, 11 Kansas, 93." The Court, in *Ins. Co. v. Gracey*, 15 Col., 70, said that the clause was inserted to give the company an opportunity for making arrangements to pay the debt, and when liability is denied, since payment is in no event to be made, preparation therefor becomes a matter of no importance whatever. It therefore held that the condition was waived by the (136) denial. The simple way to put it is, that the clause has failed of its purpose. Time was allowed upon the assumption that the company would act in good faith and pay the claim, and not attempt to use the indulgence for the mere purpose of delay. What is said in *Ins. Co. v. Cary*, 83 Ill., 453, is still more to the point: "What reason can be assigned for extending to the company the benefit of the limitation clause in the policy as to the bringing of an action for a loss which its

officers have decided, upon full examination, not to pay at any time nor under any circumstances? The time given in which to make payment of the loss was of no value to the company, for it did not intend to pay at all, and the assured was at liberty to bring her action at once." The same Court said, in *Insurance Co. v. Maguire,* 51 Ill., 342: "The fair understanding of this condition of the policy seems to us to be, that when the company agree to pay the loss, or are undecided what they will do, no suit can be brought until after the expiration of sixty days from the time proof of loss is furnished; but it cannot apply, nor would it be just that it should, to a case where a company peremptorily refused to pay, as was this case." The cases uniformly state that the object of this clause, inserted for the sole benefit of the insurer, is to allow time for investigation in the case of the requirement as to proof of loss and of preparation in the case of an adjustment. Proofs would be of no avail when there is a denial of liability, and it would be unreasonable to insist upon the extension of time to pay a claim, a mere favor, if it did not intend to pay it. "The denial of liability is inconsistent with such a claim and a waiver of it." *Insurance Co. v. Gibson,* 53 Ark., 494. The authorities sustaining this view are very numerous. Biddle on Insurance, sec. 1145; 4 Joyce on Insurance, sec. 3211; 19 Cyc., 903 (c) and note 57; 13 Am. & Eng. Enc. (2 Ed.), 374; 106 Tenn., 513; *Massell v. Ins. Co.,* 19 R. I., 565; *Assurance Co. v. Hanna,* 60 Neb., 29; *Ins. Co. v. Sylvester,* 25 Ind. App., 207; *Landis v. Ins. Co.,* 56 Mo., 591; *Ins. Co. v. Wickham,* 110 Geo., 129.

(137) The suggestion that an adjusted claim under a policy analogous to a promissory note, where a mere denial of liability would not affect the operation of the statute of limitations, is fully answered in *Ins. Co. v. Wickham, supra,* citing *Brewer, J.,* in *Cobb v. Ins. Co.,* 11 Kansas, 93. The nonwaiver agreement does not change the result. The denial of liability was something that occurred after the adjustment, and not during its progress. *Strause v. Ins. Co.,* 128 N. C., 64; *Dibbrell v. Ins. Co.,* 110 N. C., 193. Besides, in this case, the defendant ratifies the agent's denial of liability and still insists upon it. *Modlin v. Ins. Co.,* 151 N. C., 35. The very terms of the nonwaiver agreement confine its immunity and protection to things said and done while engaged in ascertaining and adjusting the loss, and not to anything said or done *ex post facto.* This exception, therefore, is overruled.

Second. But defendant says that if the action was not brought too soon, it was brought too late, as there is a clause requiring suit to be brought within twelve months next after the fire. The fire occurred in January, 1910, and this action was commenced by the millinery company on 4 May, 1910, but at the time the affairs of that company had been placed in the hands of Mr. F. S. Hassell, as receiver, who originally

brought this suit in the name of the corporation, which he had a clear right to do. Pell's Revisal, secs. 1219, 1203, and 847 and notes. It is so held in *Smathers v. Bank,* 135 N. C., 410, and *Davis v. Mfg. Co.,* 114 N. C., 321, in which *Justice Burwell,* approving what was decided in *Gray v. Lewis,* 94 N. C., 392, says: "As well because of the change in the system of our courts as because of the statutes, the receiver may sue either in his own name or that of the corporation. In whatever name he may elect to bring the action, it is essentially a suit by the corporation, prosecuted by order of the court, for the collection of the assets." And *Justice Connor* says, in *Smathers v. Bank, supra,* that "whatever may have been the law in respect to the right of the receiver to prosecute actions for the recovery of the assets of the corporation prior to the change in our judicial system, blending legal and equitable jurisdiction and remedies and power into one tribunal and providing for one form of action, it is well settled that a receiver can now sue either way." A receiver is only the officer of the court, its cus- (138) todian, and the title to the assets remains in the original owner. He is the arm of the court to collect and administer the assets, and acquires no beneficial interest in them. It is clear that he may use the name of the insolvent corporation, or his own, or both, at his election. High on Receivers, secs. 209 and 211. He did not change the nature of the suit by becoming a party to it more than one year after the fire. The action has not lost its identity. It is the same as it was in the beginning; he brought it in the name of the insolvent company; and if this had not been so, and the corporation had itself brought it, he adopted it as his own by having himself made a party afterwards. But the very point as to the limitation has been decided in *Coal Co. v. R. R.,* 42 N. J. Eq., 591. In that case an action at law had been brought, in due time, against the corporation, while in the hands of a receiver, for damages arising from negligence of defendant. Summons amended by substituting receiver as defendant, who pleaded the statute of limitations. He was enjoined by the court of equity from setting it up in the court of law, upon the ground that it was the same action and record in law, notwithstanding the amendment. The Court said: "If, therefore, the proceedings were in this Court for this recovery, and the proceedings had been amended as they have been in the Supreme Court, this Court would say that the statute is no bar, for it had not commenced to run at the time of the institution of the suit. Although the pleadings have been very materially amended by striking out the name of the only defendant and inserting the name of another, *yet it is the same suit*—a suit which was begun before the statute began to run. There is sound reason for this, and, I think, excellent authority," citing cases. And this, we think, disposes of the second exception.

Third. The defendant attacks the award upon the ground that its terms are conflicting, and, if not, then uncertain, and it cannot, therefore, be enforced, and if enforcible at all, it is only partially so, and to the extent of holding it good only as an award for $1,166.91. The question is not by any means free from difficulty, and may require us (139) to consider carefully the nature, in law, of an award under a submission by the parties. Anciently, the construction of awards often turned on nice and subtle distinctions, and much refinement will be found in the books of that time on the subject; but a more liberal and sensible method has been introduced, and the judges have invariably laid it down that the courts will intend everything to support awards, if possible, and will always give effect to them, if it can be done consistently with law, and nothing will be intended against them. An award must be made strictly in pursuance and in uniformity with the submission, which must not, in its terms, be exceeded, and the arbitrators should regularly award as to all things referred to them, though an award may be good as to part and void as to the remainder if the parts are separable, where the arbitrators have acted in excess of authority. Watson on Arbitration and Award, marg. p. 176 (59 Law Library, 111); *Stevens v. Brown,* 82 N. C., 460. It must be certain and final as to all matters submitted (*Gibbs v. Berry,* 35 N. C., 388), and it will be taken to be so, unless the contrary expressly appears on its face, the law indulging every fair presumption in its favor, and not leaning to a construction which would destroy it, but putting one consistent sense on all the terms. *Wood v. Griffith* (*Lord Eldon*), 1 Swanst., 43; *Ballard v. Waldo,* 53 N. C., 153. Any ambiguity in the words should be settled in the way which will best coincide with the apparent intention of the arbitrators, and the court will, by intendment, restrain the general terms in an award to apply to particular words in the submission; so it will connect the particular thing awarded with the general words of the submission. Watson, *supra.* We have said the award must be certain, for the object of the parties in submitting their disputes to arbitration is to make an end of litigation, and uncertainty in it would only produce a fresh source of dispute between them. The certainty required in an award is certainty to a common intent (Watson, marg. p. 204; *Carter v. Sams,* 20 N. C., 182); not to a certain intent in general or in every particular. It is the certainty which is attained by giving to the words their ordinary sense, but not excluding any other meaning derived from fair argument or inference. Black's Dict., p. 186. *Lord Mans-* (140) *field* said that awards are now considered with greater latitude and less strictness than they were formerly. And it is right that they should be literally construed, because they are made by judges of the parties' own choosing. And this is often (as it is here) in cases of

small consequence, where the play is not worth the candle. Indeed, they must have these two properties, to be certain and final. But the certainty may be judged of according to a common intent, and consistent with fair and probable presumption. *Hawkins v. Colclonch,* 1 Burr., 274-277. While certainty is an essential of a good award and one of its chief characteristics, it is not necessary that it should be written with such technical and critical nicety that subtle examinations and forced constructions cannot discover a doubt, or a difficulty, or a double meaning, in any part of it. Reasonable certainty of meaning is sufficient, for it will be construed in a fair and liberal spirit and favorably, with a view to support it as far as a sensible interpretation will allow. *Borretts v. Patterson,* 1 N. C., 27; *Stevens v. Brown,* 82 N. C., 460. If it be expressed in such language that plain men, acquainted with the subject-matter, can understand it, that is enough, no matter how short and elliptical it is. The degree of uncertainty, to avoid an award, should be such as would avoid any other contract; such as would leave the meaning of the arbitrators wholly in doubt. Morse on Arbitration and Award, pp. 408-409, and cases cited in notes; *Osborne v. Calvert,* 83 N. C., 366. The award generally speaks for itself, and cannot be altered any more than the verdict of a jury. It is not open to proof of any understanding or meaning of the arbitrators, different from that it carries with it and warranted by its terms. *Scott v. Green,* 89 N. C., 278. Arbitrators need not go into particulars or assign reasons, and their duty is best discharged by a simple announcement of their decision, or the result of their investigation. *Patton v. Baird,* 42 N. C., 255. They are not bound to decide according to law, when acting within the scope of their authority, being the chosen judges of the parties and a law unto themselves, but may award according to their notions of justice and without assigning any reason. *Jones v. Frazier,* 8 N. C., 379; *Leach v. Harris,* 69 N. C., 532; *Robbins v. Killebrew,* 95 N. C., 19; *Ezzell v. Lumber Co.,* 130 N. C., 205. They may decide upon principles of equity and good conscience, and make their award *ex æquo et* (141) *bono.* 3 Story Eq. Jur., sec. 1454; *Johnson v. Nobor,* 38 Me., 487. The policy of the law favors settlements by arbitration and, therefore, leans liberally and partially towards them, extending its favor in support of this amicable method of settlement. *Robbins v. Killebrew, supra.* Parol evidence is competent in order to show what matters the arbitrators acted on. *Brown v. Brown,* 49 N. C., 123; *Walker v. Walker,* 60 N. C., 259; *Osborne v. Calvert, supra.*

With these well-settled principles kept in mind, we must determine whether this award is invalid for uncertainty or inconsistency, or whether we can adopt the view of defendant, that, if valid, the arbitrators have awarded only $1,166.91 to be paid to plaintiff. As to the last

position, we think that it is utterly inadmissible, as the arbitrators have, in so many words, awarded the sum of $4,872.62 and the damaged stock to the plaintiff, and we cannot, therefore, decide that $1,166.91 is the amount due. If these two findings are in hopeless conflict, the award is void for uncertainty. Unfortunately, the arbitrators have been a little obscure in the form of stating their conclusion. We have no doubt that they performed their duty intelligently and knew exactly what they intended to decide, but were misled by a lack of familiarity with insurance methods and terms, and by not knowing in which column of defendant's form or blank to place the figures. The evidence discloses this fact. They have unwittingly run into a mere inaccuracy of expression, and that is all. Where the intention is clear or free from reasonable doubt, we should not try to test an award by the strict rules of grammar, arithmetic, or bookkeeping, but look at the instrument with favor, and take a common-sense view of it, allowing for the deficiencies of the layman or those not skilled in legal forms or methods. We may examine the submission, in connection with the award, in order to explain or construe the latter, for they naturally and legally go together. The arbitrators were directed by it to ascertain the sound value of the stock in the first instance, and unless we adopt the amount, $4,872.62, as this value, there is nothing in the award to stand for it. We have seen that parol evidence may be heard to show what the arbitrators did,
(142) that is, what they acted upon, and that they kept within the terms of the submission. This they say was done by following its instructions and deducting the necessary items from the cost price, to get the actual "sound value" on the day of the fire and just before it occurred. *Brown v. Brown, supra.* The amount, $4,872.62, is put in the column headed "Sound Value," and it is very evident that it was arrived at by deducting $1,166.91 from it, and the latter figures were manifestly placed in the wrong column. This is made more apparent when we consider that the arbitrators actually awarded $4,872.62 as the loss on the stock, or the amount due under the policies. But the award sheds still more light upon itself, so that we can readily and safely read its meaning. It must be remembreed that the statement preceding the actual award was an "appraisal and determinator" of values—merely a statement of the process by which they came to their conclusion. The pith of the award—the final adjudication of the arbitrators—is contained in the words, "Total amount of award, $4,872.62 and the damaged stock." This clearly implies, to the exclusion of any reasonable doubt, that they regarded the loss as total, and included the débris with the pecuniary award, because they decided it was worth nothing.

Excluding from our consideration all oral testimony admitted by the court as to what the arbitrators meant and as to how they awarded, we

can call to our aid a very significant admission of the defendant in the pleadings, to confirm our construction of the award. Plaintiff alleged that the fire practically destroyed the entire stock, and this is admitted in the answer. If this be so, how could the amount of the loss be $1,166.91, only one-fourth of the sound value of the goods? The defendant admitted, and the arbitrators found, a total loss, and for that reason added to their award of money, $4,872.62, "the damaged stock." The giving of the stock to plaintiff is entirely inconsistent with the claim of defendant, that the arbitrators intended to award only $1,166.91, or any other amount than the one they did give, to wit, $4,872.62, which was the sound value of the stock, the loss being practically total, as they and the parties thought, and the débris or damaged goods (143) being worth nothing, as the arbitrators evidently decided. The arbitrators could not have made the award without having decided that the loss was total and the débris of no value, because the insured could not fairly and equitably be entitled to the débris upon any other theory. This is not only a "fair and reasonable presumption," but a clear implication from the terms of the award and its context, and such a presumption and implication may be summoned to the aid of an instrument, which, without some such assistance, would have to be condemned as too uncertain (Watson on Arb., pp. 411 and 414), and for that reason incapable of enforcement. It is true that the jury have found that the damaged goods were worth $257, which was deducted by the court from the amount found due by the arbitrators; but while we think this ruling was erroneous, as changing the award, it was in favor of defendant, who cannot, therefore, complain; and the plaintiff not having appealed, it must stand.

We have considered the case without reference to the extrinsic evidence, showing what was the intention of the arbitrators. We have said it is not competent to change the award in any way that will change its meaning, as that appears upon its face, in the absence of proper allegations and proof of fraud or mistake. We must accept it as we find it. *Scott v. Green,* 1 A. & E., 964.

No error.

(144)

MERL J. CARSON v. C. S. WOODROW.

(Filed 9 October, 1912.)

1. Process—Attachment—Interpretation of Statutes.

The writ of attachment is an extraordinary writ in derogation of a common-law right, and the statutes under which they are allowed to issue must be strictly construed, and in favor of the party whose property is sought to be attached.

2. Same—Attorney and Client.

In order to the valid issuance of an attachment from the Superior Court, it is necessary that the requisite facts be shown to the court by an affidavit of prescribed form and substance (Revisal, sec. 758 *et seq.*); and when an attachment form in blank, including a form for the affidavit, has been signed by the clerk and delivered to the attorney of the party seeking the attachment, upon condition that he properly fill out the papers and give a sufficient bond, the writ and the levy thereunder are both void, though subsequently approved by the clerk.

3. Process—Attachment—Sheriff—Other Officer—Void Levy.

A writ of attachment issuing out of the Superior Court on causes within its jurisdiction must be addressed, as required by the statute, to the sheriff of the county in which the property of the defendant may be found; and when it is addressed to any other process officer a levy thereunder is invalid.

APPEAL by plaintiff from *Carter, J.*, at March Term, 1912, of NASH.

Action heard on special appearance and motion to dissolve an attachment.

On the hearing it was made to appear that the warrant of attachment purported to issue from Superior Court of Nash County and to the counties of Nash and Edgecombe, and that to Edgecombe under which the property was levied on being addressed "To any constable or other lawful officer of Edgecombe County—Greeting," and return made thereon:

Seized and levied on, and the following property, etc.

W. G. BULLOCK, *Constable,*
No. 12 Township, Edgecombe.

The other facts relevant to the question presented and embodied in the judgment are as follows:

That on 23 December, 1911, the Deputy Clerk of the Superior Court of Nash County, at the request of one of the plaintiff's attorneys, signed and delivered to him the summons since returned in this action, the same being, at the time of their said delivery, filled out in part only, the caption and title of the cause, the name of defendant to be sum-

moned, and plaintiff's undertaking for costs not having been filled out until subsequently thereto, as hereinafter set out; that, at the same time, said deputy clerk signed and delivered to plaintiff's said attorney the warrants of attachment thereafter issued to the counties of (145) Nash and Edgecombe and since returned herein; that when delivered to plaintiff's said attorney said warrants of attachment were in blank, save the clerk's signature attached thereto, the date "23d day of December, 1911," appearing thereon and the seal of court annexed to one of them; and the undertaking, justification of sureties, and affidavits annexed to said warrants of attachment were, at the time of such delivery, wholly in blank, the essential operative parts thereof having been subsequently filled in by plaintiff's said attorney, as hereinafter set out.

That at the time of making application to and of receiving from said deputy clerk the said blank summonses, warrants of attachment, and other papers, plaintiff's said attorney informed said deputy clerk that it was his purpose to use the same in an action to be that day instituted by the plaintiff above named against the defendant above named, and of the facts involved therein, at the same time giving assurance that he would have the undertaking in attachment executed and other papers properly filled out before the service of warrant of attachment; and that, as the result of such assurance, said deputy clerk intrusted plaintiff's said attorney with the duty of taking bond, perfecting affidavit, and filling out warrants of attachments and summonses herein. And this was thereafter done by plaintiff's said attorney, in accordance with the statement of fact made at the time aforesaid, which undertaking and affidavit are now considered sufficient by said deputy clerk.

That prior to the issuance of said warrants of attachment no affidavit or undertaking in attachment was ever exhibited to or filed with said deputy clerk or in the clerk's office, nor was this ever done until some time subsequent to 3 January, 1912.

That the warrant of attachment issued to Edgecombe County came into the hands of W. G. Bullock, Constable of No. 12 Township in said county, on 23 December, 1911, who, by virtue of the powers conferred upon him by his said office, proceeded to levy upon the property of the defendant thereunder, as set out in his return annexed thereto.

There was judgment dissolving the attachment, and plaintiff (146) excepted and appealed.

M. V. Barnhill and E. B. Grantham for plaintiff.
L. V. Bassett and F. S. Spruill for defendant.

HOKE, J., after stating the case: On the facts presented we are of the opinion that the attachment in this case was properly dissolved. Our statute on this subject (Revisal, ch. 12, sec. 758 *et seq.*) in general

terms provides that the writ may issue when the requisite facts are shown to the court by affidavit of prescribed form and substance, and before issuing the same the officer who issues, for the purpose of indemnifying defendant, shall require an undertaking with sufficient surety in a sum not less than $200, etc.

While our decisions are to the effect that when the terms of the law are duly complied with, the clerk is without further discretion in the matter, and that the issuance of the writ in most of its aspects is a ministerial act permitting performance by regular deputy, a perusal of the statute will readily disclose that in order to a valid writ there are important duties imposed in express terms upon the officials and which may not be delegated to the parties or their attorneys. It is true that such a custom has been allowed to prevail as to original process, the summons, and to ordinary subpoenas for witnesses, etc. (*Webster v. Sharp,* 116 N. C., 468; *Croom v. Morrisey,* 63 N. C., 591), but in the case of attachments, conferring as it does the present right to seize and sequestrate the property of the citizen before trial or opportunity to be heard, a stricter construction is required. Thus in 4 Cyc., page 400, it is said: "Attachment being an extraordinary and summary remedy in derogation of the common law, the courts will usually, in the absence of statutory provision to the contrary, construe the statute strictly in favor of those against whom the proceeding is employed, both as to the subject-matter of the attachment and the method of enforcing the remedy, and will exact of the plaintiff a strict compliance with all statutory requirements." And in 2 Lewis's Sutherland on Statutory Construction (2 Ed.), sec. 566, p. 1049: "A party seeking the benefit of such a statute must bring himself strictly, not within the spirit, but within the
(147) letter; he can take nothing by intendment. . . . The remedy by attachment is special and extraordinary, and the statutory provisions for it must be strictly construed, and cannot have force in cases not plainly within their terms." And our decisions are in full approval of this position. *Skinner v. Moore,* 19 N. C., 138-146; *Bank v. Hinton,* 12 N. C., 398-99.

Again, and by reason of the same rule of construction, it must be held that a writ of attachment issuing out of the Superior Court on causes within that jurisdiction shall be addressed to the sheriff of the county. On this question section 765, Revisal, provides as follows: "The warrant shall be directed to the sheriff of any county in which the property of such defendant may be, or in case it be issued by a justice of the peace to such sheriff, or to any constable of such county," etc. This making clear distinction between writs issuing from the Superior Court and courts of justice of the peace and in express terms requiring that writs of attachment from the Superior Courts shall, as stated, be ad-

dressed to the sheriff of the county. There are different statutes, general and special, conferring on town and township constables the power of serving ordinary court process, as in Revisal, sec. 937, sec. 2939. But the cases construing these statutes have thus far generally held that, to make a valid service of process from the Superior Courts by constables, the same should be specially addressed to such officer by his official title. *McGloughan v. Mitchell,* 126 N. C., 681; *Davis v. Sanderlin,* 119 N. C., 84, and these statutes could not apply, therefore, when as in this case the writ could not be so directed.

For the reasons stated we are of opinion that the attachment writ and the seizure of property under it were invalid, and the judgment of his Honor discharging same must be

Affirmed.

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(148)

J. A. FAISON, GUARDIAN, v. B. C. MOORE.

(Filed 9 October, 1912.)

Wills—Devises—Estates—Remainders—Tenant by the Curtesy.

A will devised to M., testator's niece, "all my real estate on the south side of College Street through to Bay Street, also all the land known as the Summerland land on the west side of the public road, during her natural life, and if she marries and leaves heirs from such marriage, then to her heirs in fee simple; if she dies without issue from such marriage, all the real estate loaned to her to be divided between J. and B.: *Held,* (1) that said M. took only a life estate, with remainder to her children, and on her death without children or issue of her marriage then living, the ultimate devisees became the owners entitled to possession of the property; (2) the term "loaned," under the meaning of the clause, is synonymous with give, devise, or bequeath, and in this case the term applies to both parcels of land, and the devise creating only a life estate in the niece, the surviving husband is not entitled as tenant by the curtesy, though there had been issue born alive during coverture.

APPEAL by defendant from *O. H. Allen, J.,* at February Term, 1912, of DUPLIN.

Ejectment. On the admissions in the pleadings and the facts in evidence agreed upon by the parties, including the original will as an exhibit, there was judgment for plaintiffs, and defendant excepted and appealed.

Faison & Wright for plaintiff.
Rountree & Carr for defendant.

HOKE, J. The rights of these parties were properly made to depend on the construction of the will of D. G. Morrisey, deceased, more especially the fourth clause thereof, in terms as follows:

"4. I give to my adopted baby, Maggie L. Bass, all my real estate on the south side of College Street through to Bay Street, also all the land known as the Summerland land on the west side of the public road running out by Carlton's, during her natural life, and if she marries and leaves heirs from such marriage, to such heirs in fee simple; also $100 in money. If she dies and leaves no heirs from such marriage, all the real estate loaned her to be divided between Junius Chestnut,
(149) son of my nephew, Junius M. Chestnut, and D. G. Morrisey, Jr., son of my nephew, John M. Morrisey."

The Maggie L. Bass referred to went into possession of the land under said will and intermarried with defendant B. C. Moore and died on 31 March, 1911, without leaving child or children or lineal descendants of a marriage then living. There had been issue of the marriage born alive during coverture. Plaintiffs are the Junius Chestnut and the three children and heirs at law of the D. G. Morrisey, deceased, the ultimate devisees in said fourth item of the will, and make their claim as such, contending that Maggie L. Bass took a life estate in all the property mentioned, with remainder to said claimants.

Defendant B. C. Moore contends that said Maggie L. Bass took the first portion of the land in fee, and that he is entitled to hold said portion as tenant by curtesy.

Upon these the controlling facts relevant to the inquiry, we think his Honor correctly ruled that plaintiffs are the owners and entitled to the present possession of the property.

Under our decisions the will conferred upon Maggie L. Bass a life estate, remainder to her children, and in case she died without children or issue of her marriage then living, all the real estate loaned to her to be divided between Junius Chestnut and D. G. Morrisey, deceased, the father of the other plaintiffs. *Smith v. Lumber Co.*, 155 N. C., 389; *Sain v. Baker*, 128 N. C., 256; *Rollins v. Keel*, 115 N. C., 68.

Under the clause in question the property is treated as a whole. There is no punctuation and nothing that gives indication that the testator intended to differentiate the one portion from the other in reference to the quantity of the estate. "The word lend is not infrequently used as synonymous with give or bequeath or devise," and this should be the interpretation unless it is manifest that a different meaning was intended (*Sessoms v. Sessoms*, 144 N. C., 121), and when the testator devised that in case Maggie L. Bass died leaving no heirs from her marriage, "all the real estate loaned her should be divided," he clearly referred to the entire property included in the clause.

On the question presented the case is not dissimilar to that of *Hyman v. Williams,* 34 N. C., 92-93, and on authority as stated the judgment in plaintiffs' favor must be

Affirmed.

WALKER and ALLEN, JJ., did not sit.

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(150)

ANNIE E. JONES v. MARY F. SANDLIN.

(Filed 16 October, 1912.)

Deeds and Conveyances — Contracts — Consideration — Profits to Grantor — Breach—Equity—Improvements—Charge on Lands—Personal Charge—Reservation of Life Estate.

Upon default by the grantee of lands under a deed made to him in consideration of his keeping and cultivating the fields conveyed, reserving a life estate in the grantor and giving the yield of the lands to him, the deed to be "null and void" if the grantor becomes dissatisfied, in which event the grantee is "to have pay for what he has done on the property": *Held,* (1) the grantor should recover the lands, with a reasonable rental value for the time of the grantee's possession under the contract; (2) the grantee is entitled to recover the increased value of the lands caused by the improvements made thereon by him as a charge upon the lands, and to recover the reasonable value of the work or labor done, as a personal charge against the grantor, under an implied promise to pay, and also whatever payment he may have made in part performance of his contract; (3) that while the deed is construed (*Midgett v. Meekin, ante,* 42) to reserve a life estate in the grantor, it does not affect the merits of this case, as the lands have reverted to him upon the breach of contract by the grantee.

APPEAL by plaintiffs from *Cline, J.,* at March Special Term, 1912, of SAMPSON.

This action was brought to cancel a deed for 42 acres of land, which was executed by plaintiff to defendant, and is alleged to have been placed in the possession of a third party, to be delivered upon compliance with its conditions. It contained this clause: "That said Annie E. Jones, in consideration of $1, and a further consideration that the said Mary F. Sandlin keep up and cultivate my house field and give (151) me what is made on said land where I now live, and as long as I live, and if she fails to do this and I become dissatisfied, then this deed is null and void; and she, the said Mary F. Sandlin, to have pay for what she has done out of my property." Then follows a conveyance

of the land, with the following words at the end of the warranty clause: "I, Annie E. Jones, except my lifetime interest." The court submitted issues to the jury, which, with the answers thereto, are as follows:

1. Did plaintiff and defendants contract and agree that defendants were to keep up and cultivate plaintiff's house field and give her what was made thereon as long as she lives, and to take care of plaintiff during her life, and attend to all her wants and pay her rents on all the other land which was cleared on the 42-acre tract on 12 January, 1901? Answer: Yes.

2. Does the paper-writing called the deed of plaintiff, dated 12 January, 1901, contain all of the contract and agreement between the parties to this suit? Answer: .....

3. Have the defendants failed and refused to perform and carry out their agreement and obligations in the contract? Answer: Yes.

4. Was there a mutual abandonment of this contract by both plaintiff and defendants? Answer: .....

4½. Did plaintiff and defendants leave it to J. R. Westbrook and R. W. Jones to determine what amount was to be paid by plaintiff to defendants in satisfaction of what they had done, and if so, what was the amount fixed by them? Answer: No.

5. What is the worth of the buildings placed by the defendants on the land? Answer: $560.

6. What is the worth of the other labors, such as clearing, ditching, grubbing, and fencing, performed by defendants on said land? Answer: Nothing.

7. What is the value of the work done by the defendants on the 7-acre house field? Answer: $315.

8. What is the value of the services rendered by defendants in getting wood for plaintiff, going to store and mill, waiting on her, and doing any other things of a similar and personal character? Answer: $325.

9. What is a fair rental value of the land, other than the house (152) field, which was cleared on 12 January, 1901? Answer: $100.

Plaintiff tendered two issues, but they are embraced by the sixth issue submitted. He also tendered a third issue, "What is the fair rental value of the 42 acres of land, outside the house field of 7 acres?" This issue was refused. He then excepted to the sixth, seventh, and eighth issues. The court gave judgment to plaintiff for the land, and to defendant for $1,100, and the plaintiff appealed.

Faison & Wright for plaintiff.

George E. Butler, H. A. Grady, J. D. Kerr, Sr., and C. M. Faircloth for defendants.

WALKER, J., after stating the case: As the defendant failed to perform the contract, as appears by the verdict, plaintiff is entitled to recover the land, and must pay to the defendant the value of any improvements the latter has put upon the same. This is what the deed provides, for it says that, upon defendant's default and plaintiff's dissatisfaction, the defendant is "to have pay for what she has done out of the property" of the plaintiff. The first issue seems to have been submitted without objection, and the answer of the jury thereto ascertains the contract of the parties, without reference to the particular words of the deed. But this contract was not complied with by the defendant, and it follows that plaintiff is entitled to recover, in addition to the land, a fair and reasonable rental for the land while in defendant's possession, and the defendant is entitled to the value of the improvements, to the extent that they have enhanced the value of the land, in analogy to cases in which the doctrine of betterments applies (*Kelly v. Johnson,* 135 N. C., 647), and, in addition, the reasonable value of any work and labor done or of any services rendered the plaintiff during the period when she was under defendant's care and defendant occupied the land. If defendant has paid anything to the plaintiff in part performance of the contract, she will be entitled to a credit therefor.

It would not be right, nor is it the law, as we think, that plain- (153)
tiff should be charged with the value of work done upon the land, except to the extent that she has received a benefit therefrom. If the contract provided specifically that defendant should receive back exactly what she had paid out, or the value of the work and labor and of the improvements, without regard to the enhancement in value of the land, the case would be different. But the deed says that she should have pay for all she has done for the plaintiff—that is, the value of the service rendered to her in work, labor, and improvements. *Gorman v. Bellamy,* 82 N. C., 497; *Tussey v. Owen,* 139 N. C., 457; *Chamblee v. Baker,* 95 N. C., 100; *Parker v. Brown,* 136 N. C., 280. It could not properly be said to have been done for her, in a legal sense, if of no benefit to her. If she had contracted for the particular work and a wage or price was stated, she would be liable for it; but if none was expressed, the law will imply a promise to pay the reasonable value of the work and labor, that being the measure of recovery, as upon a *quantum meruit.*

It follows, therefore, that in adjusting the difference between the parties the plaintiff will recover the land and its rental value during the occupancy of defendant, and the latter will recover the value of all services rendered, including any increase in value of the land by reason of the improvements placed thereon by her. This is the fair and equitable rule, and the more so as the deed was not annulled by the sole act of the

plaintiff, but by the concurrence of both. The defendant failed to perform her part of the agreement, and the plaintiff thereupon became dissatisfied. This is the very condition in the deed, expressed conjunctively, upon which it was to be "null and void." The work to be done and the improvements to be made were not specified in the contract, and therefore we have a case bearing a close resemblance to one where the doctrine of betterments applies, so far as the land is concerned; and as no price for the labor was fixed, the defendant must fall back upon the promise of plaintiff to pay the reasonable worth of the same, which the law implies.

The defendant entered upon the land lawfully and improved the same by consent. It is not equitable, nor according to the contract, that she should lose all she has done in making the improvements, nor,
(154) on the other hand, is it right that plaintiff should pay more than she has received in benefit from the same.

The general rule is that if one is induced to improve land under a promise to convey the same to him, which promise is void or voidable, and after the improvements are made he refuses to convey, the party thus disappointed shall have the benefit of the improvements to the extent that they increased the value of the land. *Kelly v. Johnson,* 135 N. C., 647; *Reed v. Exum,* 84 N. C., 430; *Luton v. Badham,* 127 N. C., 96; *Albea v. Griffin,* 22 N. C., 9; *Hedgepeth v. Rose,* 95 N. C., 41; *Pitt v. Moore,* 99 N. C., 85. The cases on this point are very numerous, many of them being cited in *Luton v. Badham, supra,* and 1 Pell's Revisal, pp. 652, 653, and notes. The recovery is based not upon the cost of the improvements, but upon the enhanced value of the property. *Wetherell v. Gorman,* 74 N. C., 603, in which *Justice Reade* says: "The value of the improvements to the premises is undoubtedly the correct rule, for very expensive repairs might injure rather than improve them."

In our case, it was evidently contemplated by the parties that if the contract was terminated by the dissatisfaction of the plaintiff, upon default of defendant in performing her part of it, the account between them should be stated upon equitable principles, and that defendant should not lose the benefit of her work and labor, but receive a fair and reasonable compensation therefor.

The verdict upon the first and third issues, and on the issue numbered 4½, will be retained, and the second and fourth issues not having been answered, are eliminated. The other issues are set aside, and the court will submit new issues in accordance with the views of the law herein expressed, so as to ascertain the legal rights of the parties, unless there is a reference by consent, to find the facts with the conclusions of law thereon, and state the account, which, perhaps, would facilitate the trial of the case.

We have not failed to notice that, by the verdict of the seventh issue, the plaintiff is made to pay the full value of the work done by the defendant on the 7 acres, or home tract of land, without any finding as to the rental value of that tract or of what was made thereon. If plaintiff is required to pay for the work and labor on that (155) tract, she should have the fruits thereof or the rental value of the land. This would, of itself, regardless of other questions, necessitate a new trial, which should be extended, under the circumstances, to the last five issues, and not merely to the seventh; but as our decision of other matters produces the same result, we need make no further comment on this question.

Our opinion is that by the deed Annie E. Jones reserved a life estate. The deed must be construed as a whole, and the true intent of the parties thereby ascertained. *Gudger v. White,* 141 N. C., 507; *Featherston v. Merrimon,* 148 N. C., 205; *Triplett v. Williams,* 149 N. C., 396; *Real Estate Co. v. Bland,* 152 N. C., 231; *Thomas v. Bunch,* 158 N. C., 175. In *Midgett v. Meekins, ante,* 42, we held that where clauses of a deed are apparently in conflict, the courts will construe the instrument, notwithstanding the repugnancy, according to its context, and for the purpose of ascertaining the intention of the parties, which will be enforced accordingly. But we do not see that this can, in any way, affect the merits of the case. The entire fee has reverted to the plaintiff, under the facts, and she is entitled to the possession, subject to the equitable rights of defendant. The amount by which any improvements have enhanced the value of the land will be a charge thereon. *Taylor v. Brinkley,* 131 N. C., 8. In other respects, the judgment will be only a personal charge. When plaintiff has paid off the lien on the land for improvements, she will be entitled to be let into possession.

New trial.

Cited: Brown v. Brown, 168 N. C., 14; *Smithdeal v. McAdoo,* 172 N. C., 202.

(156)

J. H. NEWBERRY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 13 November, 1912.)

1. Railroads — Principal and Agent — Local Agent — Scope of Authority — Secret Limitations.

Local station agents of a railroad company are presumed to have the usual and necessary authority to carry on the business intrusted to them, and to make contracts binding upon the railroad company within the

scope of their authority, which may not be diminished by restrictions or special instructions therein from the company which are uncommunicated to the shipper.

2. Same—Contracts—Special Cars.

A local freight agent of a railroad company may make reasonable contracts for the shipment of goods, on a specified day, in cars of a certain kind, etc., and such contracts, being within the usual scope of the powers conferred on agencies of this character, will bind the company, though the terms of the particular agreement are in excess of the powers actually conferred.

3. Same—Indeterminate Period—Special Authority.

A local station agent of a railroad company may not be presumed to have the authority to contract with a traveling troupe to furnish a baggage car for the hauling of its platforms, tents, etc., for an indeterminate period and at other stations of the company; and to recover damages for breach of contract made by an agent of this character for failure to furnish a baggage car at several stations beyond that of the alleged contract, special authority must be shown or it must appear that the contract has been in some way approved or ratified by the company.

4. Railroads—Principal and Agent—Local Agent—Contracts—Special Cars—Special Authority—Evidence.

In an action brought by a traveling troupe to recover from a railroad company damages alleged to have been caused by a breach of contract, made with the defendant's local agent, to furnish a baggage car indeterminately beyond his station, it is competent for the defendant to show the want of authority of the agent to make a contract of that character.

5. Railroads — Principal and Agent — Scope of Authority — Ratification — Evidence—Nonsuit.

When there is conflicting evidence as to whether a local agent of a railroad company had authority to make the contract sued on, or whether the company had ratified the contract, and when a separate cause of action is alleged, with evidence to support it, for further damages caused by the defendant's negligence not depending on the express contract theretofore set out, a judgment of nonsuit should not be entered.

6. Actions—Severable Causes—Judgments—Modification—Appeal and Error.

When there are two causes of action alleged which are severable and distinct, and error has been committed by the trial court as to one, which necessitates a new trial, but no error has been committed as to the other, the judgment on appeal will be modified to the extent only of granting a new trial in the cause wherein the error was committed.

(157) APPEAL by defendant from *O. H. Allen, J.*, at February Term, 1912, of DUPLIN.

Action to recover damages for breach of contract. There was allegation, with evidence on part of plaintiff tending to show, that he

was the proprietor of a traveling troupe, known as the Hallie Mack Show, and had procured a special passenger car for his actors, and, being at Weldon, N. C., on or about 6 June, 1910, he made a contract with defendant's transportation agent, a Mr. Rodwell, that he was to be supplied with a baggage car of certain dimensions, with doors open at both ends, for the transportation of his outfit, including stage platform, tents, poles, etc., and he was to have this car, at a stated price, over defendant's lines, on Saturday night of each week-end while the show was giving exhibitions in that vicinity. That car was furnished as per contract for Henderson, the next point, and from Henderson to Oxford, but on the third and some subsequent points defendant failed to supply car, causing plaintiff much damage, etc.

Defendant denied making a contract for the car except to Henderson, the next point on its lines, and averred that if any such contract was made, it was with one C. E. Carter, defendant's local passenger agent at Weldon, and that neither Carter nor Rodwell, alleged to be a local freight agent at Weldon, had any authority to make the contract sued on, express or implied, and offered evidence on the questions presented, including several telegrams between Carter and C. B. Ryan, general passenger agent of defendant company, and other telegrams tending to show that the contract as made was only to supply the car to the next station, Henderson, and tending to establish other facts (158) in support and corroboration of defendant's position. These telegrams were at first admitted by the court, but were afterwards entirely withdrawn, his Honor charging the jury: "That all telegrams and communications between the ticket agent at Weldon, N. C., and Superintendent C. B. Ryan and J. A. Witt are withdrawn from the consideration of the jury for any and all purposes, and the jury are instructed that they cannot consider them for any purpose"; and charging further: "If the contract at Weldon was made by the agreement there with the ticket agent in the office, even though the ticket agent had no authority to do so, it would be binding on the railroad, as the contract alleged to have been made was apparently within the scope of his authority to arrange for cars, unless he did or attempted to do something contrary to law or the rules and regulations of the Railroad Commission of the State or Federal regulations." Defendant excepted to both rulings.

Plaintiff declared on a second cause of action for negligent injury in moving plaintiff's private car at Louisburg, causing damage. This was denied by defendant, and both parties offered evidence as to this cause of action. On issues submitted the jury rendered the following verdict:

1. Did the defendant Seaboard Air Line Railway agree, through its

agent at Weldon, to furnish the plaintiff with a baggage car every Saturday night up to and including Saturday night, 9 July, 1910, at Louisburg? Yes.

2. If so, did it fail to furnish car at Louisburg at that time? Yes.

3. If so, what damage, if any, did plaintiff sustain on account of such failure? $430.

4. Was the plaintiff's private car damaged by the negligence of the defendant? Yes.

If so, how much? $20.

Judgment for plaintiff, and defendant excepted and appealed, assigning for error, chiefly:

1. That his Honor withdrew the telegrams from the consideration of the jury.

(159) 2. The charge of the court that on the facts in evidence a contract with the ticket agent would be binding on the company, though the ticket agent had no authority to make it, the same being within the apparent scope of his authority.

3. That, on motions properly made, the court refused to nonsuit.

Johnson & Johnson and H. D. Williams for plaintiff.
Murray Allen for defendant.

HOKE, J. There was evidence on the part of the defendant tending to show that the contract was different from that declared on by plaintiff and that same was made with one E. C. Carter, the local passenger agent at Weldon, and further that C. B. Rodwell, with whom plaintiff testified the contract was made as defendant's "transportation agent," was only the local freight agent and yardmaster at Weldon, and on this testimony, in either aspect of it, we think the defendant is entitled to a new trial of the issues on the first cause of action.

On authority, these local railroad agents, whether passenger or freight, in charge of the company's business of their respective stations, have "the power to do what is usual and necessary to carry on the business intrusted to them, and to make all such contracts as are reasonable and appropriate to that end." Within the scope of these powers their acts are as binding as those of a general agent on a broader field, and under the limitations suggested their authority is subject to the well-recognized principle of the law of agency, that it may not be diminished or affected by restrictions or special instructions from the company which are uncommunicated to the shipper. *Gooding v. Moore,* 150 N. C., 198; *Harrell v. R. R.,* 106 N. C., 258; 1 Elliott on Railroads (2 Ed.), sec. 303; 2 Hutchison on Carriers (3 Ed.), sec. 630; 6 Cyc., 431.

Applying the doctrine, there are many well-considered cases to the effect that these local freight agents may make reasonable contracts for

the shipment of goods, on a specifide day, in cars of a certain kind, etc., and such contracts will bind, though the terms of the particular agreement are in excess of the powers actually conferred. *Merriwether v. R. R.*, 128 Mo. App., 647; *Harrison v. R. R.*, 74 Mo., 364; *Storer v. R. R.*, 109 Iowa, 551; *R. R. v. Racer*, 10 Ind. App., 503; *Nichols v. R. R.*, 24 Utah, 83; *Walchon v. R. R.*, 22 Wash., 253; *Greene* (160) *v. R. R.*, 142 Ind. App., 532. While giving full adherence to the general principle sustained in these cases, we are of opinion that the contract now in question is not within the powers usually possessed by one who is, in strictness, a local agent—a contract to provide a baggage car of a certain kind to haul an outfit of this character, including stage platform, tent, stage, etc., and to supply the same at each week-end for an indeterminate period and at other stations of the company.

Without deciding that the character of the car should of itself be regarded as determinative, there are many cases which hold that a local agent has not the power to contract for cars to be supplied at a separate and distinct station, and to uphold a contract of that character, special authority must be shown or it must appear that the contract has been in some way approved or ratified. *Vorhees v. R. R.*, 71 Iowa, 735; *R. R. v. Hodges*, 10 Texas Civ. App., 543; *Elkins v. R. R.*, 23 N. H., 275; *Greene v. R. R.*, 70 Mo., 672; 2 Redfield Railways, p. 137; and on the general principles controlling in such cases, see *Bank v. Hay*, 143 N. C., 326; *Stephens v. Lumber Co., ante*, 107.

With these facts in evidence, therefore, on the part of the defendant, tending to show that the contract was made with a local agent of the company, there was error in holding as a matter of law that the same was within the scope of the agent's powers, and that no limitation on his authority could be shown. For the same reason there was error in withdrawing the telegrams relevant to the question from the consideration of the jury. Those directly between local and the general passenger agents were competent in so far as they tended to show the nature of the contract and the restrictions which were imposed on the local agent's authority, and most of them are admissible in corroboration of such agent, who testified as to the terms of the contract as contended for by defendant.

The motion to nonsuit could not have been allowed, there being facts in evidence, on the part of plaintiff, tending to show that the agent with whom the plaintiff claimed to have contracted had power to make the same, and, further, that the contract as contended for by him (161) had been ratified by the company, and, further, there was pertinent evidence bearing on the fourth and fifth issues, those submitted on plaintiff's second cause of action, and to which the errors referred to have no application. We find no error in the determination of these

issues, and the actionable wrong and the incidental damage having been established without reversible error and being easily severable, it is proper that the judgment as to that portion of plaintiff's recovery should be affirmed. In 3 Cyc., p. 447, the position is stated as follows: "When a judgment appealed from consists of distinct and independent matters, so that the erroneous portions thereof can be segregated from the parts that are correct, the court will not set aside the entire judgment, but only so much as is erroneous, leaving the residue undisturbed. Thus, where a judgment, entered on several causes of action, is correct as to some of them, but erroneous as to others, it may, if the judgment is divisible, be reversed as to the latter and affirmed as to the former."

This will be certified, that there may be a new trial as to plaintiff's right to recover on the alleged breach of contract, the first cause of action, and that the judgment for the recovery on the second cause of action be affirmed.

Partial new trial.

Cited: Tilley v. R. R., 162 N. C., 40; *Newberry v. R. R.*, 167 N. C., 50; *Chesson v. Cedar Works*, 172 N. C., 34.

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(162)

THE STONE COMPANY v. A. D. RICH ET AL.

(Filed 16 October, 1912.)

1. Debtor and Creditor—Different Classes of Debt—Application of Payment.

When a payment is made by a debtor to his creditor, who holds both a secured and unsecured debt against him, the debtor must direct the application of the payment either before or at the time of making it; upon his failure to do so, the creditor may make the application within a reasonable time, and upon his not doing so, the law will make the application to the unsecured debt.

2. Same—Notice to Creditor—Book Entries.

The debtor who owes his creditor both a secured and unsecured debt must signify to the creditor in some manner his intention as to how a payment made to him must be applied, and an entry on the debtor's book showing the application of the payment is insufficient unless it is shown to have been brought to the creditor's attention at the time of the payment.

3. Same—Application by the Law.

In this case, it appearing that the debtor owed his creditor both a secured and unsecured debt, and made a payment without directing its application at the time, except by entry on his own books subsequently

brought to the creditor's attention and objected to by him, and that the application was made at the time of commencing this action, it is *Held*, that the law applied the payment to the unsecured debt.

4. Debtor and Creditor—Different Classes of Debt—Payment—Application Directed—Burden of Proof.

The burden of proof is on the debtor to show that he has directed the application of a payment he has made to his creditor, to whom he owed both a secured and unsecured debt.

5. Appeal and Error—Debtor and Creditor—Application of Payment—Judgment—Merits—Right of Appeal.

It appearing in this case that the plaintiff owed the defendant two debts, one of them secured and one unsecured, and made a payment under such circumstances that the law would apply it to the unsecured claim, but which was erroneously applied by the judgment of the lower court to the secured claim, and judgment dismissing the action against defendant was entered, it is *Held*, that the defendant's appeal would lie upon the merits of the case so as to relieve the plaintiff from the effect of the judgment applying the payment upon his unsecured debt, and that as that part of the judgment below dismissing the action against the defendant was proper, the judgment is modified and the action is dismissed.

APPEAL by defendants from *O. H. Allen, J.*, at February Term, 1912, of SAMPSON.

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

H. A. Grady for plaintiff.
Faison & Wright for defendant.

WALKER, J. This case was before us at a former term, under (163) the title of *Stone Co. v. McLamb*, 153 N. C., 378. We then held that Mrs. M. M. Vann, a *feme covert*, was liable for the debts of the firm of McLamb & Co., under the statute, Revisal, sec. 2118, and that the order appointing a receiver of the partnership effects was erroneous and should be vacated, and the property, which was under mortgage to A. D. Rich, should be restored to him. The case was remanded for the settlement of the other matters involved. The parties thereupon agreed that an issue be submitted to a jury to ascertain if a payment of $333, made by McLamb & Co. to Rich, should be applied to the debt of the firm, amounting to $1,650, which is secured by his mortgage, or to an unsecured debt of $300 held by him against McLamb & Co. The jury returned the following verdict: "Should the $333 credited to A. D. Rich on page 453 of the ledger be applied to the mortgage debt of McLamb & Co. to A. D. Rich? Answer: Yes." The court adjudged, upon the verdict, that the payment be so applied.

The defendant's exception raises the question whether there was any evidence to show that he had been instructed by the firm to so apply the payment, he having requested the court to charge substantially that there was none. We have examined the testimony carefully, and have failed to find any evidence to sustain the charge of the court or the verdict of the jury. The most that can be made of it, when considered favorably to McLamb & Co. and the other interested parties, is that the firm made some payments, at different times, aggregating $333 and entered them upon its books as credits on the mortgage notes, but did not direct Rich how to apply them, and Rich did not know of the entries until some time after they were made, when he promptly objected to them. It was then agreed that they should be applied to the unsecured debt. It is admitted that Rich did not apply the payments to either of the debts.

There is no rule in the law better settled than the one in regard to the application of payments:

1. A debtor owing two or more debts to the same creditor, and making a payment, may, at the time, direct its application to any one of the debts. The right is lost if the particular application is not di-
(164) rected at the time of the payment.

2. If the debtor fails to make the application at the time of the payment, the right to apply it belongs to the creditor.

3. If neither debtor nor creditor makes it, the law will apply it to the unsecured debt or the one for which the creditor's security is most precarious, or, as sometimes expressed, according to its own view of the intrinsic justice and equity of the case. *Sprinkle v. Martin,* 72 N. C., 92, and cases cited; *Vick v. Smith,* 83 N. C., 80; *Moss v. Adams,* 39 N. C., 42; *Jenkins v. Beal,* 70 N. C., 440; *Ramsour v. Thomas,* 32 N. C., 165; *Wittkowski v. Reid,* 84 N. C., 21; *Long v. Miller,* 93 N. C., 233; *Lester v. Houston,* 101 N. C., 605; *Pearce v. Walker,* 103 Ala., 250.

The weight of authority is that the debtor must direct the application at or before the time of his payment, and that he cannot do so afterwards. 30 Cyc., 1230, and cases in note. A direction by the debtor as to the application of payments may be shown by an express agreement with the creditor, by the declaration of the debtor, or it may be implied from circumstances showing the debtor's intention at the time of payment. 30 Cyc., 1230. Again: The communication need not be expressed in writing, nor in any technical or formal words, nor the instruction delivered in any particular manner. It will be sufficient if the intention is manifest, and that it comes to the knowledge of the other party at the proper time. 2 Am. and Eng. Enc. of Law (2 Ed.), 448. "It is certainly too late for either party to claim a right to

make an appropriation after the controversy has arisen, and *a fortiori* at the time of the trial." *U. S. v. Kirkpatrick,* 9 Wheaton (U. S.), 721, 737.

When a party, indebted to another on more than one account, makes a partial payment, the burden of proving that at or before the time of such payment he directed its application to a particular debt, as pleaded by him, and that this direction was made known to his creditor, is upon the debtor. *Pearce v. Walker, supra.*

Coming to the special facts of this case, it is said in Parsons on Contracts (6 Ed.), sec. 630: "It is not necessary that the appropriation of the payment should be made by an express declaration of the debtor; for if his intention and purpose can be clearly gathered (165) from the circumstances of the case, the creditor is bound by it. If the debtor, at the time of making a payment, makes also an entry in his own book, stating the payment to be on a particular account, and shows the entry to the creditor, this is sufficient appropriation by the debtor. But the right of election of appropriation is not conclusively exercised by entries in the books of either party until those entries are communicated to the other party." But the cases nearest to the present in matters of fact are the following: *Manning v. Westerne,* 2 Vernon, Ch., 606 (23 Eng. Reprint, 996), where it appeared that defendant, being indebted to plaintiff on specialty and also by simple contract, or a running account, made several payments of sums in gross, and entered them in his own book as paid upon the specialty. It was better for the debtor that the payment should go to the simple contract, which did not bear interest. The *Lord Chancellor* said: "Although the rule of law is that *quicquid solvitur, solvitur secundum modum solventis;* yet that is to be understood, when at the time of payment he that pays the money declares upon what account he pays it; but if the payment is general, the application is in the party who receives the money, and the entries in the defendant's books are not sufficient to make the application." So in *Frazer v. Bunn,* 8 Carr. and P., 704 (34 E. C. L., 592), where a performer at a theater had arrears of salary due to him, and a payment was made to him without any direction at the time as to its application, it was held that an entry by the debtor in his books was not a sufficient direction unless brought to the creditor's knowledge at the time; otherwise, if he had stated for what specific portion of the indebtedness it was intended, or had the entry been made known to the creditor, in which case it would have been evidence of such an appropriation as would be binding on the creditor. *Lord Abinger* said: "If Mr. Jones had expressly paid this for what was due to the plaintiff between February and June, the plaintiff would have been out of court; but so far from that, he states that he did not tell the plaintiff on what account he paid

it, neither did he show him the book. If he had shown the plaintiff the book in which he had entered it as for a particular period, that (166) would be evidence of appropriation; but that was not so, and I think that the plaintiff is at liberty to apply those payments to the other parts of what had been due to him, and that, therefore, he may recover for the rest of his claim, which is within the dates stated in the particulars."

In a case with substantially the same facts, *Terhune v. Colton,* 12 N. J. Eq. (1 Beasley), 232, the Court, after stating the general rule as to the appropriation of payments, held that while the intention of the debtor to apply the payment to a particular debt or part of a debt may be shown by circumstances attending the act of payment, they must be known to the creditor, or the intention to do so must be signified to him in some way, and that an entry in his own books of account by the debtor is insufficient to determine the application in his favor, as he had not, by showing the entry to the creditor, or otherwise, indicated his intention as to how the money should be applied.

The result of the cases is that an undisclosed intention to apply the payment will not do. The right of the creditor to apply the payment, when the debtor by his silence has lost control of it, is stated more in detail by *Justice Rodman* in *Jenkins v. Beal, supra:* "The rule is that where a debtor owes several debts to a creditor and makes payments, he may appropriate the payments to any of the debts he may please; but if he fails to do so at the time, the creditor may appropriate them as he pleases (subject to some exceptions not material here) at any time before he brings suit for the balance." And in another case the Court held: "Although as between the immediate parties the creditor has a right to appropriate when the debtor has failed to do so, yet this right must be exercised within, at the furthest, a reasonable time after the payment, and by the performance of some act which indicates an intention to appropriate. It is too late to attempt it at the trial." *Harker v. Conrad,* 12 S. & R. (Pa.), 301; *Reiss v. Scherner,* 87 Ill. App., 84.

Where neither party has exercised his right of appropriation, and a dispute subsequently arises, the court will make the application, (167) as we have seen, and in doing so will, as a general rule, apply the payment to the debt which is unsecured or the least secured, upon the assumption that the debtor would desire to pay all his debts, and this disposition of the credit most nearly accomplishes that result, or, in other words, the law pursues this course, as it intends that all men shall be honest and fully perform their just obligations, and adopts this method as the one which an honest man would unselfishly choose, if left to himself to act in the premises. It simply does what the debtor should have done if prompted by just motives. *Leeds v. Gifford,* 41 N. Y. Eq.,

464; *Turner v. Hill,* 56 N. J. Eq., 293; *Terhune v. Cotton,* 1 Beasley (12 N. J.), 238, in which cases the law upon this subject is clearly stated with peculiar reference to the same state of facts as are presented in this case.

As the burden was upon McLamb & Co. to show that they had directed how the payment should be applied at the time it was made, and as the mere entries, without the knowledge of A. D. Rich, were, in law, insufficient to show such an appropriation of the money, the court should have instructed the jury that there was no evidence of an appropriation by the debtor, McLamb & Co., and to answer the issue "No," as the law applied the payment to the unsecured debt or open account. For this error, the verdict and judgment thereon are set aside.

It appears that while the issue was found against the defendant A. D. Rich, and judgment entered thereon that the payment, $333, be applied to the mortgage debt, the Court has given a final judgment in favor of A. D. Rich, by dismissing the action as to him and taxing the plaintiff with the costs of said defendant. As our decision disposes of the principal question in the case and is given upon facts virtually admitted, or at least uncontroverted—that is, the book of McLamb & Co., and the oral testimony, which the parties agreed should be decisive of their rights, so far as the application of the payment is concerned—the defendant A. D. Rich would seem to be entitled to the final judgment. It will, therefore, be allowed to stand, and the action is dismissed as to him.

The plaintiffs have called our attention to the anomaly presented in this case, of a verdict against Rich and judgment on the same, and then a final judgment in his favor. With this before him, he expresses a doubt as to Rich's right of appeal and some wonder at the (168) course of the proceeding. We have decided the question, as to the payment, to prevent any prejudice to the defendant A. D. Rich likely to grow out of the verdict and judgment thereon, which he should have the right to review by appeal, and by holding that our decision disposes of the merits of the case in so far as Rich is affected. We thus sustain the final judgment, as consistent with our decision upon the payment, and thus reconcile what was done with orderly procedure. Appellees will pay the costs of this Court.

Action dismissed.

Cited: French v. Richardson, 167 N. C., 44.

W. H. T. CAUDLE ET AL. v. MOLLIE MORRIS ET AL.

(Filed 7 November, 1912.)

1. Homestead—Pleading—Burden of Proof.

In an action for the possession of lands, involving title, the defendant must, by proper averment in his answer, assert his right to a homestead therein, should he desire to claim one, and prove that he is entitled to it.

2. Homestead—Executors and Administrators—Lands—Sale to Make Assets—Creditors—Evidence.

In an action for the possession of lands, involving title, wherein the plaintiffs claimed as heirs at law of the deceased owner, a deed from a commissioner to sell the lands was introduced which referred to a proceeding for partition of the lands. The administrator of the deceased was examined in the present action and failed to testify that the decedent's personal property was insufficient to pay his debts; in the record, after the case on appeal, it is stated that the proceedings allotting the lands to the widow of deceased were introduced, but they were not in the record, and it does not appear whether they were *ex parte* or instituted by creditors; *Held*, not to be a scintilla of evidence that the deceased owed any debts that his personal estate was not sufficient to pay.

3. Homesteads—Widows—Heirs at Law—Dower.

A widow is not entitled to homestead in the lands of her deceased husband against the heirs at law, when there are no creditors, but only to dower. N. C. Constitution, Art. X, sec. 5.

4. Homestead—Widow — Deeds and Conveyances — Pleadings — Evidence — Judgments—Estoppel.

A widow cannot maintain her claim for a homestead in the lands of her deceased husband against the heirs at law when it appears that she has conveyed it by deed to another, and in an action by the heirs at law to recover the lands in possession of the widow's grantee the latter cannot successfully claim the homestead by virtue of his deed, when he has made no such claim in his answer, and has put his whole title in issue, which was decided adversely to him. It was his duty to set up every claim he had to the land, and is precluded as to those he might have set up, but did not.

5. Homestead—Determinable Interest—Deeds and Conveyances.

A homestead interest in lands is a determinable exemption, and not an estate in land, which determines upon its being conveyed by the homesteader.

(169) APPEAL by plaintiff from *Peebles, J.*, at October Term, 1911, of WAKE. These issues were submitted by the court to the jury:

1. Was the execution of the deed from A. B. Emery to his son Vance procured by fraud and undue influence? Answer: No.

2. Did the defendant Bryant Smith acquire title to the lands in question under the deed from J. C. L. Harris, commissioner, to him? Answer: No.

3. Is the plaintiff Mrs. Loretta Caudle, as devisee, entitled to recover the lands described in the complaint? Answer: No.

4. Did A. B. Emery at the time he signed the deed to A. Vance Emery have mental capacity to make a deed? Answer: Yes.

5. Are the plaintiffs, Loretta Caudle, Sarah Smith, and Fannie Pulley, the owners as tenants in common of the lands mentioned in the complaint, subject to the homestead of Vance Emery's widow? Answer: Yes.

6. What damages, if any, are the above-named plaintiffs en- (170) titled to recover? Answer: One penny each.

6a. Did the defendant Bryant Smith fraudulently receive and hold the deed from J. C. L. Harris, commissioner? Answer: No.

7. If so, when did the plaintiffs first learn of such fraud on the part of said Smith? Answer: .....

8. When did the plaintiffs first learn that Bryant Smith claimed the land in controversy as his own under the deed from J. C. L. Harris, commissioner? Answer: April term of court, 1908.

9. When was this action commenced as against Bryant Smith in his individual capacity? Answer: June 10, 1911, as devisee of her father.

10. Is the action of Loretta Caudle and husband as devisee of her father barred by the statute of limitations? Answer: Yes.

Whereupon the court rendered judgment that the plaintiffs herein, to wit, Mrs. Loretta Caudle, Mrs. Sarah Smith, and Mrs. Fannie Pulley, recover of the defendant Bryant Smith the lands described in the complaint, subject to the homestead of Mollie Morris, the widow of A. V. Emery, during its continuance.

The said plaintiffs excepted to so much of the judgment as adjudged Mollie Morris to be entitled to a homestead in the lands in controversy, and appealed.

R. C. Strong for plaintiffs.
R. N. Simms and Douglass, Lyon & Douglass for defendants.

BROWN, J. This action was brought to recover possession of certain tracts of land from defendant Bryant Smith, to whom they were attempted to be conveyed by J. C. L. Harris, commissioner. The land was originally the property of A. B. Emery. The findings of the jury (not excepted to) confirm the title of his son, A. Vance Emery, and destroy the title of Bryant Smith.

It is admitted in the record that Vance Emery died intestate, leaving no child, and that the three *feme* plaintiffs named in the judgment

(171) are his heirs at law and next of kin, and that the defendant Mollie is his widow, and that defendant Bryant Smith is in possession of the land.

Plaintiffs by excepting to that part of the fifth issue, and also to the judgment exempting the homestead of Mollie Morris from their recovery, present the question on this appeal as to whether under the pleadings, evidence, and the form in which this action is brought, his Honor erred in adjudging that Mollie Morris is entitled to a homestead in the lands in controversy as against these plaintiffs. The exception is well taken.

1. As contended by the learned counsel for plaintiffs, there is no such claim or plea of homestead set up in the answer of either Bryant Smith or Mollie Morris.

It has been uniformly held by this Court that in an action to recover land, if the defendant desires to claim a homestead therein he should assert his rights by proper averment in the answer. *Wilson v. Taylor,* 98 N. C., 276. In the opinion the Court says: "No issue in regard to the homestead was raised by the pleadings, and there was no question in relation thereto, as appears from the record, till after the verdict. The issues are raised by the pleadings," citing *Hinson v. Adrian,* 92 N. C., 121. The Court further says: "In all cases cited by counsel for the defendants the claim to the homestead was presented by the pleadings." This case has been cited and approved in a number of cases given in the annotated edition of our reports, and is directly in point and determinative of this appeal.

2. There is not only a lack of *allegata,* but also of *probata* supporting the claim of homestead, and it has been repeatedly held that both are essential.

There is not a scintilla of evidence in the record that Vance Emery owed any debts that his personal estate was insufficient to pay. The deed from J. C. L. Harris, commissioner, to Bryant Smith, who was the administrator of Vance Emery, refers to a proceeding to make real estate assets instituted by said administrator against Mollie F. Morris, formerly Mollie F. Emery; but it is expressly disclosed that these plaintiffs, the only heirs at law of Vance Emery, were not parties to it. In referring to that proceeding in his charge, his Honor declared it

(172) to be a proceeding for partition, in these words: "We have had a lot of fuss about this little piece of land. They told us that Smith had bought the land at his own sale, alleging fraud and everything; but on examination of the papers I find he did not buy any land at all; so that his part is eliminated. The proceeding for partition to sell the land made the widow a party, and these children were not parties, and this deed did not affect them at all. The title is in them, if A. V. Emery had title to it."

Smith, the administrator of Vance Emery, was examined as a witness in his own behalf and failed to testify to any unpaid and outstanding indebtedness against the estate that the personal property was insufficient to pay.

It is stated in the record after case on appeal that "the proceedings allotting the whole land to the widow of A. V. Emery were introduced. These proceedings are not in the record, and it does not appear whether they were *ex parte* or were instituted on behalf of creditors in accordance with the statute. A widow is not entitled to homestead against the heirs at law when there are no creditors, but only to dower. The language of the Constitution declares that "if the owner of a homestead die, leaving a widow but no children, the same shall be exempt from the debts of her husband," etc. Watts v. Leggett, 66 N. C., 197. It must be borne in mind that this is not a proceeding to sell the land to pay debts, but an action by the heirs at law to recover possession of it from the defendant Bryant Smith, who admits he is in possession.

3. There is another reason why Mollie F. Morris is not entitled to a homestead in this land, and that is because she and her husband, by deed dated 17 April, 1901, duly conveyed "the homestead right of the said Mollie F. Morris in the aforesaid eight tracts of land as heretofore laid off and allotted to her as the wife of A. V. Emery to the said Bryant Smith, his heirs and assigns, forever."

It appears from Exhibit B attached to the case on appeal that this was overlooked by the learned judge, and had it been called to his attention that he would have omitted from the judgment the words "subject to the homestead of the widow of A. V. Emery." (173)

4. Bryant Smith cannot claim the homestead of Mollie Morris for himself, because he set up no such claim in his answer, and put his whole title in issue, and that was decided adversely to him under the second issue. It was his duty to set up every claim he had to the land, and he is precluded as to those he might have set up, but did not. *Wagon Co. v. Byrd,* 119 N. C., 461.

Again, it is contended that when Mrs. Morris conveyed her homestead right in the land she terminated the homestead exemption, as a homestead is now considered a determinable exemption, a mere *cessat executio,* and not an estate in land. It is not necessary to decide the point, but in view of recent decisions of this Court it may be that Bryant Smith as assignee of Mrs. Morris cannot set up the claim of homestead exemption even as against creditors, much less against the heirs at law. *Joyner v. Sugg,* 132 N. C., 580. See note, section 11, page 378, Connor and Cheshire on Constitution.

Let the judgment of the Superior Court be modified in accordance with this opinion by striking out the words "subject to the homestead

interest of Mollie Morris, the widow of A. V. Emery during its continuance," and as so modified the judgment is affirmed.

The appellees, the defendants, will be taxed with costs of this appeal. Modified and affirmed.

HOKE, J., concurs in result.

Cited: Ferebee v. Sawyer, 167 N. C., 203; *Randolph v. Heath,* 171 N. C., 387.

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(174)

FARQUHARD SMITH ET AL. v. TOWN OF DUNN ET AL.

(Filed 20 November, 1912.)

1. Wills—Trusts and Trustees—Personal Property—Place of Taxation—Interpretation of Statutes.

Under the provisions of Revisal, sec. 5217, a guardian shall list the property of his ward for the purpose of taxation where such ward resided on the first day of June, and an executor or administrator shall list the property of the deceased where he resided on the first day of June, unless such ward or deceased person were nonresident of this State, in which case the guardian or personal representative shall list the property where he himself resided on the first day of June.

2. Same—Cities and Towns—Penalties—Injunction.

In this case the testator appointed executors of his will who were also therein named as trustees for certain beneficiaries, who in May of a certain year moved to another town, after the matters of executorship had been closed, leaving those of the trusteeship continuing: *Held,* (1) the personal property should have been listed at the place of residence of the beneficiaries in June of that year; and the taxes not having been listed at all, it was proper for the commissioners of the town of residence of the beneficiaries to cause the personalty to be listed there and impose the penalty prescribed by Revisal, sec. 5232 (section 72 of the Machinery Act of 1909); a restraining order in this case was improvidently granted.

APPEAL by defendants from *Peebles, J.,* at May Term, 1912, of HARNETT.

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

E. F. Young for plaintiffs.
J. C. Clifford for defendants.

CLARK, C. J. Under the will of Mrs. F. M. Andrews, who died resident in Stewart's Creek Township in HARNETT in 1904, the plaintiffs

were appointed executors and also trustees of certain property for her son, his wife and children. The estate has been settled up, and the plaintiffs now hold simply as trustees for the beneficiaries. In 1908 the *cestius que trustent* removed to the town of Dunn and have lived there ever since. The trustees have in their possession certain personal property consisting mostly of stocks and bonds. These they have (175) not listed for town taxes.

Revisal, 5217, provides that in all cases where the guardian, executor, or administrator resides in a city or incorporated town, all personal property in his hands shall be listed for taxation only where their wards resided on the first day of June and where the deceased persons resided on the date of their death, unless such ward or deceased persons were nonresident: *"Provided,* that when personal property is held in trust for another, by any person, firm, or corporation in this State, whether as guardian, trustee, or otherwise, and the *cestui que trust* is a resident of the State, then the same shall be listed for taxation in the county and township where the *cestui que trust* lived on the first day of June."

Revisal, 5232 (section 72 of the Machinery Act of 1909), authorized the county board of commissioners, and makes it their duty, to list property which has escaped taxes for a period not exceeding five years, adding to the simple taxes 25 per cent in addition thereto, and at the end of this section its provisions are extended so as to apply to "all cities, towns, and like municipal corporations" having the power under their charters to tax property.

On 1 May, 1908, the *cestuis que trustent* removed to the town of Dunn and have lived there ever since. The plaintiffs listed the real estate for taxation in the town of Dunn. But on 1 June, 1908, 1909, and 1910, they listed the personalty only in the township in which the trustees resided. In October, 1910, the board of commissioners of Dunn directed that the personalty held by said trustees for said beneficiaries should be listed for taxation in said town and the taxes should be collected thereon, together with 25 per cent additional for the years 1908 and 1909. This is a "case submitted without controversy," and the plaintiffs ask an injunction on the above facts to restrain the town and its tax collector from collecting the taxes upon said property held by them as trustees for said beneficiaries.

The language of the statute, Revisal, 5217, is explicit that the property is taxable "where the *cestui que trust* resides." The case also falls under Revisal, 5232 (section 72 of the Machinery Act of 1909), for it is a case where the property was "not listed at all" so far as the (176) town tax is concerned, and not a case, as his Honor seemed to have supposed, where the trustee "listed and paid in the wrong town-

ship." The property was not listed for town taxes either in the township where the plaintiffs reside nor in the town where the beneficiaries resided.

The language of Revisal, 5217, is not very neatly expressed, but it clearly means that a guardian shall list the property of his ward where such ward resided on the first day of June and an executor or administrator shall list the property of the deceased where he resided on the first day of June, unless such ward or deceased person were nonresident of this State, in which case, the guardian or personal representative shall list the property where he himself resided on said first day of June. The injunction was improvidently granted.

Reversed.

GEORGE E. GILL ET AL. V. BOARD OF COMMISSIONERS OF WAKE COUNTY.

(Filed 7 November, 1912.)

1. County Commissioners—Equity—Injunction — School Districts — Petition of Freeholders—Conditions Precedent—Taxation.

As a condition precedent to the action of the board of county commissioners in forming special school districts and submitting to the vote of the pepole the question of levying the tax under the provisions of chapter 135, sec. 1, Public Laws of 1911, and chapter 525, Public Laws 1909, amending Revisal, sec. 4115, the "petition of one-fourth of the freeholders within the proposed school district, indorsed by the county board of education," etc., must first be presented. This is a prerequisite made by the statute to the exercise of the authority conferred on the board of county commissioners, and is necessary to confer jurisdiction on them, and it may be shown, in proceedings to enjoin the county commissioners from levying the tax, that the petition upon which they were assuming to act was not in fact signed by the required number of the freeholders in the proposed district.

2. Same—Power of Courts.

When an injunction is sought to the main relief of declaring the invalidity of taxes proposed to be levied by the county commissioners for a special school district, laid out in accordance with the provisions of chapter 135, sec. 1, Public Laws of 1911, amending Revisal, sec. 4115, upon the ground that the requisite number of the freeholders of the district had not signed the petition, the courts may inquire into the legality of the proposed action of the board in levying the tax, in direct proceedings, and in proper instances afford the relief applied for, so that the *status quo* may be preserved until the rights of the parties are finally determined.

3. Injunction—Ministerial Duties—Statutory Observance.

While the courts will not restrain a municipal official in the exercise of a discretionary power conferred on him by statute, they will restrain him when he assumes to act in a manner not contemplated by the statute.

4. County Commissioners — School Districts — "Freeholders" — Words and Phrases—Woman Suffrage—Interpretation of Statutes.

The word "freeholders," used in chapter 135, sec. 1, Public Laws of 1911, amending Revisal, sec. 4115, as to who are required to sign the petition for the laying off special school districts and levying a tax therein, should not be construed by itself, but in the light of proper and relevant circumstances, such as that under the common law of England a freehold estate was held by a freeman, and the feudal duties thereof were not performed by women; that the former qualification under our Constitution that a Senator should be the owner of a freehold in 50 acres of land did not make a woman eligible for the position, requiring that a freeman, excluding woman, should be seized thereof, and thus understood in political matters, excluding woman from suffrage; that under our statutes the word "freeholder," as describing qualifications of appraisers, commissioners, and a special class of jurors (Revisal, secs. 2122, 2685, 2686, 5202, and others), excludes females; that the construction placed by the other legal advisers of the department has consistently for years been that the meaning of the word "freeholders," used in this connection, excluded women, of which the Legislature was doubtless aware and made no statutory change or correction; and *Held*, that if the petition be not signed by the required per cent of the freeholders in the proposed district, excluding the ownership of lands by women, infants, nonresidents, etc., it is not a compliance with the requisites of the statute: *Held further*, the interpretation of the word "freeholders" as used by the statute should not be confined to the quantity of estate held in the land.

5. County Commissioners—School Districts—Taxation—Injunction—Appeal and Error—Superior Court—Incorrect Ruling—Correct Result—Different Matters—Court's Investigation—Reversal—Procedure.

In this cause for an injunction against the action of the board of county commissioners in creating a special school district and submitting to the vote of the people the question of a tax levy under the provisions of chapter 135, sec. 1, Public Laws of 1911, amending section 4115 of the Revisal, the Superior Court judge granted the restraining order to the hearing, erroneously ruling that women were "freeholders" within the meaning of the act. The question of whether the proposition submitted received a majority of the votes cast, being also involved, the Supreme Court would affirm the granting of the order, though based on the wrong ruling, except that it appears from the examination of the allegations of the respective parties that there was no real or serious dispute as to the result of the figures and admissions that the proposition received the approval of a majority of the qualified voters; and therefore the judgment of the lower court continuing the injunction to the final hearing is reversed, without prejudice to the plaintiff to renew his motion therefor upon new or additional facts showing his right to it.

6. Appeal and Error—County Commissioners—School Districts—Taxation—Injunction—Interlocutory Order—Substantial Rights—Fragmentary Appeals.

In this action an injunction was asked restraining the county commissioners from ordering a levy of taxes in a special school district laid off under the provisions of chapter 355, Public Laws of 1911, and chapter 525, Public Laws of 1909, amending sec. 4115 of the Revisal, which involved two propositions; (1) the invalidity of the petition conferring jurisdiction; (2) the question as to whether a sufficient number of the qualified voters had voted in favor of the question submitted to them. Upon the first proposition it is ascertained that no jurisdiction was conferred, and in the second, that a sufficient number of the qualified voters had voted favorably: *Held*, the order appealed from was interlocutory, affected a substantial right, and the appeal taken was not objectionable as fragmentary. Revisal, sec. 587.

CLARK, C. J., and BROWN, J., dissenting.

(179) APPEAL by defendant from *Ferguson, J.*, at July Term, 1912, of WAKE.

This action was brought by the plaintiffs to test the validity of an election held in Wake Forest for the purpose of establishing a school district therein and levying a special tax for the support of the same, under Revisal, sec. 4115, which was amended by the Public Laws of 1909, ch. 525, and Public Laws of 1911, ch. 135, sec. 1. It provides that "Special school tax districts may be formed by the county board of education in any county without regard to township lines under the following conditions: Upon a petition of one-fourth of the freeholders within the proposed special school district, indorsed by the county board of education, the board of county commissioners, after thirty days notice at the courthouse door and three public places in the proposed district, shall hold an election to ascertain the will of the people within the proposed special school district whether there shall be levied in such district a special annual tax of not more than 30 cents on the $100 valuation of property and 90 cents on the poll to supplement the public school fund, which may be apportioned to such district by the county board of education, in case such special tax is voted." It is not necessary that we should further refer to the amendments. A petition purporting to be signed by one-fourth of the freeholders of the proposed district was presented to the county board of education and duly indorsed by them, and the board of county commissioners thereupon ordered the election to be held in the district on 15 June, 1912, for the purpose aforesaid. Revisal, sec. 4115, also provides that "in case a majority of the qualified voters at the election is in favor of the tax, the same shall be annually levied and collected in the manner prescribed for the levy and collection of other taxes."

Plaintiffs allege that a sufficient number of freeholders, that is, one-fourth, did not sign the petition for the election, but that the women in the district, and persons who are freeholders but are themselves not residents of the district, were not counted in making up the total of freeholders of the district, and that if they are included, one-fourth of the freeholders within the district did not sign the said petition.

The defendants admit that if the women of the district who (180) own freeholds therein are to be counted in order to make a proper roster of the freeholders, then three-fourths of the freeholders did not sign the petition, without any regard to the freeholders who are nonresidents. They contend, though, that plaintiffs cannot raise the question as to the lack of a sufficient number of qualified signers to the petition, because they are concluded by the indorsement or approval of the county board of education, and the order for the election, which was made by the county commissioners. They also insist that the women should not be counted, as they are not freeholders within the meaning and intendment of the statute.

Plaintiffs further allege that if the election was properly ordered, the question submitted did not receive the approval of a majority of the qualified voters of the district, as required by the statute. It appears that the vote at the election was canvassed by the registrar and poll-holders, who are about to certify the result to the board of county commissioners, who, it is alleged and admitted, will receive the election returns, record the same, and levy the tax as provided by Revisal, sec. 4115.

Plaintiffs prayed that the said election be declared void, set aside and annulled, and, as ancillary to this relief, that defendants be enjoined from declaring the alleged illegal result and from levying the tax.

The court, his Honor, *Judge Garand S. Ferguson,* presiding, was of the opinion, and so decided, that women and nonresidents who own freeholds in the district should be included in the count, so as to make up the total number of freeholders, or, in other words, that the term "freeholders within the proposed special school district" embraced female as well as male, and, therefore, that the petition did not have the requisite number of signers, freeholders and nonresident freeholders. The court thereupon continued to the final hearing the temporary injunction theretofore granted by *Judge Bragaw,* and defendants appealed.

N. Y. Gulley, Douglass, Lyon & Douglass, W. B. Snow, and Armistead Jones & Son for plaintiffs.

Winston & Biggs for defendants.

WALKER, J., after stating the facts: The first question for our consideration is, Can the plaintiffs now object that a sufficient (181)

number of qualified persons did not sign the petition for the election? We think, upon mature reflection and an examination of the authorities, that they can, as the jurisdiction, if we may so term it, of the board of education and the county commissioners is dependent upon the presentation to them of such a petition as is required by the sttaute, it being a condition precedent to the exercise of the particular authority conferred by the statute upon them. It was the foundation upon which all else rested, and without which the subsequent proceedings cannot stand. What is said by *Justice Merrimon* in *McDowell v. Commissioners,* 96 N. C., 514, is very pertinent here: "Accepting it as true that the commissioners of Rutherford County did ascertain and declare the result of the election in question, properly and sufficiently—and this by no means appears to be certain—their action in that respect, while it could not be attacked collaterally, was not conclusive, and it might be questioned and contested in an action brought directly for that purpose. It cannot be that such a determination and exercise of authority by county commissioners, in respect to matters frequently involving questions and rights of great moment, are final and absolutely conclusive. There is certainly no statute that so provides, and the spirit and principle of law in regard to the settlement and determination of the rights of parties and the public plainly imply the contrary. . . . The chief and leading purpose of this action is to contest directly the regularity and validity of the election in question, including the ascertainment and declaration of the result thereof by the county commissioners. The plaintiff seeks to have the election adjudged void for the causes alleged, and prays for incidental equitable relief by injunction pending the action, and a perpetual injunction. We can see no reason why this is not competent, although we need not now decide conclusively any question in this respect. It is true, the plaintiff did not bring his action at once after the result of the election was declared, to contest its validity, but it was not necessary that he should do so, until some action was about to be taken in pursuance of it. It might be that the county
182) authorities, seeing the election was irregular and void, would so treat and disregard it, in which case an action to have it declared void would be unnecessary. It seems that the plaintiff gave notice of his purpose to bring his action when and as soon as it became necessary, and that he did bring it promptly after the commissioners manifested their purpose to act upon the result of the election. There is no statutory provision that requires such elections to be contested at once after they take place, and in a particular manner. It was, therefore, sufficient for the plaintiff to bring his action within a reasonable period, and in the ordinary method."

Referring to *Smallwood v. New Bern,* 90 N. C., 36, cited by appellants in that case, this Court further said in *McDowell v. Construction Co., supra,* that it was not applicable, it being an action to enjoin a tax, which was a collateral and not a direct attack upon the commissioners' declaration of the result of the election, and thus quoted from the opinion in that case: "If the plaintiff was dissatisfied with the action of defendants in ascertaining the result of the vote in the respect mentioned, he ought, at the proper time, to have brought his action to question the truth and justice of their decision of the matter, and had the same reversed, declared irregular and void, or properly modified. There was a remedy, but that remedy cannot be had in an action like this." And the Court, in *McDowell v. Construction Co.,* at p. 532, added, in connection with that extract from *Smallwood v. New Bern:* "Nor did this Court say, or intend to say, to the contrary, in *Simpson v. Commissioners,* 84 N. C., 158; *Cain v. Commissioners,* 86 N. C., 8, and *Norment v. Charlotte,* 85 N. C., 387."

Cases in the courts of other States sustain the view that the jurisdiction of the boards to pass upon the petition is special, and there is no power to act when the required number of legal signatures is wanting, and this defect can certainly be availed of by a direct impeachment of the election. It is said in *Hoxie v. Scott,* 45 Neb., 199: "The want of jurisdiction of the county commissioners and other officers clothed with like powers, with respect to similar petitions, to act upon the petition of less than fifty freeholders, or of a certain proportion of qualified electors, is no longer a debatable question in this State [citing cases]. As the county commissioners had presented to them no petition upon (183) which they had jurisdiction to order an election, the bonds were issued without authority of law." The case of *People v. Oldtown,* 88 Ill., 202, affords another illustration of the principle. An election had been held upon a petition alleged to have been signed by ten legal voters. It was not, in fact, so signed, or, at least, there was no sufficient evidence of the fact that it was, and the jury so found for their verdict. Plaintiff had applied for a mandamus to compel the delivery of certain bonds to him, which were authorized, as he alleged, by the election. The Court thus disposed of his contention: "It is, therefore, the application that confers power to call the election, and without it there could be no valid election. In a proceeding of this character, the burden is on the relator to clearly establish the right sought to be enforced." The writ was refused, as no proof had been offered that the petition contained the legal requirements. Where township bonds had been issued after an election at which, it was alleged, the issue of them had been approved by a majority of the voters, as required by the law, the Court held, in *People v. Cline,* 53 Ill., 394, that the township was not estopped to

question the legality of the call for or the result of the election, in an action for a mandamus to compel the issue of more bonds, when the applicant had notice of the facts. This decision is in point because, in the present case, no right of an innocent holder of bonds or one having any other equitable right has intervened, not meaning to decide that even such a state of facts would make any difference. The authorities upon this question which we have cited, and others which are applicable, are put upon the ground that there is no authority to proceed, in ordering an election, unless the proper petition has been filed, and the ordinary rule obtains that the proceeding can be directly assailed, in the absence of the facts necessary to confer jurisdiction, and that is our case. *Damp v. Dane,* 29 Wis., 419; 15 Cyc., 319.

(184) It should be noted that the statute (Revisal, sec. 4115) uses apt words to create a condition precedent to the exercise of the power of ordering an election, the specific condition being that a petition signed by one-fourth of the freeholders shall be first exhibited to the boards before they can do what is required of them.

There is no question in this case of the *bona fide* purchase of bonds, issued in pursuance of an election conducted irregularly, nor any other equitable matter which would protect an innocent party. By the statute, the boards were not authorized to act at all until a properly signed petition had been filed. *R. R. v. Rich Township,* 45 Kan., at p. 292, citing Jones on Railway Securities, sec. 280, and cases therein mentioned; *Lake County v. Graham,* 130 U. S., 674; *Harshman v. Bates,* 92 U. S., 569.

Our opinion is that the action is properly brought, and that we can inquire into the legality of the order for the election made by the board of county commissioners, this being a direct attack upon the validity of the election, the injunctive process of the court having been invoked in aid of the main relief, and in order that the *status quo* may be preserved until the rights of the parties are finally determined. "We disclaim the power of the court to restrain a ministerial officer from doing an act which he has been commanded to do by the Legislature, when acting within the scope of its authority. And we put our decision upon the ground that the act here restrained is not the act which the Legislature contemplated." *Perry v. Whitaker,* 71 N. C., 475.

Howell v. Howell, 151 N. C., 575, to which we were referred by plaintiff's counsel, does not militate against our view, but a careful reading of it will disclose that it sustains what we have said, for *Justice Manning* puts the decision squarely on the ground that plaintiffs in that action could not, by injunction, assail the election because the board of education had not acted discreetly in indorsing the petition and estab-

lishing the school district, nor because in other respects they may not have exercised their judgment or discretion very wisely. These matters, says he, should have been brought to the attention of the board before action was taken by it; but he expressly says that it is not alleged or shown that one-fourth of the freeholders within the district did (185) not sign the petition, nor that any other of the vital requirements of the statute had not been complied with. All this is in perfect harmony with our decision in this case.

The next question for us to answer is, Was the petition signed by one-fourth of the freeholders? This one presents more difficulty than the first, as the language of the statute, if isolated and considered by itself, without any reference to extrinsic facts, may mean one thing, while if it is examined, as it should be, in the light of proper and relevant circumstances, it may have another and quite a different meaning. Let us first inquire, Who is a freeholder? Does the term embrace women, or only men and qualified voters or electors? We think the latter is its true meaning, and is what was clearly intended by the Legislature when it chose the words with which to express its will. Judge Blackstone tells us that "an estate of freehold, *liberum tenementum,* or franktenement, was defined by Britton to be 'the possession of the soil by a freeman.'" And St. Germyn said that "The possession of the land is called in the law of England the franktenement or freehold." Such estate, therefore, and no other, as requires actual possession of the land, is, legally speaking, *freehold;* which actual possession can, by the course of the common law, be only given by the ceremony called livery of seizin, which is the same as the feodal investiture. And from these principles we may extract this description of a freehold: that it is such an estate in lands as is conveyed by livery of seizin, or, in tenements of any incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton that where a freehold shall pass, it behooveth to have livery of seizin. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seizin, they are properly estates of freehold; and, as no other estates are conveyed with the same solemnity, therefore no others are properly freehold estates. 2 Blackstone, star p. 104.

It appears, from this account of the great commentator, that anciently and even modernly, at the common law, a freehold was the possession of a freeman, and a freeholder, therefore, was a man, the tenure of whose land was free, that is, who held it discharged of the (186) feudal duties and services formerly imposed upon it, which women did not perform. But this definition, which confines a freeholder to the owner of land by free tenure, may not be sufficient, by itself, to restrict

the word, as used in our statute, to men, exclusive of women, though in speaking of the elective franchise, when based upon the ownership of a freehold, Blackstone confines its exercise to males who possess the other legal qualifications. 1 Blackstone, 171. But in the great contest between Hon. John Berry and Hon. Hugh Waddell for a seat in the State Senate, a question arose as to the meaning of a freeholder, with reference to the qualifications of persons holding, or supposed to hold, certain stated interests or estates in lands, to vote—the Constitution, at that time, requiring the possession of a freehold estate in 50 acres of land as a qualification to vote for a Senator. This Court, in response to a request for its opinion, through *Chief Justice Ruffin,* defined a freeholder, as used in the Constitution, and said: "The term 'freehold' is a legal one, of very ancient use and of known signification in the common law. It means an estate in land, of which a freeman is seized for the term of his own life, or the life of another, at the least." *Berry v. Waddell,* 31 N. C., 520. And as thus understood, the right to vote has been confined to males in this State, as it was in England. 1 Blackstone, 171 *et seq.* We have sought in vain for anything in our law which has modified this ancient rule. Several of our statutes make use of this word "freeholder" in describing the qualification of appraisers, commissioners, and a special class of jurors, and the uniform practical construction has been that it does not include females. Revisal, secs. 2122, 2685, 2686, 2689, 5202, and others that might be mentioned. Besides, our Constitution (Art. VI, sec. 1), and the statutes enacted in pursuance thereof, provide that only native and naturalized male persons, who are of full age, shall be voters or endowed with the right of suffrage.

The whole policy of our State, so far as established by constitutional and legislative enactment to this time, has been to exclude women
(187) from participation in governmental affairs and from exercising any influence, by their action or inaction, as of legal right, in controlling the right of suffrage or the right of the State, or any one of its political subdivisions, such as counties, townships, or districts, to adopt such measures as may meet with the sanction of the voters and will promote its welfare or that of the people residing within its borders. We are aware of a case in another State, *Cummins v. Hyatt,* 54 Neb., 38, where the Court held against our construction, but we are unable to follow the decision. It may have been influenced by statutes in force there or by a policy which does not prevail with us, or, rather, has found no lodgment here, and if not, we do not think the case is in harmony with the rulings of other courts, to be hereafter noticed, or with the rule of reason. A case arose in another State where the word "citizen" was used with reference to those who should sign a petition for a

liquor license, and it was held that, while females were citizens as well as males, the word was used in the sense of a person qualified to vote, and for several cogent reasons, which were clearly stated by *Justice Cobb,* it did not include women. *Wray v. Harrison,* 116 Ga., 93. And the same conclusion was reached in a case where the words "citizens and freeholders" were used in describing those qualified to sign a petition for an election to change a county-seat. *Scarborough v. Eubank.* (Tex. Civ. App.), 52 S. W., 569, the Court saying: "We are asked, in view of another trial, to construe the word 'citizen' as used in the statute providing that a given number of citizens and freeholders might apply for an election to change the county-seat. We are disposed to adopt the view expressed by our court of criminal appeals, that, when used in such statutes, the word 'citizen' should be construed to mean one who is recognized by law as competent to exercise political rights, including particularly the sovereign right of voting, and that it does not include women and children, as seems to be contended in this case. *Ex parte Lynn,* 19 Tex. App., 294; *Abrigo v. State,* 29 Tex. App., 149." And to the same general effect are the following cases: *School District v. School District,* 63 Ark., 543; *Blanch v. Pansch,* 113 Ill., 60; *Thomason v. State,* 15 Ind., 449; *Crandall v. State,* 10 Conn., 339; *Blair v. Kilpatrick,* 40 Ind., 312. These are strong analogies, (188) and virtually hold that when the qualification is that of "citizen," or, for the same reason, "freeholder," it means one who is a voter or elector. A similar expression was used in the Constitution of 1776, sec. 9, viz.: "that all persons possessed of a freehold in any town shall be entitled to vote for a member to represent said town in the House of Commons," and no one ever supposed that this conferred the right of female suffrage.

A statute must be construed, not textually, but contextually, and with reference to the particular matter dealt with, and the word "freeholders," when used with reference to political rights or suffrage, or governmental matters, has never been understood to include women.

But there is another principle, well settled, which applies to this case: "The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the Government or has been observed and acted upon for many years; and such construction should not be disregarded or overturned unless it is clearly erroneous." 36 Cyc., 1140. The rule is thus substantially stated in *New York v. R. R.,* 193 N. Y., 543: When the meaning is doubtful, a practical construction by those for whom the law was enacted, or by public officers whose duty it was to enforce it, is entitled to great in-

fluence; but the ambiguity must not be captious, but should be so serious as to raise a reasonable doubt in a fair mind, reflecting honestly upon the subject. Numerous authorities agree practically that contemporaneous construction and official usage for a long period by persons charged with the administration of the law have always been regarded as legitimate and valuable aids in ascertaining the meaning of a statute. Sutherland on Stat. Constr., sec. 309; *Smith v. Bryan,* 100 Va., 204; 26 A. & E. (2 Ed.), 633, 635; *Va. C. and L. Co. v. K. C. and L. Co.,* 101 Va., 728; Black on Inter. of Laws, pp. 221, 222; Lewis's Suth. on Stat. Constr., sec. 474; *Whittimore v. People,* 227 Ill., 453 (10 Am. and Eng. Anno. Cases, 44, and note at p. 51), and *Bloomer v. Todd,* 1 L. R. A., 111, in which it is also held that "citizens," with reference to the
(189) right of suffrage, means male persons: *Brown v. U. S.,* 113 U. S., 568; Sedgewick on Stat. and Const. Law, 225.

It has been suggested that we should give to the word "freeholder" its technical meaning, as understood and defined in 2 Blackstone, with reference to the quantity of an estate, and without regard to the context of the statute we are construing, or to the fact that the Legislature was dealing with a question involving the exercise of the elective franchise, nor even to the uniform and long prevailing interpretation of that department of the State Government which is charged with the enforcement and execution of this law. We could not do so without plainly disregarding every well-known rule of statutory construction. Such a meaning of the word would be far more antiquated and moss-covered—dating back to the time of Blackstone, Cruise, and Coke, and even to the era of the Year Book and Domesday—than the sensible and enlightened one of a more modern age.

If by the word "freeholder" was meant merely one who had an estate in fee or for life, then, by the same token, the word, when used in the statutes, as to jurors, appraisers, and commissioners, must be given the same meaning; and we all know that time out of mind, and by common consent, the unvarying construction of the word, as thus used, has excluded females.

It is far more reasonable to exclude them, in this instance, for otherwise they would, in a very important respect, be indirectly controlling the electorate by their silent vote, which they could use to prevent a vote by the people upon questions concerning their local and vital interests. The Legislature has never, as yet, endowed women with the right to participate in governmental affairss, for reasons satisfactory to itself. It establishes the public policy of the State, and we have no power vested in us by the Constitution to question its motives or the wisdom of its policy. We must accept it and enforce it as we find it, and not

as we may think it should be, as we do not make the law, but merely declare what it is. If any such radical change in our governmental policy is to be made, it should originate in the Legislature, (190) acting within its legislative sphere, and not in this Court.

It is inconceivable that a consistent and persistent construction given to similar statutes by the Superintendent of Public Instruction and his legal adviser, the Attorney-General, for so long a time, should have escaped the attention of the Legislature, and its silence may be safely construed as an assent to their interpretation of the word.

The reason which would extend the scope of the word "freeholder" so as to embrace women, would apply also to nonresidents and infants, and it is too plain for discussion that, by the very language and purpose of the statute, they were not intended to be included. They are entitled to as much protection as the residents and adults of the school district. We prefer to adopt the uniform construction of the departments, which we believe to be in accord with the manifest intention of the lawmaking body and the great weight of authority. It is easy for the Legislature to change that meaning if, in its wisdom, a different policy should be inaugurated. Until that is done, we will stand by the ancient and settled rule of interpretation. "A contemporary exposition, practiced and acquiesced in for a period of years, fixes the construction, unless contrary to the obvious meaning of the words." *Attorney-General v. Bank,* 40 N. C., 71, citing *Stewart v. Laird,* 1 Cranche (U. S.), 299. This is also a rule in the construction of contracts when the meaning is doubtful. *Attorney-General v. Bank, supra,* at page 72. This record discloses that the educational department and the Attorney-General, its legal adviser, have constantly and consistently for years construed this particular statute to mean that the petition must be signed by freeholders who are voters. This excludes women and nonresidents.

It cannot successfully be argued that there is no doubt about the meaning of the word "freeholder" as used in section 4115. On the contrary, it is involved in a great deal of doubt, with a decided preference, though, for the departmental interpretation, and this we adopt as being not only a safe guide, but as agreeing with our notion of what the Legislature meant.

It results that the petition was signed by the requisite number (191) of freeholders, and the board of county commissioners lawfully ordered the election. But this would not reverse the ruling of the court if there is a serious controversy between the parties as to the validity of the election itself, the plaintiffs alleging that the proposal submitted to the people to establish a school district and levy a tax for its maintenance did not receive a majority of the qualified votes in its favor,

and the defendants denying this and averring that such a majority of the votes was cast in favor of the school district and tax. If there is such a controversy as to the election, it would require us to sustain the judge's ruling, by which he granted an injunction to the hearing, and to remand the case for the trial of the issue as to the election, though his decision upon the other matter was erroneous. We would, in such an event, affirm the judgment, which would be correct, though the learned judge gave the wrong reason for his ruling. It would simply place the order on its true foundation, so that it may stand, disregarding the reason assigned by the court for making it. But upon a careful examination of the allegations of the respective parties, treating the pleadings as affidavits, we are satisfied that there is no such real and serious dispute as to the result of the election as to warrant the continuance of the injunction to the final hearing. When the figures, as stated by the plaintiffs, are scrutinized and the admitted facts are considered with them, it appears that the question submitted to the people received the approval of a majority of the qualified voters, though small it may have been. At the very most, the plaintiffs have not presented such a case as should induce the court to put forth its restraining arm and thus postpone the execution of the people's will. We, therefore, reverse the judgment continuing the injunction to the final hearing, but without prejudice to a renewal of the motion of plaintiffs for such an injunction, upon new or additional facts showing their right to it under the well-settled principles of law relating to such cases.

Counsel for plaintiffs moved in this Court to dismiss the appeal upon the ground that it is fragmentary and premature, and relied on *Rogerson v. Lumber Co.*, 136 N. C., 266; *Shelby v. R. R.*, 149 N. C., 537, and *Higgs v. Gooch*, 93 N. C., 112; but they are not applicable. In (192) the first of the cases we said: "We were asked to decide, not the whole controversy, but only a part of the case. If we should comply with the request, and the case should be further tried upon the question of damages, and the other side should allege errors in the trial of that issue and appeal, we should have the anomalous case presented of two judges trying two parts of the same controversy, which the law has always required to be tried by only one." It is apparent that this case and those just cited are much alike. The judge continued the injunction to the hearing, and from his order the defendant properly entered an appeal. The order was interlocutory merely, and clearly reviewable, by appeal, in this Court, as it affected a substantial right. Revisal, sec. 587; *Bank v. Jenkins*, 64 N. C., 720. There are no two branches in this case, as there were in each of those relied on, but only one question, viz., the right to an injunction, though two propositions are involved in it,

one as to the petition and the other as to the election. It would, perhaps, have been better if the judge had passed upon the facts in regard to the election, as well as those concerning the petition; but, as we can review his findings, it is competent for this Court, in such a case as this, to determine the whole matter here, when it can see that there is really no serious controversy as to the facts. With the other question settled, it may be that the parties can adjust their differences without longer protracting the litigation.

Reversed.

CLARK, C. J., dissenting: The statute requires as a condition precedent to the submission of the proposed school tax, a "petition of one-fourth of the freeholders" in the proposed special school district. No question arises or could arise as to the right of women to vote, for the Constitution prescribes as a qualification of suffrage (Art. VI, sec 1) that only "male persons" shall be entitled to vote in this State. But the fact that this is a condition precedent to ordering an election, and that the petition is required to be signed by one-fourth of the "freeholders," and not of the "electors," shows conclusively that the Legislature did not consider the two words as synonymous. It was trying to protect "freeholders" whose property would bear the burden of the (193) tax, but who might be outvoted by the nonfreeholders, as well as the women freeholders who would have no ballot or voice in the election, if ordered.

The word "freeholder" means the "owner of a freehold," and has no sex. Any one, male or female, of legal age, who holds an estate in fee simple or for life in realty is a "freeholder" in law. *Cummings v. Hyatt,* 54 Neb., 38; 2 Bl. Com., 39 and 417; 20 Cyc., 843; 14 A. & E. (2 Ed.), 530; Webster's Dictionary.

The courts in construing a statute should take the meaning of the Legislature from the standpoint of the present time, and not with any reference to what were the views of judges centuries ago. A woman, whether single or married, who owns realty is a "freeholder," and, for the very reason that she is not protected by having the right of suffrage when a special tax is to be laid upon her property, ought to be protected by her consent being required to the antecedent and preliminary petition which the Legislature has a right to require before such election can be ordered. There would be small use of such preliminary petition if it was to be signed only by the same class who would vote at the election. In this way the Legislature as a condition precedent to the ordering an election for a fence law has sometimes required that a petition for such election should be signed by a specified number of the "landowners," because the assessment for the fence would fall only upon property,

whereas at the election every male person would be entitled to vote. Similar requirement of a petition by a specified number of "householders" has been required as a condition precedent to other elections.

Shakespeare, who was a fairly good lawyer, stated the law of England in his day when he made Petruchio say of his wife (*Taming of the Shrew,* Act II, Sc. 2):

> "I will be master of what is mine own.
> She is my goods, my chattels; she is my house,
> My household stuff, my field, my barn,
> My horse, my ox, my ass—my anything."

(194) And *Judge Settle* in *S. v. Oliver,* 70 N. C., 60, recognized that till then in this State (1874) a husband had a "right to whip his wife, provided he used a switch no larger than his thumb." And for the first time the courts in this State then declared that they had "advanced from that barbarism." *Pearson, C. J.,* a few years before, in *S. v. Rhodes,* 61 N. C., 453, held that this barbarism was still law in North Carolina. The Court in *S. v. Oliver* changed it without a statute. *S. v. Fulton,* 149 N. C., 500.

To construe a statute of the Legislature, passed now, with reference to long antiquated holdings of former judges in regard to women, is illogical and unjust. The average legislator knows nothing of the absolute barbarism of the law formerly as to women, especially married women, as evinced by the above and other rulings. The Legislature votes without any ideas of that kind. It is but fair and just to deem that in passing an act, the legislators are acting with a view to the present consideration paid to women and their present status and, in this case, with knowledge of the fact that our Constitution of 1868—forty-four years ago—made a woman as absolute owner of her property "as if she were unmarried," and that whether single, married, or a widow, she now owns her property as absolutely as a man. If she owns real estate for life or in fee, she is a "freeholder" fully as much as a man, and when the statute requires that one-fourth of the "freeholders" shall sign a petition before an election is ordered to levy a tax, there is no logical reason, in the light of the present day, for a court construing away her right by holding that she shall not be counted among the other freeholders.

We know that at the present time in ten great States of this country, and in a dozen foreign countries, women exercise the full right of suffrage and of holding any office; that in thirty other States of this Union they vote upon all questions that concern schools, or special assessments upon their property, and our Legislature should be deemed to have intended to come up abreast of the age, and were just enough to give women

freeholders the privilege of being counted like other freeholders on preliminary petitions requisite to the ordering of an election taxing their property, more especially since our Constitution does not allow them to vote when the proposition of the tax itself is submitted to (195) the ballot box. In this district there are 61 women freeholders and 158 male freeholders.

Not only have women held the highest office in England, Spain, Austria, and Russia, as, for instance, Elizabeth and Victoria in England, Isabella in Spain, Maria Theresa in Austria, and Catherine in Russia, who were among the ablest sovereigns of those countries; not only was Deborah "judge over all Israel," but, at the present, women are competent to hold office in many countries and in several of our States. In North Carolina and generally everywhere in civilized communities they are now members of the bar, bank presidents, physicians, and ministers, and exercise any other avocation they see fit. It is "harking back" to the past and a distinct denial of the progress of the age to hold that under present-day surroundings, and in the light in which woman is now viewed, she is not to be counted as a freeholder when the statute, in order to protect property from being subject to a special tax which can be voted by an electorate, a majority of whom perhaps may not be property holders, provides that there shall be a preliminary petition signed by "one-fourth of the freeholders." Considering this evident object of the act, and that a woman *is* in truth both in fact and in law a "freeholder" equally with a man, if she holds realty for life or in fee simple, she should not be held by a court *not* a "freeholder" within the purport of this statute because in times past women were subjected to many disabilities and wrongs (and nearly in every instance by courts inventing such disabilities, and rarely, if ever, by legislation) from which they have been gradually freed by legislation and by the evolution of mankind to a higher state of civilization.

In the only case in which this precise point has been presented, *Cummings v. Hyatt,* 54 Neb., 38, it was held that a married woman who owned land, for life or in fee, was a "freeholder" and must be counted in passing on a preliminary petition required, under an act exactly like this, before ordering an election to issue bonds. "Equal Suffrage" or "Woman's Suffrage" does not exist in Nebraska, and if it did this point could not have arisen.

That case is exactly in point. We can derive no aid by refer- (196) ence to the status of women under the feudal system, which was long ago rejected by the common sense and sense of justice of our race and the remnants even of which were abolished as long ago as 12 Charles II, A. D. 1660, over two centuries and a half ago. Nor is there

any help to be had from decisions like *Berry v. Waddell,* 31 N. C., 520, (overruled *S. v. Ragland,* 75 N. C., 13), concerning the meaning of the word "freeholder" as one of the qualifications for voting and holding office which are restricted by the Constitution to "male persons." We are here dealing with a statute to provide safeguards in voting taxation, and the ownership of property, unlike suffrage, is not restricted to one *sex.* It is not the province of the courts to seek out strained analogies, or to delve in the *débris* of a rejected and barbarous legal system to defeat and destroy an act which the Legislature has adopted in accord with the spirit of an advancing civilization. It is not for us to bivouac always by the abandoned campfires of more progressive communities. The courts should construe legislation from the standpoint of this age and of the men who enact it.

BROWN, J., concurs in dissenting opinion.

NOTE.—Changed by chapter 22, Laws 1915. *Chitty v. Parker,* 172 N. C., 126.

Cited: Corporation Commission v. Construction Co., post, 590; *Key v. Board of Comrs.,* 170 N. C., 125.

GEORGE B. FLEMING v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 7 November, 1912.)

1. Pleadings—Material Allegations—Answer—Absence of Denial—Interpretation of Statutes—Interstate Commerce—Evidence.

Material allegations of the complaint are taken as true when not denied by the answer (Revisal, sec. 503); and when the complaint in an action against a railroad company for damages arising from a personal injury negligently inflicted on an employee alleges that the injury occurred on a train over the defendant's road running wholly within the State, so that it appears that the train was an intrastate train, it is incompetent for the defendant to introduce evidence tending to show that the train was an interstate one, in the absence of a denial of the allegation in its answer.

2. Same—Federal Employers' Liability Act—Separate Causes—Defenses.

In an action for damages against a railroad company for a personal injury to an employee negligently inflicted, where the complaint alleges the injury sued on occurred on an intrastate train, it is incompetent for the defendant to show that the train was an interstate train, in the absence of a denial of plaintiff's allegation in the answer, and thus defeat the plaintiff's action on the ground of a failure of his proof, under the

Federal Employers' Liability Act, considered as a separate cause of action. As to whether it is necessary for a plaintiff relying on this Federal statute to specially plead it under certain conditions, discussed by HOKE, J.

3. Federal Employers' Liability Act—State Courts—Contributory Negligence —Procedure—Interpretation of Statutes.

The Federal Employers' Liability Act, in so far as it undertakes to regulate and provide for fixing responsibility as to the defendant's negligence, is not dissimilar to the provisions of the Revisal, sec. 2624, the chief difference being upon the issues of contributory negligence and assumption of risk; and as the Federal act makes no specific regulations as to the methods by which the fact of contributory negligence should be established, when the action is brought in the State court, the procedure should conform as near as may be to that of the State law applicable, including the "character of action, the order and manner of trial, the rules of pleading and evidence, etc."

4. Same—Partial Defenses—Diminution of Damages—Pleadings.

While matters in diminution of damages are not required to be specially pleaded under our statutes, except in cases of libel and slander (Revisal, sec. 502), but may be made available under the general issue, in view of the requirements of the Federal Employers' Liability Act, that the fact of contributory negligence should in some way be established and that procedure for that purpose has been defined and approved under numerous decisions of our Court construing the State statutes controlling the question, the fact of contributory negligence, as referred to in the Federal statute, should be considered and treated as a partial defense, coming within the terms of the local law, and to make same available it must be set up in the answer and proved as the State statute requires. Revisal, sec. 483.

APPEAL by defendant from *Cline, J.*, at May Term, 1912, of WAKE.

Action to recover damages for physical injuries caused by alleged negligence of defendant. (198)

There was allegation with evidence on the part of plaintiff tending to show that on 18 August, 1910, plaintiff was the locomotive engineer running a passenger train, 11 and 12, from Raleigh to New Bern and return; that on the return trip from New Bern, via Washington, N. C., as he was approaching the city of Raleigh and about one mile from the station, he collided with a light engine, meaning an engine and tender only, coming from the opposite direction, and by reason of which plaintiff received serious and painful injuries; that plaintiff's engine was drawing a first-class passenger train, on the main line, and, while something behind time, was running on schedule and having the right of way; that the collision took place while plaintiff's train was rounding a curve and shortly after crossing the Seaboard track, plaintiff having been signaled so to cross; there was no switch engine on that yard, and the light engine causing such collision was running in violation of rules.

Defendant's answer was as follows:

"That as to the allegations of paragraph 3 of said complaint, the defendant says that it is true that on 18 August, 1910, the train which plaintiff was operating as engineer of the defendant collided with another engine, and that in consequence thereof the plaintiff suffered some injuries, but none of a serious or permanent nature. Except as herein admitted, the allegations of said paragraph 3 of said complaint are denied.

"2. That the allegations of paragraph 4 of said complaint are denied.

"Wherefore the defendant prays judgment that the prayer of the plaintiff be denied, and that the defendant have such other and further relief as may be proper."

The following was submitted as the issues arising on the pleadings:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

2. What damage is plaintiff entitled to recover?

During the progress of the trial, defendant proposed to ask plaintiff, a witness testifying in his own behalf, the following questions:

"It connected at Washington with train from Norfolk, bring-
(199) ing passengers from Norfolk to Raleigh?"

And this further question:

"At the time of this occurrence the Norfolk Southern Railroad operated a line of railroad from Norfolk in the State of Virginia, passing through Washington, N. C.?"

And this further question:

"The train that you operated made connections at Washington with a train coming from Norfolk, in the State of Virginia, did it not?"

And this further question:

"Mr. Fleming, did the train you were operating receive at Washington, from the train coming from Norfolk, mail, express, and baggage?"

And this further question:

"On the particular day of the occurrence, did you receive at Washington a car containing passengers or persons which was coming from Norfolk and which was destined to Raleigh?"

On objection, these proposed questions were excluded, and defendant excepted.

In connection with these questions and the ruling of the court thereon, the following statement appears and is made a part of the case on appeal:

"The defendant stated that it offered to show by this witness and the above questions that the Norfolk Southern Railroad operates a line of railroad from Norfolk to Raleigh. At the time of the occurrence under investigation the train leaving Norfolk in the morning came to Wash-

ington, N. C., going thence to New Bern, N. C., and the train on which the plaintiff was engineer on the day of the occurrence under investigation connected with the train leaving Norfolk, Va., for New Bern, N. C., at Washington, and that passengers from Norfolk and mail from Norfolk, baggage and express and cars, could be transferred from train running from Norfolk, Va., to train from Washington, N. C., to Raleigh, which the plaintiff, as engineer, was operating, and that on the occasion of this occurrence he was transporting a car which left Norfolk and was switched to his train that it might be brought to Raleigh; that the car left Norfolk, Va., that morning on the train running from Norfolk, Va., and when it arrived at Washington was (200) switched to train being operated by plaintiff, and was then hauled from Washington, N. C., to point of accident (the car containing officials of the company and others). The above questions were asked for the purpose of showing that the defendant railroad company was engaged in interstate commerce, and that the plaintiff was an employee engaged in such commerce at the time of the occurrence. The court, upon objection of the plaintiff, excluded all the evidence above offered, upon the ground that defendant claims that under the facts, if the defendant be permitted to show that the defendant was a railroad company engaged in interstate commerce and that the plaintiff was an employee engaged in such commerce at the time of said occurrence, and that under the acts of Congress regulating interstate commerce the cause of action must be tried thereunder, and the plaintiff has failed to set out facts sufficient to constitute cause of action under said acts of Congress, and the defendant claims the benefit of the said acts."

There was verdict for plaintiff. Judgment, and defendant excepted and appealed, assigning, among other errors, the rejection of the proposed questions, as above stated.

Douglass, Lyon & Douglass and J. H. Fleming for plaintiff.
R. N. Simms for defendant.

HOKE, J. It was not seriously contended before us that, on the facts in evidence, the validity of this trial and judgment could be successfully assailed. It was earnestly urged, however, that the court below made an erroneous ruling in excluding the evidence offered tending to show that defendant's train was engaged at the time in interstate commerce, and this with a view of defeating plaintiff's action on the ground of a failure of proof; the position being that if the facts suggested were established, plaintiff could only recover under the Federal Employers' Liability Act, which for this purpose should be considered as affording a separate and distinct cause of action. In our opinion, however, the position sug-

gested is not open to defendant on the record. It proceeds upon the theory that plaintiff has stated in his complaint and offered evi-
(201) dence tending to show a cause of action exclusively cognizable in the State courts and sustainable only on principles prevailing here, and which differ from those established by the Federal statute. In sections 1 and 2 of the verified complaint it is alleged:

"1. That the Norfolk Southern Railroad Company is a corporation, duly chartered and organized, and was at the times hereinafter mentioned, and still is, engaged in operating certain lines of railroad for the carriage of freight and passengers, one of their said lines of railroad extending from Washington, N. C., through various towns, cities, and stations, to Raleigh, N. C.

"2. That on 18 August, 1910, the defendant, as such corporation, was operating a passenger and mail train on said line of railway from Washington, N. C., to Raleigh, N. C., which was due to arrive at Raleigh, N. C., about 7:25 o'clock P. M. on that day, said train being drawn by a locomotive engine, and the plaintiff was in the employ of the defendant as locomotive engineer on said engine, and was at said time and at the time of the injury hereinafter alleged, engaged in his duties as such."

These allegations are not denied or in any way challenged in the answer. Our statute applicable to the question (Revisal, sec. 503), among other things, provides that "every material allegation of the complaint not controverted by the answer shall be taken as true," etc. If as defendant here contends, the averments referred to contain issuable matter determinative of the rights of these parties, and the company desired and intended to offer evidence in contradiction, it should have raised the issue in the pleadings, that the question might be properly submitted to the jury. Not having done so, the material facts contained in the allegations, that plaintiff at the time of the injury was engaged in operating an intrastate train, must be taken as admitted and no longer open to question by defendant. *Moss v. R. R.*, 122 N. C., 890.

There are decisions to the effect that a plaintiff, seeking recovery on the Federal statute, need not plead the same nor refer in express terms to its provisions, and others that such plaintiff, in stating the facts in reference to the character of the train, will not be held to that
(202) strictness of averment which might be otherwise required, such facts being more especially within the knowledge of the company. Further, in a well-considered case, reported in 116 Fed., 867, *Voelker v. R. R.*, it was held that when the plaintiff has set forth the facts of the occurrence tending to establish a negligent injury by reason of a defective coupler, and evidence was admitted that the train was

engaged at the time in interstate commerce, it was not error for the presiding judge to refer to the provisions of this act of Congress as relevant to the issue, though there was no averment in the petition that defendant was engaged at the time in interstate traffic, and a recovery by plaintiff was sustained. In that case, testimony as to the character of the train seems to have been admitted without objection, and the decision of this question was made to rest chiefly on the ground that the facts of the occurrence and as to the character of the train having been all admitted in evidence, the defendant could not have been taken by surprise on the trial judge referring to the provisions of an act of Congress bearing on such facts, and more especially as defendant must have been aware of the business in which the train was engaged and made no objection on the ground of surprise, when given an opportunity to do so at the close of the charge.

But none of these cases are apposite to the facts of the case before us, where a material averment in the complaint that plaintiff was injured while engaged as a locomotive engineer on an intrastate train must, under our rules of pleading, be taken as admitted by defendant. In this, its proper aspect, the case is not dissimilar to that of *Bradberry v. R. R.*, 149 Iowa, 57. In that case, *Ladd, J.*, delivering the opinion, said: "Nor do we think there was error in striking out the evidence tending to show that plaintiff was at the time he received the injury engaged in interstate commerce. The fact that he was so engaged had not been alleged in the petition nor asserted in the answer; so that whether he was so engaged was not in issue. As argued, it is not necessary to plead the statutes of the United States; but, to invoke their benefit, facts rendering these applicable should be pleaded. All essential under the State law
was proof that the injury was received because of the negligence (203)
of the company in the use or operation of its railway within the
State, for until the contrary was made to appear it will be presumed to have been engaged in intrastate commerce. The evidence was rightly excluded."

While this disposes of the present appeal, and affirms the judgment of the Superior Court, we are of opinion, further, that the decision of his Honor in excluding the proposed evidence could not be held for reversible error, because it does not appear that the defendant was in any way prejudiced by the ruling. This Federal Employers' Liability Act which defendant now seeks to invoke for his protection has been recently before the United States Supreme Court in several causes, styled the Second *Employers' Liability Cases*, 223 U. S., 1, and it was there held, among other things, "(*a*) That the act was constitutional. (*b*) That the regulations prescribed by the act supersede the laws of the several States

in so far as the latter cover the same field. (*c*) Rights arising under the regulations prescribed by the act may be enforced as of right in the courts of the States when their jurisdiction, as fixed by local laws, is adequate to the occasion."

The statute, in so far as it undertakes to regulate and provide for fixing responsibility on the issue as to defendant's negligence, is not dissimilar to the State statute on the same subject (Revisal, sec. 2624), and the facts of the occurrence itself being all before the court, no harm could have come to defendant on the determination of that issue.

The only departure from the principles prevailing under the State law and relevant to the facts, as they now appear of record, is in section 3 of the act, that relating to the question of contributory negligence. That section provides, in effect, that in case of employers, subject to its provisions, when the injury of an employee arises by reason of some statute enacted for the employee's safety, held to be some Federal statute (Thornton on Employers' Liability Act, 2 Ed., p. 95), the fact of the employee's contributory negligence shall be in no way considered; and in other cases the fact of such contributory negligence on the part
(204) of the employee shall only be considered by the jury in diminution of damages. The Federal statute, being thus general in terms, and making no specific regulations as to the methods by which the *fact* of contributory negligence should be established, when the action is brought in the State Court, the procedure should conform as near as may be to that of the State law applicable, including the "character of action, the order and manner of trial, the rules of pleadings and evidence," etc. Hughes on Federal Procedure, p. 355; *Cochran v. Ward,* 5 Ind. App., 89. Our State statute on this subject (Revisal, sec. 483) provides that "in all actions to recover damages by reason of a defendant's negligence, when contributory negligence is relied on as a defense, it shall be set up in the answer and proved at the trial." While matter in diminution of damages is not ordinarily required to be specially pleaded except in cases of libel and slander (Revisal, sec. 502), but the same may be made available under the general issue, in view of the provision of the Federal statute that the fact of contributory negligence should be in some way established, and that the procedure for that purpose has been defined and approved under numerous decisions of our Court, construing the State statute controlling the question, we deem it proper to hold that in order to establish this fact of contributory negligence, as referred to in the Federal statute, it should be considered and treated as a partial defense, coming within the terms of the local law, and to make same available, it must be set up in the answer and proved as the State statute requires.

This position of treating contributory negligence as a partial defense has been adopted in a very informing and intelligent treatise on the subject by Mr. Thornton. Thornton on Employers' Liability and Safety Appliance Acts (2 Ed.), pp. 96-146. In an action prosecuted under the Federal statute, where negligence on the part of employer has been shown and the fact of the employee's contributory negligence, when available under such statute, has been properly established, the judge should direct the jury in general terms that such fact is no bar to recovery by the employee, but the same shall be considered in diminution of damages and such allowance made therefor in reduction of plaintiff's claim as they may deem right and proper. Thornton (2 Ed.), pp. 130 (205) to 147, inclusive.

In the present case there is no plea of contributory negligence set up in the answer, and even if the facts in evidence would permit the consideration of contributory negligence, on objection they could not be made available to defendant, there being no issue raised presenting the question. As heretofore stated, therefore, it does not appar that any harm could have come to defendant by the exclusion of the evidence, as it was not relevant or material to any issue raised by the pleadings. There is

No error.

Cited: *Myers v. R. R.,* 162 N. C., 344; *Horton v. R. R.,* 169 N. C., 116.

N. H. BERGER v. R. H. SMITH AND J. D. SMITH.

(Filed 16 October, 1912.)

1. Injunction—Nuisance—Sawmills—Evidence—Burden of Proof.

The operation of a sawmill is not a nuisance *per se*, and the erection of one will not be enjoined unless it be proved by the complaining party that it will be, in fact, a nuisance under the particular circumstances of the case.

2. Same—Conjecture—Averments.

When the erection of a sawmill is sought to be enjoined, the proof that it will be a nuisance if operated must be shown by evidence which amounts to more than a conjecture; and unless the facts are made to appear from which the courts may see that its operation, under the circumstances shown, will amount to a public or private nuisance, the injunction will be denied, and the mere averment of the plaintiff to sustain his contention is insufficient, the question being one of law upon the facts ascertained.

3. Injunction—Nuisance—Sawmills—Cities and Towns — Ordinances — Evidence—Bona Fides.

In proceedings to enjoin the erection of a sawmill on lands adjoining those of plaintiff, whereon he resided, upon the alleged ground that its operation would affect the comfort of the plaintiff's family and the value of his property, it is competent to show that the plaintiff had operated a cotton gin nearer to his residence than the proposed mill would be, and that he had procured an ordinance prohibiting other sawmills from being built within the corporate limits of the town, wherein he operated one, upon the question as to whether the plaintiff was actually apprehensive of the injury, or whether the ordinance was passed in his interest and at his instance to destroy competition.

4. Injunction—Public Nuisance—Special Injury.

A complaining party cannot maintain an action for the commitment of a public nuisance without showing some special injury peculiar to himself, and when such is not shown an injunction will not issue.

5. Cities and Towns — Public Nuisance — Sawmills — Courts — Void Ordinances—Injunctions—Remedy at Law.

An ordinance declaring the operation of a sawmill within its limits to be a nuisance, which in fact is not one, does not deprive the court of its authority to pass upon the question; and it appearing in this case that the mill in question, the erection of which is sought to be enjoined, would not be a nuisance *per se*, and it not appearing that it would be one in fact, but that the ordinance was passed at the instance of the complaining party to prevent competition, it is held that the injunction should not issue, and that the party be left to his action for damages at law, should it hereafter appear that he has sustained any.

APPEAL by plaintiff from *Peebles, J.*, at November Term, 1911, of WAYNE.

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

M. T. Dickinson and Winston & Biggs for plaintiff.
Langston & Allen for defendant.

WALKER, J. This case was before us at a former term, and is reported in 156 N. C., 323. We then held that the sawmill which it was alleged the defendant was about to erect in violation of the ordinance was not a nuisance *per se*, and we remanded the case in order that it might be submitted to a jury to ascertain if it was a nuisance in fact. At the trial, the court, upon plaintiff's evidence, ordered a nonsuit, and plaintiff appealed. It appeared by the evidence that the mill had not been built, but that defendant only intended to build it, and plaintiff testified that its operation, if it was built, "would be annoying to (207) his family by reason of noise, smoke, and flying trash, and would

expose his property to fire." He also stated that it would depreciate the value of his property and other property in the same block. There was more evidence to the same effect.

There are some things which, in their nature, are nuisances and which the law recognizes as such. There are others which may or may not be so, their character, in this respect, depending on circumstances. This case would seem to fall directly within the principle as applied in *Dorsey v. Allen,* 85 N. C., 358. The facts of the two cases are almost identical, and, in substance, they are sufficiently alike to make that case a controlling authority. In the *Dorsey case* plaintiff sought to enjoin the erection of a planing mill and cotton gin, which had already been begun, and he alleged, as does the plaintiff in this case, that the operation of the mill and gin, when finished, would render their dwellings not only uncomfortable, but unfit for habitation, by reason of the noise of the machinery; that they would be exposed to increased perils from fire, and that their property would be greatly impaired in value. The Court, approving the order of the judge refusing an injunction to stop the progress of the work in its early stages, as being unnecessary for the protection of the plaintiff, said: "Before operations were commenced there was no increased danger from fire, and no disturbing noise made requiring judicial interference, and the relief could be obtained after the results were definitely ascertained, if the plaintiffs should be found entitled to it. The nuisance, if incidental and not necessary to the proper conduct of the business, or inherent and inseparable from it, could then be abated, and the defendant's knowledge of the pending suit would take from him all just cause of complaint when it should be so adjudged. But it would be an unwise exercise of power upon such uncertainty as to the practical working of an undertaken enterprise and its consequent effects, for the court to interpose and prevent its being carried out, with its promises of substantial and lasting benefits to a community, because of the discomfort and inconvenience a single family or a small number of persons may experience from its presence in their vicinity, so inconsiderable when weighed in the scale with the public interests. While (208) it is true that a business lawful in itself may become so obnoxious to neighboring dwellings as to render their enjoyment uncomfortable, whether by smoke, noxious and offensive odors, noises, or otherwise, as to justify the protecting arm of the law, yet there must be the ascertained and not probable effects apprehended. When the anticipated injury is contingent and possible only, or the public benefit preponderates over the private inconvenience, the court will refrain from interfering."

The following authorities support the same view: "Where an injunction is asked to restrain the construction of works of such a nature that

it is impossible for the court to know, until they are completed and in operation, whether they will or will not constitute a nuisance, the writ will be refused in the first instance. Nor in such a case will the motion for an interlocutory injunction be allowed to stand over until the work is so far executed that its character may be determined. It is proper, however, under such circumstances to dismiss the bill without prejudice to any further application which plaintiffs may think themselves entitled to make." 1 High on Injunctions (4 Ed.), sec. 743. "A court of equity will grant injunctions to prevent undoubted and irreparable mischief; and it may thus act on the application of individuals, not only in the case of a private nuisance, but where the individuals suffer special injury, in the case of public nuisances also. But the courts will only exercise this power in a case of necessity, where the evil sought to be remedied is not merely probable, but undoubted. And it will be particularly cautious thus to interfere where the apprehended mischief is to follow from such establishments and erections (as, for instance, a public mill) as have a tendency to promote the public convenience." Per *Gaston, J.,* in *Barnes v. Calhoun,* 37 N. C., 199. This was said by the learned judge after confessing that the strong leaning of the Court's opinion was with those who thought that the apprehensions of the plaintiff were not without foundation. *Ellison v. Commissioners,* 58 N. C., 57, furnishes another illustration of the principle. The plaintiff there sought to enjoin the laying off of his land for a cemetery. The Court strongly intimated that a cemetery was not a nuisance *per se,* and
(209) would not be either a public or private nuisance in fact, if it was properly arranged and sufficiently drained and in other respects carefully supervised. If it threatened or proved to be actually deleterious to the health of the people of the vicinity, the case would be different. The word "nuisance" was held, in its legal sense, to be confined to such matters of annoyance as the law recognizes and for which it gives a remedy by way of redress or abatement, or, in a proper case, by restraining process. "The unpleasant reflections," said *Judge Manly,* "suggested by having before one's eyes constantly recurring memorials of death is not one of these nuisances. Mankind would, by no means, agree upon a point of that sort, but many would insist that suggestions thus occasioned would, in the end, be of salutary influence. The death-head is kept in the cell of the anchorite, perpetually before his eyes as a needful and salutary monitor. The nuisance which the law takes cognizance of is such matter as, admitting it to exist, all men, having ordinary senses and instincts, will decide to be injurious." "The subject of nuisances, private as well as public, has undergone much discussion in the courts during the past few years. Amongst other principles established,

is one which we think definitive of the rights of the parties now before the Court. It is settled in respect to private nuisances, that where the nuisance apprehended is dubious or contingent, equity will not interfere, but will leave complainant to his remedy at law," citing Drewry on Injunctions, 242; *Barnes v. Calhoun, supra; Attorney-General v. Lea,* 38 N. C., 301; *Simpson v. Justice,* 43 N. C., 115.

In *Attorney-General v. Lea, supra,* the Court held: A court of equity will refuse to interfere by injunction in the case of the erection of a milldam, unless it is shown that it will be a public nuisance, or, if it will be a private nuisance only to an individual, unless it manifestly appears that so great a difference will exist between the injury to the individual and the public convenience as will bear no comparison, or that the erection of the dam will be followed by irreparable mischief. The Court refused an injunction against the erection of a turpentine distillery in *Simpson v. Justice, supra,* because the nuisance was not certain, but only contingent, and required the fact of nuisance (210) to be first established. It was said therein that the jurisdiction of the court to enjoin in the case of private nuisance is of recent origin, and is always exercised sparingly and with great caution, because if, in fact, there be a nuisance, there may be an adequate remedy at law, depending somewhat, of course, upon the nature of the nuisance, citing *Attorney-General v. Nichols,* 1 Ves., 338, and an anonymous case before *Lord Thurlow* in 1 Vesey, Jr., 140. There is an obvious difference, said *Judge Pearson,* between a thing which is a nuisance in itself and one which may or may not be a nuisance according to the manner in which it is used; a turpentine distillery and like structures being of the latter class. If they make noises or generate "smoke, blacks, and soot," or tend to diminish property values, those facts must appear by proof and not be left to mere conjecture. No one should be prevented by a resort to this extraordinary process of the court, on the part of his neighbor, with nothing more than a supposed grievance, from engaging in an enterprise which is not only lawful, but beneficial to the public, because of the unfounded fear or apprehension of the plaintiff that the value of his property may be impaired or that he may suffer some inconvenience from smoke and noise. His appeal for the intervention of the "strong and omnipotent arm of the court" is answered by *Chief Justice Pearson* in *Hyatt v. Myers,* 73 N. C., 232: "If a man, instead of contenting himself with the quiet and comfort of a country residence, chooses to live in a town, he must take the inconvenience of noise, dust, flies, rats, smoke, soot, and cinders, etc., etc.; and he cannot, in law, complain of the owner of an adjoining lot by reason of smoke, soot, and cinders caused in the use and employment of his property: *Provided,*

the use of it is for a reasonable purpose, and the manner of using it such as not to cause any unnecessary damage or annoyance, and he takes all prudent precautions to avoid annoying his neighbors; and even then neither a court of law nor a court of equity will treat it as a nuisance unless the damage is material, so as to exceed what the owner of property ought to be allowed to put upon the owner of property adjoining, (211) in the reasonable enjoyment of his own property, under the maxim, *'Sic utere tuo ut alienum non lœdas,'* which depends upon the circumstances of the case. 'Does the nuisance arise from an establishment made for personal gratification or mere private profit? Or does it promote the convenience of the public?' What is the extent of the damages? If slight, the courts of law may treat it as a nuisance, and give a remedy in damages; if great and irreparable, so that compensation cannot be made, then a court of equity will interfere by injunction. These general principles are announced and discussed in *Dargan v. Waddell,* 31 N. C., 244, a case showing when courts of law give relief, and in *Eason v. Perkins,* 17 N. C., 38, a case showing when courts of equity will interfere by the extraordinary writ of injunction.

A good legal definition of an actionable nuisance will be found in *Dargan v. Waddell, supra:* "A stable in a town lot is not, like a slaughter-pen or a hog-stye, necessarily or *prima facie* a nuisance. But if it be so built, so kept, or so used as to destroy the comfort of persons owning and occupying premises and impairing their value as places of habitation, it does thereby become a nuisance. If the adjacent proprietors be annoyed by it in any manner which could be avoided, it becomes an actionable nuisance, though a stable in itself be a convenient and lawful erection." See, also, *Wilder v. Strickland,* 55 N. C., 386; *Privett v. Whitaker;* 73 N. C., 554, in which *Justice Rodman* classifies nuisances. Joyce in his treatise on Nuisances, sec. 102, states the same general rule: "The fact that a buiness which is lawful may become a nuisance after it has been commenced is not a sufficient ground for enjoining the same. It must clearly appear to the satisfaction of the court that it will become a nuisance. So it has been said in this connection: 'Before a court of equity will restrain a lawful work from which merely threatened evils are apprehended, the court must be satisfied that the evils anticipated are imminent and certain to occur. An injunction will not issue to prevent supposed or barely possible injuries.' "

All the authorities tend to the conclusion that plaintiff must offer tangible proof of the fact of nuisance, when there is no nuisance *per se,* before the court will interfere to stop the erection of a building (212) or the prosecution of a lawful business, especially if it will be beneficial to the public, and, in the latter case, not unless the

private injury is greater in proportion than the public benefit. The court will not act upon speculative proof, or such as furnishes ground only for a conjecture.

The plaintiff has not brought his case within these principles, so as to induce the court to interfere in his behalf. We have said, in this case, at the former term, that the mill in question is not a nuisance *per se,* and the authorities, as we have shown, sustain that view. We also held that he must prove that it would be, in fact, a nuisance. This he has not done. It is evident that plaintiff, when testifying, was merely giving his opinion or conjecture as to what might occur should the mill be erected. In other words, he is simply declaring that to be a nuisance *per se* which the law says is not such a nuisance. How can he know, at this time, whether the mill, if properly built and carefully operated, will injure him in such a way as to be a legal nuisance? His fears and apprehensions of injury may be purely imaginary and utterly groundless, for it is possible, or even probable, that the defendant can so construct and operate it as to avoid any substantial injury to the plaintiff. It appears, also, that plaintiff has built and operated a cotton gin since the dwellings were erected, within fifty yards of them, which is nearer than the mill will be, and yet no complaint has been made against it. There is also strong proof that the ordinance was procured at the instance of the plaintiff for the purpose of destroying the competition of defendant, his business rival, with him, and we may add, that it also tends strongly, if not conclusively, to show that the ordinance was adopted, not to protect the public or individuals against a threatened nuisance, but in furtherance of plaintiff's scheme to thwart the efforts of his business competitor and thus cripple him. Although this is not to be taken as conclusive against plaintiff's supposed equity, it is a matter which might be considered and turn the scale in a doubtful case, and tends, certainly, to show that his apprehensions of injury are either not entertained at all or are greatly exaggerated. *Ellison v. Commissioners, supra.* As we said in *Durham v. Cotton Mills,* 141 N. C., 615:

"When an injunction is sought to restrain that which it is ap- (213) prehended will create a nuisance, the proof must show that the apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the danger is real and imminent." There is no proof in this cse which amounts to more than a mere guess that the mill stack will emit an unusual quantity of smoke or cinders, or that the mill will be so constructed as to produce disagreeable noises, or that it will seriously impair the value of adjacent property. It did not occur to the plaintiff while operating his own gin, under like circumstances, that such a result would follow, and his fear only arose,

as suggested, when his apprehension of a dangerous rivalry in business quickened him into activity, and he became suddenly alarmed about the consequences of something which he had been substantially doing himself for about ten years.

If the fears, real or assumed, of the plaintiff, as to the effects of the proposed mill upon the comfort of his family and the value of his property be realized, he will not be without redress. The courts of law will be open to him, and he will go into them with more grace, having by these proceedings put the defendant on his guard. *Wilder v. Strickland, supra.*

We have not made any special reference to the ordinance, as we hold that there is no sufficient evidence, in law, of any nuisance in fact, and this is the question we ordered to be tried below. As in harmony with the view then taken of the case by this Court, we may add these authorities: Judge Dillon says, with reference to the power of a municipal corporation to pass ordinances for the suppression or abatement of nuisances: "Such powers, conferred in general terms, cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such." 1 Dill. Mun. Corp. (4 Ed.), secs. 95 and 374. And in *River Rendering Co. v. Behr,* 77 Mo., 91, we find the following safe and conservative rule stated: "We do not deny that the General Assembly may confer upon municipal authorities the power to abate nuisances, and to declare what shall be deemed nuisances, but the latter power cannot be so absolute as to be beyond the cognizance of the courts to determine whether it has
(214) been reasonably exercised in a given case or not," citing *Yates v. Milwaukee,* 77 U. S., 10 Wall., 497, in which the Supreme Court of the United States, through *Mr. Justice Miller,* said: "But the mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance, unless it in fact had that character."

The ordinance in this case was manifestly directed against this particular building, and had the effect, if not intended, to prevent the defendant, by the erection of his mill, from injuring the business of his local rival; but even if intended to promote the public welfare and safety, it has not been shown to be a nuisance, and this sustains the nonsuit and the order dissolving the injunction, whatever the ground of his Honor's decision may have been. This was not an effort of the commissioners to establish fire limits, conceding that they have the power, under the town charter, or inherently, to do so, but to declare that to be a nuisance which is not one *per se,* nor in fact, so far as the proof tends to show.

We do not question the power of the municipal board to enact ordinances prohibiting the erection of dangerous buildings in proper cases. But any ordinance may be declared void if, in itself, or because of the peculiar facts and circumstances which gave rise to its adoption, or with reference to which it must be enforced, it will be unreasonable and oppressive in its operation. That is what, in substance, we formerly decided in this case. *Barger v. Smith,* 156 N. C., 323.

Plaintiff cannot maintain an action against defendant for committing a public nuisance, unless he shows special injury peculiar to himself, and this he has not done. High on Injunctions (4 Ed.), secs. 757, 761, 762, 764, and 828. We have not overlooked the fact that defendant has built his gin and mill on an adjoining lot, about the same distance from plaintiff's lot as the other mill, if erected, would have been, and there has been no word of protest against it, so far as appears.

This case is distinguishable from *Raleigh v. Hunter,* 16 N. C., 12; *Vickers v. Durham,* 132 N. C., 880, and *Cherry v. Williams,* 147 N. C., 452, in which the public health was threatened by the building of a milldam, or a sewage disposal plant, or a hospital for the treat- (215) ment of tuberculosis, where the evidence was of a satisfactory and tangible character, and created strong probability that the act proposed to be enjoined would, if committed, constitute a nuisance, and the injury was imminent. Our case belongs to a class quite different, and represented by *Simpson v. Justice,* 43 N. C., 115; *Hyatt v. Myers,* 71 N. C., 271 (*s. c.,* 73 N. C., 232); *Dorsey v. Allen, supra; Hickory v. R. R.,* 143 N. C., 451, and others to be found in our reports, in which the injunction was prayed against buildings or enterprises of great public utility or benefit. The distinction between the two classes is clearly shown by *Justice Hoke* in *Cherry v. Williams, supra.* The record discloses

No error.

Cited: Rope Co. v. Aluminum Co., 165 N. C., 576; *Jones v. Lassiter,* 169 N. C., 751.

J. M. PACE MULE COMPANY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 20 November, 1912.)

1. Contracts—Carriers of Goods—Bills of Lading.

The execution of a bill of lading by the carrier to transport the property for the consideration expressed therein is a *contract* between the carrier and the shipper.

2. Same—Public Duties.

In addition to the contractual obligations as expressed by the executed bill of lading issued, the law imposes upon the common carrier other obligations and duties by reason of the privileges it has, as such, in the exercise of the right of eminent domain, which can only be conferred by law in consideration of public service, and by reason of its enjoying a virtual monopoly of the carriage of freight within certain distances.

3. Same.

It is the duty of a common carrier, independent of contract, to transport safely and to deliver within a reasonable time the shipment for which it issues its bill of lading.

4. Same—Tort.

The negligent failure of a common carrier to safely deliver the subject-matter of its bill of lading is a tort for which the carrier is liable independently of its contract.

5. Carriers of Goods—Contract—Negligence—Exemption.

A common carrier may not, by contract, absolve itself from the consequences of its own negligence in the transportation of the subject-matter of its bill of lading, or exempt itself from liability, partial or total, thereby caused.

6. Same—Live-stock Bill of Lading.

A common carrier cannot, by fixing the valuation of a shipment of mules at not exceeding $100 for each animal, in its live-stock bill of lading, limit recovery to that amount, as such would be an attempt to contract against its own negligence to that extent, and a provision to that effect in the bill of lading is void. *Jones v.* R. R., 148 N. C., 449; *Winslow v. R. R.*, 151 N. C., 250, cited and overruled.

7. Same—Federal Questions—Common-law Liability—Statutes.

An action brought in the State court, involving the construction of a live-stock bill of lading issued by a common carrier for the transportation of live stock from another State to a point in North Carolina, where the recovery is limited to $100 on each animal shipped, and wherein the recovery exceeds the amount stipulated for in the bill of lading, does not raise a Federal question and will be governed by the decisions of our own courts as to the common-law doctrines applicable, or by any laws the Legislature may make relating thereto.

8. Same—Discrimination—Common Law.

A recovery for injury to live stock caused by the negligence of the carrier in transporting a car-load shipment from another State to a North Carolina point, under a live-stock bill of lading, exceeding the amount fixed therein as the value of each animal, is not a discrimination in favor of the plaintiff or an interference with the Interstate Commerce Act, there being no express provision of the act in regulation of such matters, and nothing in abrogation of the common-law doctrine.

9. Same—United States Supreme Court—State's Decisions—Practice—Jurisdiction.

The Supreme Court of the United States recognizes and follows the decisions of the State courts on questions involving the right of a common carrier to relieve itself, by contract, of the effects of its negligent acts in transporting stock, under its live-stock bill of lading, from a point beyond the State, when the action is brought to recover damages therefor in the State court, though otherwise in cases originating in the Federal jurisdiction.

10. Carriers of Goods—Interstate Commerce Acts—Live-stock Bill of Lading—Limited Liability—Negligence—Interpretation of Statutes.

There being no express language in the act of Congress known as the Intestate Commerce Act abrogating the common-law right of a plaintiff to recover of the carrier the full amount of damages he may have sustained by reason of the defendant's negligence in a shipment of stock, under the carrier's live-stock bill of lading fixing the valuation of each animal, if there is any abrogation of the right, it must be by implication, and then only when it would render the act of Congress nugatory, which does not apply in cases of this character.

11. Interstate Commerce Acts—Commission—State's Laws—Incidental Matters.

The mere fact that Congress has created the Interstate Commerce Commission and given to it a large measure of control over interstate commerce does not deprive the State of the right to enforce laws which may incidentally affect commerce, in the absence of action by Congress or rules and regulations of the Commission as to the particular matters to be inquired of.

12. Interstate Commerce Acts—Commission—Provisions—Negligence—Remedy—Common-Law Interpretation of Statutes.

The act of Congress and the rules and regulations of the Commission are to compel the common carrier to the performance of its duties, and the rates prescribed are to afford the transportation of property safely and with reasonable care, and are not based upon the assumption that the carrier will not perform its duty; and in the absence of any provision for a remedy for the carrier's negligence, or for relieving it from the consequence of its negligence, there is no restriction upon the application of the common-law doctrine as held by the courts of the State.

13. Interstate Commerce Acts—Carriers of Goods—Live-stock Bill of Lading—Limited Recovery—Actual Damages—Interpretation of Statutes.

The right of action of a plaintiff to recover for the negligence of a common carrier an amount in excess of the valuation of a mule shipped in a car-load, and covered by a stipulation as to valuation of each animal, is preserved by the proviso of the act of Congress known as the Interstate Commerce Commission Act, as amended in 1906.

BROWN and WALKER, JJ., dissenting.

(218) APPEAL by defendant from *Cline, J.*, at May Special Term, 1912, of WAKE.

This action was originally brought by the plaintiff against the Seaboard Air Line Railway and the Louisville and Nashville Railroad Company to recover $310 for the death of a mule alleged to have been caused by the negligence of the defendants in the course of transportation from East St. Louis, Ill., to Raleigh, N. C. The mule in question was one of a car-load of twenty-six shipped by the Maxwell-Crouch Mule Company to the plaintiff company on 3 March, 1911. The mules arrived at Raleigh 8 March, 1911. The injury to the mule was apparent when he was unloaded, and he was sent to the stable of a veterinary surgeon by the defendant's agent. A few days after being sent to the stable, the mule died.

At the trial the court instructed the jury that there was no evidence of negligence on the part of the Louisville and Nashville Railroad Company, and the verdict rendered placed the responsibility for the mule's death entirely on the Seaboard Air Line Railway.

The defendant pleaded the provisions of the Act to Regulate Commerce, as amended, as restricting the plaintiff's right to recover more than $100 for the death of this mule, and offered in evidence tariffs and classifications on file with the Interstate Commerce Commission, from which it appeared that the rate charged and the valuation fixed in the contract upon which this shipment moved are in accordance with the published tariff rate. The defendants also pleaded the provisions of the contract of shipment, fixing the value of the mule at $100, as a bar to plaintiff's right to recover more than that amount under the law as declared by the Supreme Court of North Carolina.

The contract recited a rate of $170 per car, and contained this provision: "Should damage occur for which the said carrier may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed . . . for a horse or mule $100 . . . which amounts it is agreed are as much as such animals as are herein agreed to be transported are worth."

The defendant also offered evidence tending to prove that the rate on horses and mules from National Stock Yards, Ill., to Ra- (219) leigh, N. C., via Louisville and Nashville Railroad Company and Seaboard Air Line, is $170 per standard car, plus $1 bed charges and feed charges en route, when regular live-stock contract is executed, which limits liability of carrier not to exceed $100 per animal in case of loss or damage. In case the shipper desires not to accept contract limiting liability, he can increase the valuation of the animals, but for every increase of 100 per cent or fraction thereof in the value of his animals the freight rate is increased 20 per cent more on the car.

The jury returned the following verdict:

1. Was plaintiff's mule injured by the negligence of the defendant Louisville and Nashville Railroad Company, as alleged in the complaint? Answer: No.

2. Was plaintiff's mule injured by the negligence of the defendant Seaboard Air Line Railway, as alleged in the complaint? Answer: Yes.

3. Did the plaintiff comply with the contract of shipment as to the giving of notice to the railroad company (Seaboard) as to his claim for damages? Answer: Yes.

4. What damages, if any, is plaintiff entitled to recover? Answer: $285.

His Honor, being of opinion that the clause in the bill of lading limiting the value to $100 did not prevent the recovery of the damages sustained by negligence, and that to permit such a recovery did not interfere with the Act to Regulate Interstate Commerce, rendered judgment in favor of the plaintiff for $285 and costs, and the defendant excepted and appealed.

S. Brown Shepherd for plaintiff.
Murray Allen for defendant.

ALLEN, J. The execution of a bill of lading by a railroad company establishes a contractual relationship between it and the shipper, the carrier agreeing, for a consideration, to transport and to deliver, and the shipper agreeing to pay the consideration. This is the contract. 4 Elliott on Railroads, sec. 1415. In addition to the obligations contained in the contract, the law imposes upon the company other obliga- (220) tions and duties, and justifies its right to do so because the company is a creation of the law, enjoys a virtual monopoly of the carriage of freight within a certain distance, and exercises the right of eminent domain, which can only be conferred in consideration of public service. *Branch v. R. R.*, 77 N. C., 349.

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

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

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

These duties of the common carrier, as such, do not rest upon contract, but are imposed by law (Elliott on Railroads, vol. 4, sec. 1454), and exist independently of contract, having their foundation in the policy of the law. *Merritt v. Earle,* 29 N. Y., 122.

Among these duties imposed by law, independent of contract, are to carry safely and to deliver within a reasonable time, and a breach thereof is a tort. *Peanut Co. v. R. R.,* 155 N. C., 150, and at p. 164.

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

These cases are approved in *Solomon v. Bates,* 118 N. C., 315, and the principle was approved by the Supreme Court of the United
(221) States in *Guardian Co. v. Fisher,* 200 U. S., 57, where the Court says: "Doubtless in the same transaction there may be negligence and breach of contract. If a railroad company contract to carry a passenger, there is an implied obligation that he will be carried with reasonable care for his safety. A failure to exercise such care, resulting in injury to the passenger, gives rise to an action *ex contractu* for breach of the contract, or as well to an action for the damages on account of the negligence—an action sounding in tort."

These authorities and many others not only hold that an action in tort may be maintained for breach of duty, resulting in damage, although the duty is imposed because of the relationship created by contract, but they go further, and classify the action as one to recover damages for negligence.

"In every case involving negligence there are necessarily three elements essential to its existence: (1) The existence of a duty on the part

of defendant to protect plaintiff from the injury; (2) failure of defendant to perform that duty; and (3) injury to plaintiff from such failure of defendant." 29 Cyc., 419.

If these views are sound, we come to the consideration of the question of the right of the common carrier to limit its liability by contract.

Prior to 1776, the common carrier was an insurer, and liable for losses occasioned by all causes except the act of God and the King's enemies, and without power to limit its responsibility (*Fish v. Chapman,* 2 Ga., 349, 46 A. D. 393); but this rule has been modified to the extent that the extraordinary liability as an insurer may be limited. 5 Eng. Rul. Cases, 346, note.

The courts have not, however, gone further and permitted the carrier to absolve itself from the consequences of its own negligence. *Moulton v. R. R.,* 31 Minn., 85; *R. R. v. Wynne,* 88 Tenn., 320; *Hudson v. R. R.,* 92 Iowa, 231; *R. R. v. Hall,* 124 Ga., 322; *Express Co. v. Blackman,* 28 Ohio St., 156; *R. R. v. Lockwood,* 84 U. S., 357; *R. R. v. Solan,* 169 U. S., 135; *Calderon v. Steamship Co.,* 170 U. S., 272.

The consensus of opinion on this question is stated in Cyc., vol. 6, 385 and 388, as follows: "While considerations of public policy have been potent in determining the courts to recognize a rule of liability in the case of common carriers much stricter than that recognized as applying in the case of ordinary bailees, the courts have not (222) thought it necessary to deny the parties to a contract of carriage the right to exonerate the carrier from his extraordinary liability, and the general proposition has been almost universally recognized that by special agreement, or by notice to the shipper, acquiesced in by him, the common carrier may limit his liability to that of a private carrier. It is, therefore, stated as a general proposition in many cases that the common carrier may by contract limit his liability, except for damages or loss resulting from the negligence of the carrier or his agents or servants"; and on page 388: "The proposition amplified in the last subdivision, that a common carrier may by contract reduce his liability to that of a bailee for hire, is not to be extended so as to authorize him as such bailee for hire to exempt himself from liability for negligence. Whatever may be the rule as to ordinary bailees, it is well settled that it is contrary to public policy to allow a common carrier to relieve himself in any capacity from liability for negligence or misconduct. A different conclusion has been reached by the New York courts, and it has been held in a line of cases which are out of harmony with the great current of authority, that inasmuch as the shipper has a right to insist on the common-law liability of the carrier if he sees fit, a contract exempting the carrier from liability for his own negligence will be sustained. Outside of New York the current of authorities is almost un-

broken that for reasons of public policy carriers cannot exempt themselves by any contract, notice, or stipulation from liability for the consequences of their own negligence." The author, Judge McClain, of the Supreme Court of Iowa, comments on the New York cases in the note, and says: "Even the courts of New York regard the rule as so anomalous that they qualify it by the further rule, that a general contract of exemption from loss, even from loss of a particular description, will not be interpreted as an exemption from loss due to the carrier's own negligence, unless it is expressly so stipulated. *Wilson v. R. R.,* 97 N. Y., 87; *Holsapple v. R. R.,* 86 N. Y., 275."

(223) It is the settled policy of this State that the common carrier canot, by contract, exempt itself from liability, partial or total, caused by negligence. *Phifer v. R. R.,* 89 N. C., 316; *Capehart v. R. R.,* 81 N. C., 438; *Mitchell v. R. R.,* 124 N. C., 238; *Parker v. R. R.,* 133 N. C., 335; *McConnell v. R. R.,* 144 N. C., 90.

In the *Phifer case, supra,* this Court said: "It is well settled that no conditions in a common carrier's bill of lading can be allowed to exempt it from liability for losses occasioned by the negligence or mismanagement of its own servants and employees; for protection against such liability is a duty inseparable from their occupation as public agencies. This responsibility cannot be avoided, and a stipulation to this effect will not be enforced against such as may require their services, even when by reference inserted in the contract of transportation, the parties to it in this respect not standing upon equal footing.

"Amidst varying adjudications upon the extent to which common carriers may limit their liabilities by special agreement, we are disposed to accept the guidance of those made in the Supreme Court of the United States, not only because of the great learning and ability of the judges who constitute it, but that there ought to be uniformity in the law and its administration in all the States, and interstate and local commerce ought to be settled upon a permanent and well understood basis. We shall, therefore, seek instruction from that source to aid in arriving at a satisfactory conclusion as to the question now before us. *Mr. Justice Field* remarks, in reference to such special limitations: 'Where such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement.' *York Co. v. R. R.,* 3 Wall., 113. So in *R. R. v. Mfg. Co.,* 16 Wall., 328, *Mr. Justice Day* says: 'Whether a carrier, when charged upon his common-law responsibility, can discharge himself from it by special contract, is not an open question since *Navigation Co. v. Bank,* 6 How., 344, and *York Co. v. R. R.,* 3 Wall., 113. In both these cases the right of the carrier to restrict or diminish his general liability by special contract, which does not cover losses by negli-

gence or misconduct, received the sanction of this Court.' After (224) a full and elaborate examination of the authorities, *Mr Justice Bradley* announces the result in these words: '(1) A common carrier cannot lawfully stipulate for exemption from responsibility where such exemption is not just and reasonable in the eyes of the law. (2) It is not just and reasonable in the eyes of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his agents.'" And in the *McConnell case:* "The defendant could not, by any stipulation in the bill of lading, contract to limit its liability for negligence in transporting goods which it receives for carriage."

It is upon these principles that we have held that the valuation clause in a bill of lading is inoperative when relied on to exempt from liability for negligence, and cannot diminish the recovery of damages caused by such negligence. *Gardner v. R. R.,* 127 N. C., 293; *Everett v. R. R.,* 138 N. C., 71; *Stringfield v. R. R.,* 152 N. C., 128; *Kissenger v. R. R.,* 152 N. C., 247; *Harden v. R. R.,* 157 N. C., 238

It has heretofore been recognized that *Jones v R. R.,* 148 N. C., 449, and *Winslow v. R. R.,* 151 N. C., 250, are not in harmony with the authorities in this State and elsewhere, and they are now overruled.

We are not inadvertent to *Hart v. R. R.,* 112 U. S., 331, declaring a different rule as to valuation clauses in bills of lading, which has been followed in some States and denied in others; but this authority, while entitled to the greatest respect on account of the high source from which it emanates, is not controlling, as it has been held in the Federal jurisdictions that no Federal question is raised upon the facts presented by this record.

In *Latta v. R. R.,* 172 Fed. 850, the plaintiff brought suit in a State court of Nebraska to recover damages to a mare and colt, caused by the negligence of the defendant in transporting from one State to another. The case was removed to the Circuit Court of the United States for the District of Nebraska, and there tried, and upon the trial the defendant relied upon the valuation clause in a bill of lading, limiting the recovery to $220. The Circuit Court sustained the contention of (225) the defendant, but on appeal the Circuit Court of Appeals reversed this holding upon the ground that the Supreme Court of Nebraska had decided that the valuation clause was void under the Constitution of Nebraska, providing that "The liability of railroad corporations as common carriers shall never be limited," and that the Federal court was bound by this construction.

In *Hughes v. R. R.,* 191 N. S., the plaintiff brought suit in the courts of Pennsylvania for negligent injury to a horse, shipped from Albany, N. Y., to Cynwyd, Pa., under a bill of lading containing a valuation

clause. A recovery was had in excess of the value in the bill of lading, and upon appeal the judgment rendered was affirmed by the Supreme Court of Pennsylvania. The case was then carried to the Supreme Court of the United States, by writ of error, and that Court affirmed the judgment of the courts of Pennsylvania, saying in the course of the opinion: "The first error assigned in the common pleas court raised the question as to the law of the contract. It does not assert that any Federal right was invaded or denied. It seems to have been conceded at the trial that the law of the State of New York, where the contract was made, permitted the making of a contract limiting the liability of the carrier to the agreed valuation in consideration of the lower freight rate for carriage, the shipper having the opportunity to have the larger liability for the value of the goods if the higher rate of freight for carriage was paid. This rule also prevails in the courts of the United States (*Hart v. R. R.*, 112 U. S., 331), wherein it was held that a contract fairly made and signed by the shipper, agreeing on a valuation of the property carried, with a rate of freight based on such valuation, on the condition that the carrier assume liability only to the extent of such agreed valuation in case of loss by the negligence of the carrier, will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier is responsible and the freight received, and of protecting the carrier against extravagant valuations.

(226) But this is not a question of Federal law wherein the decision of the highest Federal tribunal is of conclusive authority. In *Grogan v. Express Co.*, 114 Pa., 523, 60 Am. Rep., 360, the Supreme Court of Pennsyvania expressly declined to follow the rule laid down in *Hart v. R. R.*, adhering to its own declared doctrine denying the right of a common carrier to thus limit its liability for injuries resulting from negligence. The cases are numerous and conflicting, different rules prevailing in different States. The Federal courts in cases of which they have jurisdiction will doubtless continue to follow the rule of the *Hart case*, but the highest court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the Federal Supreme Court where some right, title, immunity, or privilege, the creation of the Federal power, has been asserted and denied."

In the case before us the action is based on the common law, as in the *Hughes case*, and we have held that the valuation clause cannot have the effect of diminishing the recovery for damages caused by negligence, following a long line of decisions in this Court, and the same course was followed in the Pennsylvania case; and it would seem that if no

Federal question could be found in the *Hughes case,* none can be found in this, in so far as the determination of the effect of the valuation clause in the bill of lading is concerned.

The defendant contends further, that if it is held that the plaintiff is entitled to recover $285, when the rate of freight was fixed upon the valuation of $100, that this would be a discrimination in favor of the plaintiff and an interference with the Interstate Commerce Act, and further, that Congress having legislated upon the subject-matter of this action, the courts of this State are without jurisdiction.

The principle involved is important, and has not been heretofore decided in this Court, although considered in the *Kissenger case,* where there is a clear intimation against the contention of the defendant.

We do not question the power of Congress to regulate interstate commerce, nor do we doubt the correctness of the decisions, chiefly relied on, that where Congress, acting within the power conferred by the Constitution, has legislated with reference to the matter involved (227) in the litigation, the legislation of Congress is exclusive, and the courts of the State are without jurisdiction. *R. R. v. Oil Co.,* 204 U. S., 426; *R. R. v. Mugg,* 202 U. S., 543; *R. R. v. Coal Co.,* 215 U. S., 481; *Robinson v. R. R.,* 222 U. S., 506; *R. R. v. Reid,* 222 U. S., 424.

These cases, however, go no further. In the *Oil Co. case* the shipper sought to recover freights which he alleged to be unreasonable, but which were such as had been established and approved under the Interstate Commerce Law; in the *Mugg case* the shipper sued to recover the difference between a rate quoted to him by the carrier and the regular classified rate filed and approved by the Commission, which he had paid; in the *Pitcairn case,* to compel by mandamus the discontinuance of certain regulations adopted by certain railroad companies for the distribution of cars to coal mines in a time of car shortage, which regulations were alleged to be in violation of the Interstate Commerce Act; in the *Robinson case,* a schedule of charges for loading coal into cars was filed and approved by the Commission, under which 50 cents more per ton was charged for loading from a wagon than from a tipple. The plaintiff's shipment came under the higher rate, and conceiving that the schedule unjustly discriminated betwen shipments loaded from wagons and those loaded from tipples, he brought action to recover the excess.

We have stated the subject-matter of these cases for the purpose of showing that in each case a clause of the Interstate Commerce Act, or a rule or regulation of the Commission, was directly involved, and we, therefore, conclude that they are not decisive of the question before us.

We will hereafter refer to the *Reid case.*

We come then to the contention of the defendant, that to permit a recovery of more than $100, when the freight rate was fixed on the basis

of that value, would be a discrimination, and that, therefore, the Interstate Commerce Act abrogates the common-law right of action to recover damages.

If we turn to the act itself, no language can be found which (228) in express terms purports to have this effect, and the defendant must rely upon an abrogation of the right of action by implication.

This being true, the Supreme Court of the United States has laid down the rules by which the contentoin of the defendant is to be tested.

In the *Oil Co. case,* after recognizing the right at common law to recover freight charges in excess of a reasonable rate, and holding that the Commission having approved the rate, the courts could not, in the first instance, inquire into its reasonableness, the Court says: "As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not, in so many words, abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition, we concede that we must be guided by the principle that repeals by implication are not favored, and, indeed, that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the preëxisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

Again, it has been held in numerous cases that the fact that Congress has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce, does not deprive the State of the right to enforce laws which may incidentally affect commerce, in the absence of action by Congress or the Commission as to the particular matter to be inquired of. A number of instances of such laws are collected in *R. R. v. Illinois,* 177 U. S., 514, and the Court there says: "Few classes of cases have become more common in recent years than those wherein the police power of the State over the vehicles of interstate commerce has been drawn into question. That such (229) power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employees, persons crossing railroad tracks, and adjacent property-owners, as well as other regulations intended for the public good. We have recently applied this doctrine to State laws requiring locomotive

engineers to be examined and licensed by the State authorities (*Smith v. Alabama,* 124 U. S., 465; 1 Interst. Com., 804); requiring such engineers to be examined from time to time with respect to their ability to distinguish colors (*R. R. v. Alabama,* 128 U. S., 96; 2 Interst. Com., 238); requiring telegraph companies to receive dispatches and to transmit and deliver them with due diligence, as applied to messages from outside the State (*Tel. Co. v. James,* 162 U. S., 650); forbidding the running of freight trains on Sunday (*Hennington v. Georgia,* 163 U. S., 299); requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations (*R. R. v. Fuller,* 17 Wall, 560); forbidding the consolidation of parallel or competing lines of railway (*R. R. v. Kentucky,* 161 U. S., 667); regulating the heating of passenger cars, and directing guards and guard-posts to be placed on railroad bridges and trestles and the approaches thereto (*R. R. v. New York,* 165 U. S., 628); providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made (*R. R. v. Solan,* 169 U. S., 133), and declaring that when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to (230) its point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent (*R. R. v. Tobacco Co.,* 169 U. S., 311). In none of these cases was it thought that the regulations were unreasonable, or operated in any just sense as a restriction upon interstate commerce."

The same rule was applied in *R. R. v. Larabee Mills,* 211 U. S., 612.

The expressions in *R. R. v. Reid, supra,* that Congress having taken possession of the field—having taken control—are relied on to sustain the argument that this rule has been extended, and that now the State has no power to enforce any law which may remotely affect interstate commerce; but the language referred to must be read with the context, and when this is done it will be seen that the principle is sustained.

In the *Reid case* the Court quotes with approval the following from *R. R. v. Larabee Mills, supra:* "In other words, the mere grant by Congress to the Commission of certain National powers in respect to interstate commerce does not of itself and in the absence of action by the Commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. . . . Until specific action by Congress or the Commission, the control of the State over those incidental matters remains undisturbed," and

then says: "The duty which was enforced in the State court was the duty of a railroad company engaged in interstate commerce to afford equal local switching service to its shippers, notwithstanding the cars concerning which the service was claimed were eventually to be engaged in interstate commerce. This duty was declared (p. 624) to be a common-law duty which the State might, 'at least, in the absence of Congressional action, compel the carrier to discharge.' The principle of that case, therefore, requires us to find specific action either by Congress in the Interstate Commerce Act or by the Commission covering the (231) matters which the statute of North Carolina attempts to regulate."

The decision in the *Reid case* was upon the ground that, "By the specific provisions of the act to regulate commerce, as amended, Congress has taken control of rate making and charging for interstate shipments, and in that respect such provisions supersede State statutes on the same subject; and that a statute of North Carolina requiring common carriers to transport freight as soon as received to interstate points under penalties for failure, conflicts with the requirement of section 2 of the Hepburn Act of 29 July, 1906, ch. 3591, 34 Stat., 584, forbidding transportation until rates had been fixed and published, and is therefore unenforcible."

Tested by these rules, the right of action of the plaintiff, as it existed at common law, is unimpaired, unless its recognition by the courts would render the act to regulate commerce nugatory, or unless Congress has acted on the subject-matter of this controversy.

Congress has legislated and the Commission has made rules and regulations to compel the performance of duty, and not for the purpose of excusing negligent conduct. The rates prescribed are to afford transporting property safely, and with reasonable care, and are not based upon the assumption that the carrier will not perform its duty, and neither Congress nor the Commission has provided a remedy for negligence, nor purported to relieve from its consequences.

A jury has found in this action that the property of the plaintiff has been damaged $285 by the negligence of the defendant, and if he cannot recover that sum in this action, he is without remedy. He cannot go to Congress, nor can he go to the Commission; and if the contention of the defendant is sustained, an act of Congress designed to regulate commerce and the rules of a commission created to administer its provisions will have the effect of reducing his claim to $100.

Conceding that the right of action exists at common law, it does not render the act of Congress nugatory to enforce it, and in the absence of action by Congress or the Commission upon the subject-matter of (232) the controversy, there is no implied abrogation of the right.

The implication we are asked to infer compels us to write into the act of Congress words that cannot be found there, and words which, if written in the bill of lading itself, would be void, according to our authorities, to wit, "that in consideration of the rate paid the carrier shall not be liable for negligence."

Hughes v. R. R., 191 U. S., 477, seems to be directly in point against both contentions of the defendant. In that case the plaintiff brought his action in the court of Pennsylvania to recover damages for negligent injury to a horse shipped from New York to Pennsylvania, and the defendant relied on the valuation clause in the bill of lading, and also urged that to permit a recovery for a larger amount than that named would be in conflict with the Interstate Commerce Act. The Supreme Court of Pennsylvania held against the defendant on both points, and rendered judgment in favor of the plaintiff for the full amount of his damages, and this judgment was affirmed by the Supreme Court of the United States. In the course of the opinion, the Court says: "Upon the authority of *R. R. v. Elliott,* 184 U. S., 533, it may be admitted that the question of the decision of the State court being in contravention of the legislation of Congress to regulate interstate commerce was sufficiently made, and the adverse decision to the party claiming the benefit of that act gives rise to the right of review here. In refusing to limit the recovery to the valuation agreed upon, did the State court deny to the company a right or privilege secured by the interstate commerce law? It may be assumed that under the broad power conferred upon Congress over interstate commerce, as defined in repeated decisions of this Court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon, we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error (24 Stat. at L., 379-82, ch. 104, U. S. Comp. Stat., 1901, pp. 3154-3159, 25 (233) Stat. at L., 855, ch. 382, U. S. Comp. Stat., 1901, p. 3158) provide for equal facilities to shippers for the interchange of traffic; for nondiscrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules, and regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates except after ten days notice to the Commission; against reduction of joint tariff rates except after

three days like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points as to which a joint tariff is made different than is specified in the schedule filed with the Commission; giving remedies for the enforcement of the foregoing provisions and providing penalties for their violation; making it unlawful to prevent continuous carriage, and providing that no break of bulk, stoppage or interruption by the carrier, unless made in good faith and for necessary purpose, without intention to evade the act, shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination. While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and until Congress shall legislate upon it, is there any valid objection to the State enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage? It is well settled that the State may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic."

The Court then considers several cases, and among them *R. R.* (234) *v. Solan,* 169 U. S., 133, in which a statute of Iowa was upheld which invalidated a valuation clause in a bill of lading, and concludes as follows: "We can see no difference in the application of the principle based upon the manner in which the State requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the State courts. The State has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement in the case just cited is held not to be an unlawful attempt to regulate interstate commerce, in the absence of Congressional action providing a different measure of liability when contracts such as the one now before us are made in relation to interstate carriage. Its pertinence to the case under consideration renders further discussion unnecessary."

This case was approved in *Tel. Co. v. Milling Co.,* 218 U. S., 406, in which, after holding that intercourse between the States by telegraph is

interstate commerce, a statute of Michigan was sustained declaring that "telegraph companies shall be liable for any mistakes, errors, or delays in the transmission or delivery, or for the nondelivery of any repeated or nonrepeated message, in damages to the amount which such person or persons may sustain by reason of the mistakes, errors, or delays in the transmission or delivery, due to the negligence of such telegraph company or its agents, to be recovered with the costs of suit by the person or persons sustaining such damage," although on the face of the telegram there was a stipulation that the company should not be liable for the nondelivery of an unrepeated message beyond the amount paid for the telegram, the Court saying in conclusion: "The telegraph company in the case at bar surely owed the obligation to the milling company to not only transmit the message, but to deliver it. For the failure of the latter it sought to limit its responsibility, to make the measure of its default not the full and natural consequence of the breach of its obligation, but the mere price of the service, relieving itself, to some extent, even from the performance of its duty. A duty, we may (235) say, if performed or omitted, may have consequence beyond the damage in the particular instance. This the statute of the State, expressing the policy of the State, declares shall not be. For the reasons stated we think that this may be done, and that it is not an illegal interference with interstate commerce."

The Supreme Court of South Carolina has recently decided both questions presented by this appeal against the contention of the defendant. *Elliott v. R. R.*, 94 S. C., 129.

There is also authority for the position that the Interstate Commerce Act, as amended in 1906, instead of taking away the right of action of the plaintiff, preserves it.

In *Latta v. R. R.*, 172 Fed. 850, the plaintiff sued to recover damages for injuries caused by negligence to a mare and colt, shipped from Nebraska to Iowa, under a bill of lading containing a valuation clause, and the action was removed to the Circuit Court of the United States. Upon the trial, the defendant relied on the clause in the bill of lading limiting the amount of recovery, and it was also shown "that the rate of $24.38 charged by the defendant for the transportation of the animals mentioned was its regular tariff based upon the valuation stated in the contract. It was also conceded at the trial that said tariff rate had been filed with the Interstate Commerce Commission, and published as required by law, and that the rules, regulations, and tariffs of the defendant on file with the Interstate Commerce Commission disclosed that the above-named rate applied to the limited liability contract in use by

the company for the transportation of live stock." Upon appeal, the Circuit Court of Appeals held that the plaintiff had the right to recover the full amount of his damages, and that the Interstate Commerce Act, instead of taking away this right, preserved it, the Court saying in reference to the last question: "It is claimed, however, that Congress has legislated upon the very subject now under discussion, and that in consequence thereof the law of Nebraska, so far as it is sought to enforce the same against the provisions of a contract in relation to interstate commerce, is inoperative. In this connection our attention is called to Act June 29, 1906, ch. 3591, sec. 7, 34 Stat. 595 (U. S. Comp. St.
(236) Supp., 1907, p. 909). In the section referred to is found the following language: 'That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass; and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability herein imposed: *Provided,* that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws.' It plainly appears from a reading of the above language that Congress has legislated upon the subject of the liability of railroad corporations as common carriers when engaged in interstate commerce. If it were not for the proviso accompanying the language above quoted, we should feel compelled to determine the validity of the contract in question with reference to the law of Congress. We think that the proviso found in the law above quoted was placed therein to cover just such a case as is now presented. Congress, undoubtedly, was aware of the many conflicting decisions by the courts in reference to the question as to how far common carriers could limit their common-law liability by contract, receipt, rule, or regulation. It therefore was aware that the Constitution of Nebraska, as interpreted by her Supreme Court, was in conflict with the rule established by the United States Supreme Court in *Hart v. R. R., supra;* and was also aware that the Supreme Court of Pennsylvania in *Grogan v. Adams Express Co.,* 114 Pa., 523, 60 Am. 360, refused to follow the rule established by said case of *Hart v. R. R., supra,* and therefore, in view of these conflicting opinions, very wisely provided that the legislation by Congress should not deprive 'any holder of such receipt or bill of lading of any remedy or right of action which he had under existing law.' We are therefore of the opinion that the right which the

plaintiff in this case had under the law of Nebraska to sue for the (237) full value of his property was not taken away by the legislation of Congress herein referred to, but was preserved to him, and that he may now enforce that right as he has attempted to do."

We conclude, upon reason and authority:

(1) That under the common law as administered in this State, the valuation clause in a bill of lading does not relieve from the consequences of negligence.

(2) That if the common law was different, the Legislature of the State would have the power to pass an act providing that such a clause should not relieve against negligence.

(3) That the Supreme Court of the United States recognizes and follows the decisions of the courts of the State on this question, in cases originating in the State courts, whether based on the common law or statute, although it would hold otherwise in cases originating in the Federal jurisdiction.

(4) That Congress has not, in the act to regulate commerce, purported to relieve against negligence.

(5) That Congress having failed to act in this particular, this State may administer its own laws and enforce its settled policy.

(6) There being no express language in the act of Congress abrogating the common-law right of action of the plaintiff, if abrogated at all, it must be by implication.

(7) That the abrogation of the right will not be implied, unless to permit it to exist would render the act of Congress nugatory.

(8) That the enforcement of the right of action is not in conflict with the terms or purpose of the act of Congress, and therefore its abrogation will not be implied.

(9) That if Congress has legislated upon the matter in controversy, the right of action of the plaintiff is preserved by the proviso in the act.

We are, therefore, of opinion there is

No error.

CLARK, C. J., concurring: No question as to rates, nor as to the power of the Interstate Commerce Commission to regulate rates, arises in this case. The sole question is whether under the guise of fixing rates the carrier can make a collateral stipulation which (238) shall relieve it from payment in part of damages sustained by the shipper because of the negligence of the carrier. If the carrier could thus relieve itself by contract of part of the consequence of its negligence, it could relieve itself altogether. It is well settled that this cannot

be done. Besides the authorities cited in the opinion of *Mr. Justice Allen* in this case, they can be found collected in the opinion of *Mr. Justice Walker* in *Kime v. R. R., post,* 457.

The carrier can relieve itself by contract, in proper cases and for a reasonable consideration, from its liability as insurer, but it cannot stipulate to be relieved either in whole or in part from liability to pay for damages caused by its negligence.

BROWN, J., dissenting: The fact that Congressional legislation on matters relating to interstate commerce may interfere with the exercise of the police power by the State, or may contravene the public policy of the State, is not sufficient to prevent the operation of such legislation. The Federal statute is supreme. Therefore, if Congress has, by its enactments, covered the subject of rate making and charging in its relation to interstate commerce, the right of a State, through either its Legislature or its courts, to regulate or interfere with such rate making and charging is destroyed. This is fundamental, and I do not understand it to be controverted by the opinion of the Court. That opinion seems to be based upon the view that Congress has not acted upon the subject, and, therefore, the State courts have the right to apply to the situation the law in force in the State. I am forced by the decisions of the Supreme Court of the United States to reach a different conclusion.

It has recently been held by that Court that Congress has completely taken control of the subject of rate making and charging by the provisions of the act to regulate commerce and the amendments thereto. *R. R. v. Reid,* 222 U. S., 424. Upon the authority of that case inhibitive Congressional legislation is not required to prevent the application of State legislation upon incidental matters relating to interstate commerce. It is said to be sufficient if Federal legisla-
(239) tion occupies the field. After discussing the power conferred upon the Interstate Commerce Commission by the act to regulate commerce, *Mr. Justice McKenna* says in the *Reid case:* "It is evident, therefore, that Congress has taken control of the subject of rate making and charging. All of the particular details we cannot set forth without extensive quotations from the act, which it is quite inconvenient to make. The provisions of the act are directed at the abuses most to be feared—unreasonableness in the rates and discriminations, including in the latter discriminations in service, in the acceptance and delivery of freight, and in facilities furnished." And again referring to the act to regulate commerce, *Mr. Justice McKenna* uses this sweeping language: "There is scarcely a detail of regulation which is omitted to secure the

purpose to which the Interstate Commerce Act is aimed. It is true that words directly inhibitive of the exercise of State authority are not employed, but the subject is taken possession of."

It is not denied that Congress has so far conferred upon the Interstate Commerce Commission the power to regulate interstate rates as to destroy the jurisdiction of the State courts to pass upon the reasonableness of such rates. The plain language of the United States Supreme Court in *R. R. v. Oil Co,* 204 U. S., 426, placed that matter beyond dispute. But it is asserted that although a State court cannot by its action directly regulate the rate to be charged for an interstate shipment, it can destroy the relation of the value of shipment to the rate charged, as fixed by the tariffs on file with the Interstate Commerce Commission, without encroaching upon the power vested in the Commission by the act to regulate commerce. I think this is doing indirectly the very thing prohibited by the *Oil Co. case.* It is not sufficient, to sustain that position, to say, in this case, that the action is one for negligence, and that the plaintiff has been damaged $285, and if he cannot recover that sum he is without remedy. He has the remedy which he has contracted to accept and which was made the basis of the rate on which his shipment moved. He agreed for a valuable consideration that his remedy should be restricted to the recovery of $100, and he did this with knowledge that the extent of his remedy was determined by the rate of freight, and (240) that for every increase of 20 per cent in rate, the amount which he would be entitled to recover would be increased 100 per cent, as provided by the tariff on file with the Interstate Commerce Commission. It is said that the rates prescribed "are not based upon the assumption that the carrier will not perform its duty." In what other way could the carrier be liable for injury to animals in transportation? Negligence is essential to create liability. The contract of shipment in this case provided that *"should damage occur for which the said carrier may be liable,* the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed for a horse or mule $100, which amount, it is agreed, is as much as such animals as are herein agreed to be transported are worth." The rate charged was $170 for the car-load of mules, which rate was on file with the Interstate Commerce Commission in a tariff containing this provision: "Live stock subject to the following rules, viz.: Rates on live stock will apply when the declared value does not exceed the following: Horses or mules, each, $100. For every increase of 100 per cent or fraction thereof in the declared value there shall be an increase of 20 per cent in rate." The meaning of this provision is plain. It is contemplated that where the shipper accepts a rate based upon the value of the animals as declared, he is restricted to the recovery of such value, regardless of the character

of his claim. The very purpose of this provision of the tariff is to establish a relation between the value of the thing shipped and the rate. This method of rate making not only has the sanction of the Interstate Commerce Commission, but has the approval of the Supreme Court of the United States. In *Hart v. R. R.,* 112 U. S., 331, a contract of carriage, agreeing on the valuation of the property carried, was upheld as "a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives."

Congress has conferred upon the Interstate Commerce Commission the power to regulate rate making in its application to interstate commerce; the declared value of the article shipped is a proper basis
(241) for fixing freight rates; the carrier in the present case has fixed its rates upon such basis and has filed its tariff containing such rates with the Interstate Commerce Commission in strict accordance with the provisions of the act to regulate commerce. The question arises: Has a State power to enforce a greater responsibility than that fixed by the tariff on file with the Commission and made the basis of the rate paid by the shipper? If the State court has no power to pass upon the reasonableness of an interstate rate in the absence of action by the Interstate Commerce Commission, as was declared in the *Abilene Cotton Oil Co. case,* it seems to me that it follows as an unavoidable conclusion that such courts are denied the power to change an interstate rate by altering the relation of the value of the article shipped to such rate.

We must assume that the rates and regulations on file with the Interstate Commerce Commission are reasonable until determined to be unreasonable by the Commission (*R. R. v. Lumber Co.,* 75 N. J. Law, 878), and it is the duty of the State court to enforce such rates and regulations. *Oil Co. case, supra.* It was, therefore, the duty of the Court to restrict the plaintiff's recovery in this action to the valuation which was made the basis of the rate filed with the Commission.

In *Grain Co. v. R. R.,* 12 I. C. C., 418, *Commissioner Harlan* says: "When once lawfully published, a rate so long as it remains uncanceled is as fixed and unalterable, either by the shipper or the carrier, as if the particular rate had been established by a special act of Congress. When regularly published, it is no longer the rate imposed by the carrier, but the rate imposed by the law."

In the present case the carrier charged the shipper $170 to transport a car-load of twenty-six mules from East St. Louis, Mo., to Raleigh, N. C. The rate was based upon the declared valuation of $100 as provided by the tariff. If the shipper had declared a valuation of $285, the valuation of the mule as fixed by the jury, the rate according to the tariff would have been $238 for the car-load. If the judgment is sustained,

the plaintiff has secured the transportation of his car-load of (242) mules for $170, when the published tariff rate is $238. The act to regulate commerce, sec. 6 (as amended in 1906 and 1910), provides that no carrier shall "charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time, nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." The judgment in this case forces the defendant to violate the provisions of this section.

In *R. R. v. Oil Co., supra,* the purposes of the act to regulate commerce are set forth, and *Chief Justice White* says: "It is apparent that the means by which these great purposes are to be accomplished was by placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a reasonable application to all, and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law." After citing cases, the learned *Chief Justice* continues: "When the general scope of the act is enlightened by the considerations just stated, it becomes manifest that there is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and prohibitions against preference and discrimination." One of the important purposes of the act is to insure uniformity and prevent discrimination in freight rates, and certainly any action by the State through its courts which results in destroying such uniformity and creating a discrimination is violative of the act. Uniformity in the application of the established rate will be destroyed if the State courts shall have the power to disturb the relation between the declared value of the article and the rate. A shipper can declare a value of $100 and secure the low rate based upon that value. When the shipment reaches its destination the amount which he will be entitled to recover in case of loss or damage will (243) be submitted to a jury for determination and the declared value will be ignored. A dozen shippers may declare the same value, secure the same rate, and recover a different amount. Uniformity in the application of the rate is clearly destroyed.

This judgment forces a discrimination in favor of shippers whose animals are transported to North Carolina, and against the shipper whose animals are shipped to those States in which the valuation fixed by the contract of shipment is upheld. If North Carolina is the destina-

tion of the shipment, the shipper can declare a value of $100, secure the low rate, and recover ten times that amount if he can prove such damage. The shipper who selects one of the States referred to as the destination of his shipment will be forced to accept $100 for loss or damage to each animal regardless of the extent of his loss. The same result is brought about if the validity of the contract is to be determined by the law of the place of shipment. The amount of damages will be determined by the rules in force in the various States. Elliott on Railroads, sec. 1510; 6 Cyc., 398. If this condition is permitted to exist uniformity will be destroyed and discrimination will take its place.

In *Packing Co. v. United States,* 209 U. S., 57, *Mr. Justice Day,* dealing with a violation of the act by carrying out a contract for a rate after the rate had been changed by publication of a higher rate, said: "The Elkins act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and posted as required by law. It is not so much the particular form by which, or the motive for which, this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

The language of *Mr. Justice Van Devanter* in the case of *Robertson v. R. R.,* 222 U. S., 506, leaves no doubt of the purpose of Congress to confer upon the Interstate Commerce Commission the sole power (244) and duty to regulate all matters relating to the subject of interstate freight rates. It is held in that case that an inquiry into the reasonableness of a rate shall be made by the Commission before resort to the courts. *Justice Van Devanter* says: "When the purpose of the act and the means for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of prescribed standards; and this is so because the existence and exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule that a rate established in the mode prescribed should be deemed the legal rate, and obligatory alike upon carrier and shipper until changed in the manner provided, would be in derogation of the power expressly delegated to the Commission, and would be destructive of the uniformity and equality which the act was designed to effect."

In addition to the authorities already cited, the following cases sup-

port the statement that Congress has conferred upon the Interstate Commerce Commission authority to regulate commerce, including the right to fix and approve rates and regulations governing such rates: *R. R. v. Mugg,* 202 U. S., 242; *McNeill v. R. R.,* 202 U. S., 543; *R. R. v. Coal Co.,* 215 U. S., 481; *Robinson v. R. R.,* 222 U. S., 506; *R. R. v. Kirby,* 225, U. S. 155.

In *R. R. v. Mugg,* 98 Tex., 353, it was attempted to base a right of recovery upon the misrepresentation of an agent in quoting an interstate rate. The Texas court upheld the right to recover damages, notwithstanding the fact that the rate quoted was the rate published and on file with the Interstate Commerce Commission. The decision was put upon the ground that the question of rates was not involved, and that the action was based upon the misstatement of the agent, which induced the shippers to make contracts which resulted in loss. Upon appeal to the Supreme Court of the United States, the judgment (245) of the Texas court was reversed. *R. R. v. Mugg, supra.*

Hughes v. R. R., 191 U. S., 477, is said to be an authority in support of the position that Congress has not legislated on the subject-matter of this action. That decision was rendered in 1902. I have examined the act to regulate commerce as it was in force at that time, and find that it has since been extensively amended, and the power of the Interstate Commerce Commission has been enlarged. This was accomplished by amendments in 1906 and in 1910. The enlargement of the scope of the act and the recent decisions of the Supreme Court of the United States, considered in connection with the facts of this case, lead me to conclude that the *Hughes case* is not to be regarded as authority against the position that Congress has now taken control of the subject of rate making and charging, and conferred upon the Interstate Commerce Commission the power to pass upon questions relating to that subject. Each amendment of the act was made with the view of extending the jurisdiction of the Commission over interstate commerce, and the language of the entire act leaves no doubt of the purpose of Congress to have one tribunal to pass upon the intricate problems of rate making. In this way alone can uniformity be secured and discrimination prevented.

The scope of the power of the Interstate Commerce Commission is illustrated by section 15 of the act, by the provisions of which the Commission is given authority, among other things, to investigate any "regulations or practices whatsoever of such carrier or carriers subject to the provisions of this act" as are alleged to be "unjust and unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act"; and "the Commission is hereby authorized and empowered to determine and prescribe

. . . what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease or desist from such violation to the extent to which the Commission finds the same to exist."

Under the provisions of this last section the Interstate Com-
(246) merce Commission has assumed jurisdiction to determine the validity of a stipulation in a bill of lading fixing the basis upon which damages should be determined in case of loss or damage. In Shafer *v. R. R.*, 21 I. C. C., 8, the complainant alleged that a provision in the uniform bill of lading used by the defendant that fixes the amount of damages for which a carrier is liable at the invoice value of the property at a point of shipment is unjust and unreasonable and prevents the defendant from paying to the complainant just compensation for the loss of a carload of wheat which the defendant misdelivered to another party; and complainant prayed that an order be entered directing the defendant to pay the value of the property at point of delivery. The Interstate Commerce Commission not only assumed jurisdiction, but held that the stipulation of the bill of lading was reasonable and valid. The report of the Commission quotes the above parts of section 15, and says: "Under the law, therefore, the Commission has authority to consider and determine the reasonableness of regulations and practices in respect of issuance, form, and substance of bills of lading, and to determine and prescribe what regulations and practices are reasonable."

It is said in the opinion of the Court that the effect of the Hepburn Act is to prohibit agreements fixing the value of the article shipped and restricting liability to such value in case of loss or damage by negligence. The Supreme Courts of Massachusetts, New York, and New Jersey have taken the opposite view. The cases are well considered, and I can add nothing to what is said by the learned judges of those courts. *Bernard v. Express Co.*, 205 Mass., 254; *Greenwald v. Barrett*, 199 N. Y., 170; *s. c.*, 115 N. Y. Supp., 311; *Travis v. Wells-Fargo Co.*, 79 N. J. Law, 83.

In *Travis v. Wells-Fargo Co.* it is held: "In an action against a common carrier for goods lost in transit, a receipt was put in evidence, in which receipt the defendant limited its liability to the sum of $50, unless a greater value was stated by the shipper. The trial court held that section 20 of the Interstate Commerce Act of 1906 (the Hepburn
Act) prohibited a common carrier from so limiting its liability by
(247) contract. *Held*, that this was error, as that section of the Federal statute only prohibited any contract which exempted such carrier from liability from losses caused by a connecting carrier to which the defendant had delivered the goods." In *Greenwald v. Barrett* it is held by the Supreme Court of Appeals of New York that, "The language of

the act of Congress commonly known as the Hepburn Act, being an amendment to section 20 of the Interstate Commerce Act, does not abrogate the right of common carriers either to regulate their charges for carriage by the value of the goods, or to agree with the shipper upon a valuation of the property carried."

I conclude from the authorities referred to that Congress has conferred upon the Interstate Commerce Commission the power to regulate rates on interstate commerce; that a rate established and on file with the Commission is presumed to be reasonable until declared by the Commission to be otherwise; that such rate must be strictly adhered to by the shipper and carrier as long as it remains in force; and, finally, that a State court is without jurisdiction to interfere directly or indirectly with an interstate rate properly established and published and on file with the Interstate Commerce Commission as provided by the act to regulate commerce.

WALKER, J., dissenting: I concur in the dissenting opinion of *Justice Brown*. The Court now reverses its former rulings in *Jones v. R. R.*, 148 N. C., 580 (decided by a unanimous Court), and *Winslow v. R. R.*, 151 N. C., 250, and, as I think, *Gardner v. R. R.*, 127 N. C., 293, which cases are clearly sustained, in principle, at least, by *Mitchell v. R. R.*, 124 N. C., 246; *Selby v. R. R.*, 113 N. C., 588, and *Everett v. R. R.*, 138 N. C., 71, in the last of which cases *Justice Hoke* said, when addressing himself to this subject: "Such agreements are upheld where the carrier being without knowledge or notice of the true value, the parties agree upon a valuation of the particular goods shipped, approximating the average value of ordinary goods of like kind, and make such valuation the basis of a just and reasonable shipping rate." The cases cited by the Court, in its opinion, did not repudiate or even modify the general rule we had adopted, after much considera- (248) tion and discussion of the matter, but were simply decided upon the ground that the rule was not applicable to their peculiar and exceptional facts. The stipulation in the bill of lading, as to value, is not any attempted evasion by the railroad company of its liability for negligence as a carrier, which still remains, as is said in *Kime v. R. R., post,* 457, but it is merely a legitimate, reasonable, and lawful arrangement for the liquidation of the quantum of damages, upon a just basis, should a loss occur by the negligence of the carrier, for it does not relieve him of any obligation to exercise diligence, fidelity, and care. It is not, by any means, unusual for parties to agree beforehand upon the extent of the recovery in the way of stipulated damages, where there is a breach of contract, and such agreements have been upheld by the courts, even if the breach is intentional or willful, or amounts technically, as in this

case, to a tort. Our former and well-considered decisions, now overturned, were in perfect harmony with the view of the Supreme Court of the United States in *Hart v. R. R.*, 112 U. S., 331, in which it was held that where a contract of carriage, signed by the shipper, is fairly made with a railroad company, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. It will be seen from this statement of the law that the liability of the carrier for negligence, in the receipt, transportation, and delivery of the goods entrusted to him, is in no degree diminished, but the clause by which the value of them is fixed is for the twofold purpose of determining what is a reasonable tariff rate and of protecting the carrier against imposition and fraud, as well as to predetermine the damages in case of a loss. There is nothing unlawful or oppressive in this arrangement, and no attempt to take advantage of the shipper, but, on the contrary, the stipulation prevents the shipper from taking
(249) any advantage of the carrier by a false representation as to value. The charge for carriage must be settled beforehand by some fixed standard.

In *York Co. v. R. R.*, 70 U. S. (3 Wall.), 107, the same Court held that "A common carrier may prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter." And in *R. R. v. Lockwood,* 84 U. S. (18 Wall.), 357, the Court, while recognizing fully the general rule that a common carrier cannot lawfully stipulate for exemption from responsibility if the exemption is not just and reasonable, and that it is not so for a common carrier to stipulate for his exemption from responsibility for the negligence either of himself or his servants, nevertheless decided it to be "just and reasonable that he should not be held responsible, in law, for losses happening by sheer accident, nor chargeable for valuable articles liable to be damaged, unless apprized of their character or value."

We have referred to the law as thus stated by courts entitled to our highest respect, and whose decision on any particular question of general law, though not conclusive upon us, is not to be lightly considered or disregarded, but should have the greatest weight with us in deciding the same or similar questions, for the purpose of showing clearly the difference between *Kime v. R. R., post,* 457, and this case, and it is emphasized and accentuated in this passage taken from the opinion of *Justice*

Blatchford in *Hart v. R. R., supra:* "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is stopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of (250) the freedom of contracting, and thus conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

In *Kime's case* we were discussing the right of the carrier to limit his liability, at common law, as an insurer, and also for negligence. We held that he might rid himself of his liability as insurer by notice given in advance to the shipper, if the agreement made in response thereto is reasonable and founded upon a fair consideration and conforms to the sound public policy by which the obligations of the carrier to the public are settled (6 Cyc., 396), but that he cannot stipulate for an exemption from responsibility for a loss of goods caused by his negligence in their transportation. The question decided in this case was not presented, as the judge instructed the jury, in *Kime's case,* that the stipulation in the bill of lading, that the carrier assumed liability only to the extent of the agreed valuation, which was $100 for each horse in the car-load, was valid, and that they should assess plaintiff's damages accordingly. He did not appeal, and therefore could not avail himself in this Court of any error in the charge, if there was any, nor could defendant, as it was in its favor, and I then thought, and still think, that there was none. But the question as to the validity of the clause which provides for the payment of a stipulated amount or the agreed value of the goods was not involved in that case at all, the only issue being as to the negligent conduct of the defendant railroad company in the carriage of the horses from Richmond, Va., to Burlington, N. C., and we held that the stipulation in the bill of lading as to the examination of the car by the shipper did not so far limit the responsibility of the defendant as to relieve it from the exercise of due and proper care in the transportation, and that loading and transporting the horses in a close car, without any ventilation, and almost air-tight, which caused them to be smothered, so that they staggered as they were being unloaded at Burlington and had to be assisted from the car, was itself gross, if not wanton, negligence. The

(251) distinction is clearly to be seen between such a case, where the attempt of the carrier was to limit his liability for a negligent transportation, and a clause fixing the amount of the recovery or quantum of damages if the horses were injured by such negligence, and obtaining a considerable reduction in the freight charges by a fair and optional agreement as to value.

I have said this much in the case, not for the purpose of vindicating our former opinions at the present time, but to show how unlike this case is that of *Kime v. R. R., post,* 457, and in which, at its request, I expressed the views and stated the conclusions of the Court. I may, perhaps, have occasion to discuss the other question later, when I will attempt to show, by reason and, as I think, by the great weight of authority, that the view we formerly entertained is the correct one. Nor do I intend, now, to dwell upon the remaining question, viz., whether by the recent amendments to the Interstate Commerce Act the Congress has not made the question of fixing the rate by an agreed valuation, or upon such a valuation as its basis, one of Federal law, so that when the schedules are filed with the Interstate Commerce Commission that body is vested with the power to determine as to the reasonableness and validity of the rates, it having actually decided that such an agreement as is now in question is a valid one and that a lawful rate is established thereby. I am thoroughly satisfied, in all these respects, with the able and learned opinion of *Justice Brown,* in which I have concurred, and which to my mind presents unanswerable arguments in support of our views. If it is a Federal question, the decision of the Court in *Hart v. R. R.* and in *Hughes v. R. R.,* cited in the principal opinion in this case, in which the Court adheres to its former rulings, are controlling upon us, however much we may differ with that Court in its reasoning and conclusion.

NOTE.—The "Cummins" act, ratified 4 March, 1915, makes the Federal law, in conformity to what is here held in the majority opinion, that the common carrier cannot by contract restrict the liability for damages caused by its negligence.

Cited: Stehli v. Express Co., post, 495, 508; *Cooper v. R. R.,* 161 N. C., 401; *Horse Exchange v. R. R.,* 171 N. C., 72.

(252)

R. E. HERRING ET AL. v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 November, 1912.)

APPEAL by defendant from *Carter, J.*, at August Term, 1912, of SAMPSON.

Fowler & Crumpler and C. M. Faircloth for plaintiff.
H. A. Grady and Davis & Davis for defendant.

ALLEN, J. The decision in *Mule Co. v. R. R., ante,* 215, controls this, and upon that authority the judgment is affirmed.

No error.

J. M. PACE MULE COMPANY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 9 October, 1912.)

1. Carriers of Goods—Injury to Stock—Negligence—Evidence—Nonsuit.

In an action for damages against a railroad company for the negligent injury to two mules in a carload shipment, which resulted in their death, there was evidence tending to show that the mules were "tired and droopy" on their arrival at destination, and not in good condition; that they died on the night following the day of their receipt, were dissected, and their bodies were discovered to have been bruised, after removing the skin, and their internal organs in a state of congestion and decomposition. The shipment had been receipted for by the initial carrier as in good condition: *Held*, a motion to nonsuit was properly disallowed, and the issue as to defendant's negligence properly left to the jury.

2. Carriers of Goods—Negligence—Expert Evidence—Questions of Fact—Assignment of Claim.

In an action against a common carrier for damages for the negligent injury to two mules in a carload shipment, resulting in their death, testimony of an expert veterinarian, who had made a *post-mortem* examination and found them bruised and in a bad condition internally, that, from the examination, in his "opinion the mules had been jammed up in the car," is incompetent as an expression of an opinion as to a fact of which he had no personal knowledge and which was involved directly in the issue. *Summerlin v. R. R.*, 133 N. C., 551, cited and approved. As to whether the plaintiff can recover for one of the mules sold to another and replaced by him, without evidence that the cause of action had been assigned, *Quœre.*

(253) APPEAL by defendant from *Cline, J.*, at May Term, 1912, of WAKE.

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

S. Brown Shepherd for plaintiff.
Murray Allen for defendant.

WALKER, J. This is an action to recover the value of two mules alleged to have been injured in the course of transportation from East St. Louis, Ill., to Raleigh, N. C., by defendant's negligence, and to have died from said injuries the day after they were delivered to plaintiff. The jury returned the following verdict:

1. Was plaintiff's stock injured by the negligence of the defendant Louisville and Nashville Railroad Company, as alleged in the complaint? Answer: No.

2. Was the plaintiff's stock injured by the negligence of the defendant Seaboard Air Line Railway, as alleged in the complaint? Answer: Yes.

3. Did the plaintiff comply with the contract of shipment as to giving of notice to the railroad company as to his claim for damages? Answer: Yes.

3½. Could the plaintiff, by an examination of the mules in question before their removal from the depot, have discovered any injury to them? Answer: No.

4. What damages, if any, is plaintiff entitled to recover? Answer: $470.

The mules were two of a car-load of twenty-six shipped to plaintiff, and were accepted and a receipt given for them as in good condition, it appearing that the injuries were not then discoverable upon inspection.

(254) The mules were received at Raleigh from defendant on 23 February, 1911, and one J. J. Womble purchased a pair of them from plaintiff, and had them driven the next day to Apex, where one of them died the night of 24 February. Plaintiff gave Womble another mule for the one that died. On 24 February another mule died from his injuries, in the lot of plaintiff at Raleigh. When the mules were received at Raleigh by plaintiff they seemed to be "tired and droopy" and their general condition was not good, though there was nothing in their appearance to indicate that there had been any permanent injury to them, and certainly none likely to result fatally. The mule sold to Womble, which died, was cut open and found to be internally injured. The other, which died in plaintiff's lot in Raleigh, was dissected and afterwards examined by Dr. McMackin, an expert veterinarian, who found, after the mule's skin had been removed, that his body was badly

bruised and his internal organs were in a state of congestion and decomposition. He was asked, substantially, the following question by plaintiff's counsel: State your opinion as to the cause of the mule's death, if you have one, based upon your knowledge and experience and your *post-mortem* examination of him. He answered: "My opinion is that the mule was jammed up in the car." This evidence was improperly admitted. The question required him to testify not only as to the condition of the mule when he examined him, which was proper, but to go further and give his opinion as to the existence of a fact which was almost, if not quite, the equivalent of the one directly involved in the issue. It would have been competent to have asked him if the death of the mule could have been caused by being jammed in the car, or, if the jury should find from the evidence that the mule had been jammed in the car and had received no other injury, could the death, in his opinion, be attributable to the jamming as its cause—that is, was it sufficient of itself to cause the death. A question similar to the one admitted in this case by the court was asked in *Summerlin v. R. R.*, 133 N. C., 551, and excluded by the court, and we sustained the ruling, upon the ground that the witness was called upon to state a fact of which he had no personal or competent knowledge, and not merely the opinion of an expert. The opinion of the witness should be based upon facts admitted or found, or upon his personal knowledge, and not upon (255) the assumption of the fact. The question should, therefore, be hypothetical, or rather supposititious, in form, following the precedents as settled by our decisions. *S. v. Bowman,* 78 N. C., 509; *S. v. Cole,* 96 N. C., 258; *S. v. Wilcox,* 132 N. C., 1120; and *Summerlin v. R. R., supra.* The Court, in *Hitchcock v. Burgett,* 38 Mich., 501, held that "a physician cannot be asked his opinion as to the cause of an injury, judging merely from the condition in which he found the patient, and without any knowledge as to how it took place." See, also, *National Union v Thomas,* 10 App. Cases (D. C.), 277; *Carpenter v. E. T. Co.,* 71 N. Y., 574; *Van Zandt v. Ins. Co.,* 55 N. Y., at p. 179; *Lumber Co. v. R. R.,* 151 N. C., 217, and cases cited at page 222.

We conclude that there was error in admitting the question and answer, over the objection of the defendant, which was made in the proper way and in due time.

A question was raised as to the right of plaintiff to recover for the loss of the mule sold to Womble, and which died in his possession. The plaintiff contends that by giving Womble another mule in the place of the one that died, it acquired the right to sue for the value of the latter, while the defendant says that the act of giving another mule to Womble was purely voluntary and conferred no new right on the plaintiff, in the absence of an assignment of the cause of action by Womble to

the plaintiff. As in the verdict all the questions of fact and law, including the damages, are so blended that the error we have noted permeates the entire record, it becomes unnecessary to decide this question, which is not free from difficulty. Besides, it may be that there was some express understanding and agreement between the parties, with respect thereto, which may appear at the next trial, and an opinion upon the meager facts now presented may prove to be still more unnecessary.

We cannot say that there was not more than a scintilla of evidence to sustain the plaintiff's case, upon the motion to nonsuit. There was no proof of any intervening physical cause sufficient to account for the death of the mules, and the condition of the bodies and the inter-
(256) nal organs, which was disclosed by the *post-mortem* examination, indicated that they must have been subjected to very rough handling in some way. It was a question for the jury whether upon all the facts and circumstances the injuries to the mules could fairly be imputed to the negligence of the carrier in their transportation.

We order a new trial for the error in regard to the testimony of Dr. McMackin, the expert witness.

New trial.

Cited: Herring v. R. R., ante, 252; *Ridge v. R. R.,* 167 N. C., 528.

FANNIE H. THOMPSON v. MARCELLUS SMITH ET AL.

(Filed 9 October, 1912.)

1. Wills—Devises—Advancements—Definition.

An advancement is an irrevocable gift *in presenti* of money or of property, real or personal, to a child by a parent, to enable the donee to anticipate his inheritance or succession to the extent of the gift.

2. Wills—Devises—Advancements—Intent—Interpretation of Statutes.

Property transferred or money paid by the parent to the child is *prima facia* an advancement, but the presumption thus raised may be rebutted by parol, even when there is a recital of a consideration in a deed, by showing that the parent had a contrary intent at the time; and this rule as to the intention of the testator is not altered by our statute. Revisal, secs. 133 and 1556, Rule 2. *Hollister v. Atmore,* 58 N. C., 373, cited and applied.

3. Reference—Findings—Appeal and Error—Wills—Advancements—Intent—Practice.

The findings of fact by a referee, upon the consideration of the evidence and approval of the trial judge, when there is some evidence to support

them, will not be reviewed on appeal; and on the appeal taken, in this case, upon the question as to whether a gift by the testator was an advancement, being one of fact as to the intention of the testator, the judgment below is affirmed.

APPEAL by plaintiff from *Webb, J.*, at February Term, 1912, of WAKE.

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

J. H. Fleming for plaintiff.
Bart M. Gatling for defendant.

WALKER, J. This case was before us at a former term and is reported in 156 N. C., 345. We then held that the presiding judge committed an error in affirming the referee's findings of fact, merely because there was, in his opinion, some evidence to support the same, but without himself passing upon the evidence and its probative force, and exercising his own judgment as to whether the facts so found had been established by the proof. The case was remanded, to the end that it might be heard in accordance with this rule. It is now before us upon the findings of fact and conclusions of law of the referee, Mr. John W. Hinsdale, Jr., which have, upon due consideration of the evidence and the law, been confirmed by *Webb, J.*

The matter as now presented to us seems to be largely, if not altogether, a question of fact. The action was brought by the plaintiff, Fannie H. Thompson, heir at law and distributee of her deceased father, J. R. Smith, against the defendant, Marcellus Smith and A. M. Thompson, his administrators, for an accounting, and the controversy related principally to the question whether certain lands which the father divided among his children were to be regarded as gifts or advancements, and if the latter, the prayer is to have them account for the value thereof, and for the value of the use and occupation of the lands before the title thereto was completely vested by conveyances.

An advancement is said to be an irrevocable gift *in presenti* of money or of property, real or personal, to a child by a parent, to enable the donee to anticipate his inheritance or succession to the extent of the gift. 14 Cyc., 162. It is thus defined by *Chief Justice Pearson* in *Hollister v. Attmore,* 58 N. C., 373: "An advancement is a gift by a parent to a child, of a portion of his estate, in anticipation of the whole or a part of the share to which the child would be entitled at the death of the parent, under the statute of distribution, in the event of his (258) dying intestate." And by *Chief Justice Ruffin* in *Meadows v. Meadows,* 33 N. C., 148: Advancements are understood to be gifts of

money or property for the preferment and settlement of the child in life, and not such as are mere presents of small value, or such as are required for the maintenance or education of the child, which the law throws on the father, at all events, or such small sums as are given to the child to defray the expenses of the ordinary pleasures and amusements of youth in their rank of life. It has been said that "if a son has deserved a good turn at his father's hands, this is no advancement, but a recompense of that which was formerly deserved." *Hollister v. Attmore, supra,* at p. 375. See *Tart v. Tart,* 154 N. C., 502.

If the lands so transferred by J. R. Smith to his children are not advancements, it is conceded that they were absolute gifts, and the donees are not, therefore, accountable for their value or the value of their use.

The doctrine of advancements is based on the idea that parents are presumed to intend, in the absence of a will, an equality of division among their children; hence a gift of property or money is *prima facie* an advancement, that is, property transferred or money paid in anticipation of a distribution of his estate; but the presumption thus raised may surely be rebutted, and parol evidence is competent for that purpose, even though there is a recital of the consideration in the deed or other instrument of conveyance. *Griffin, ex parte,* 142 N. C., 116; *James v. James,* 76 N. C., 331.

Making proper allowance for the burden of proof, as fixed by the presumption arising out of the nature or circumstances of the gift, the question of whether there was a clear gift, a loan, or an advancement, is to be settled by ascertaining what was the intention of the parent. Thornton on Gifts and Advancements, 591; *Melvin v. Bullard,* 82 N. C., 53; *Harper v. Harper,* 92 N. C., 300; *Kiger v. Terry,* 119 N. C., 456. This rule as to the intention of the testator is not altered by our statutes. Revisal, secs. 133 and 1556, Rule 2. So that, as the question is to be determined by the intention of the parent at the time of the transfer, it was, in this case, largely one of fact, which the referee and the

(259) judge have settled against the plaintiff, so far as the division of the lands is concerned, and as to the personalty, they have properly allowed the plaintiff the sum of $50, which they found as a fact was required to make an equal distribution among the children. There is no question of law involved. We will not review the referee's findings of fact, which are settled, upon a consideration of the evidence, and approved by the judge, when exceptions are filed thereto, if there is some evidence to support them. *Boyle v. Stallings,* 140 N. C., 524; *Harris v. Smith,* 144 N. C., 439, and cases cited; *Thornton v. McNeely, ibid.,* 622; *Frey v. Lumber Co., ibid.,* 759.

There is an exception as to the payment of a note for $350, given by defendant Marcellus Smith to his father, J. R. Smith. The referee and

judge found that this note had been paid by the maker to his father, the plaintiff having contended and offered much and very strong and persuasive testimony to show that it had not been. The referee and judge might very well have found as a fact that the payments, though alleged by Marcellus Smith to have been made by him, were not in truth so made, and such finding would have been fully supported by the evidence, but this exception comes within the same rule we have just stated and applied to the other branch of the case, and the finding must stand, as we will not review it. We concur with the referee and judge in their finding of fact, that the transfers of land were clear gifts, for the purpose of equality in the division of his real estate by the donor among his children, and not advancements, and we can only say, as to the note, that plaintiff was merely unfortunate in not being able to convince the learned judge and referee that it had not been paid. In both instances, though, the plaintiff must abide by their decision as to the facts, and this overrules both exceptions.

There is no error in the case, and we, therefore, affirm the judgment. Affirmed.

Cited: McCullers v. Cheatham, 163 N. C., 63.

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(260)

NORVELLA McKAY, ADMINISTRATRIX, KATE HOWELL, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 16 October, 1912.)

Railroads—Negligence—Fires—Wrongful Death—Contributory Negligence—Apprehension of Loss—Evidence—Questions for Jury.

In an action against a railroad company for damages for the negligent killing of plaintiff's intestate, the court may not hold as a matter of law that the plaintiff's action is barred by the contributory negligence of the intestate, when the evidence tends to show that the intestate was burned to death while endeavoring to extinguish an extensive fire caused by negligence in the operation of the defendant's locomotive, on lands adjoining her own, and it appears that she had reasonable apprehension that it would spread to her own lands and destroy her dwelling thereon situated; and in this case it is held that evidence is sufficient to be submitted to the jury on the issue as to contributory negligence.

APPEAL by plaintiff from *Peebles, J.,* at April Term, 1912, of CUMBERLAND.

The plaintiff alleged that the defendant was a corporation doing and carrying on the business of a railroad and a common carrier, and that

on 30 March, 1910, it ran its locomotive on its right of way and negligently permitted coals and sparks of fire to be emitted from its locomotive, and that said sparks and fire ignited combustible matter which it had allowed to accumulate on its right of way, and that the fire communicated to the lands and premises of one Kate Howell, who, while prudently and carefully attempting to stay the progress of the fire and prevent the destruction of her property and dwelling, caught on fire and was burned to death, and the plaintiff alleges damages in the sum of $25,000.

The defendant, answering the complaint, denied that it was guilty of any negligence, as alleged in the complaint, and alleged that if plaintiff's intestate was injured, she was injured by her own negligence in attempting to put out fire not upon her own land, where no property in which she was interested or owned was in danger, and her own negligence contributed to and was the approximate cause of injury.

The following issues were prepared for submission to the jury:

(261) 1. Was the injury and death of the intestate of the plaintiff caused by the negligence of the defendant, as alleged in the complaint? Answer: .....

2. Did the intestate by her own negligence contribute to her death? Answer: .....

3. What damage is the plaintiff entitled to recover, if any? Answer: .....

At the close of plaintiff's evidence the court stated to plaintiff that he would charge the jury, if they were satisfied by the greater weight of the evidence that the fire started on the defendant's right of way, to answer the first issue "Yes"; otherwise, "No." If they believed the evidence, to answer second issue "Yes." In deference to this intimation, plaintiffs having duly excepted, submitted to a nonsuit and appealed.

H. L. Cook for plaintiff.
Rose & Rose for defendants.

HOKE, J., after stating the case: There was evidence tending to show that intestate lived alone in a cabin on a wooded tract of land in which there was a small clearing or two, and that on 20 March, 1910, said to be Wednesday, a fire, originating on defendant's right of way, and negligently started from one of the company's trains, burned over the intervening lands towards the intestate's property and partly over her own land. That it proved to be an extensive fire, and several of the neighbors at different places were engaged in trying to extinguish it. One of them heard the intestate cry out on Thursday morning, but was unable to go to her because engaged in endeavoring to save his own property.

That on Friday or Saturday morning the dead body of the intestate was found on a path about the dividing line where the fire was approaching her own from Colonel Broadfoot's adjoining tract. That all the clothing was burned off except the shoes, and a pine top lying near, half beaten or worn out, and her tracks along the path and some burning shreds of her clothing along the edge of the fire gave indication that she had caught fire while engaged in the effort to beat back the fire and (262) prevent it from making further progress towards her land and dwelling. On these the facts chiefly relevant to the second issue, we think there was error in the ruling of the court.

While our decisions would seem to make some distinction between the risks allowable when human life is at stake and those when the destruction of property is presently threatened, all of the authorities, here and elsewhere, are to the effect that it is both the right and duty of an owner to make every reasonable endeavor to save his property from destruction, and that in passing upon his conduct full allowance shall be made for the natural impulse prompting the effort and for the emergency under which he acts. *Norris v. R. R.*, 152 N. C., 515; *Burrett v. R. R.*, 132 N. C., 261; *Rexter v. Starin*, 70 N. Y., 601; 29 Cyc., 524. *Pegram v. R. R.*, 139 N. C., 303, cited and to some extent relied upon by defendant, does not contravene, but is in full recognition of the general principle as stated, the case only deciding on this question that "where an employee who had escaped from a burning building and was in a place of safety voluntarily returned to same in an effort to recover his employer's property, an instruction that imposed only one limitation upon his right to recover, that he must not act recklessly, was erroneous." Applying the controlling position as sustained by the authorities cited, the court below was clearly not justified in holding as a matter of law that the intestate was guilty of contributory negligence, the facts in evidence tending as they do to prove that she was burned in the effort to beat back a fire which threatened her property and even her home. And to show that this last apprehension was not groundless, it further appears that the same fire, though delayed for a time probably by a small clearing which intervened, did subsequently reach her yard, and the dwelling was only saved by the efforts of her neighbors.

For the error indicated plaintiff is entitled to a

New trial.

(263)

C. P. WESTON AND RICHMOND CEDAR WORKS v. J. L. ROPER LUMBER COMPANY.

(Filed 11 September, 1912.)

1. Deeds and Conveyances—County of Registration.

Generally, a deed to land must be registered in the county where the land it conveys is situated. Revisal, sec. 980.

2. Same—Probate and Registration—Validating Acts—Repeal—Interpretation of Statutes.

Whether section 3867 of The Code and section 5453 of the Revisal repeal the provisions of the Laws of 1858-9, ch. 18, and of the Revised Code, ch. 37, sec. 29, which validate certain void and defective probates and registrations of conveyances of land in the wrong county, *Quœre.*

3. Deeds and Conveyances—Probate—Registration—Wrong County—Interpretation of Statutes.

Section 1009 of the Revisal expressly refers to and validates the probate and registration of conveyances in one county of land situated in another, which have been taken by the courts of pleas and quarter sessions, and such probates and registrations come within the letter as well as the spirit of the act.

4. Same.

Section 988 of the Revisal should be construed with reference to chapter 18, Laws of 1858-9, from which it was taken, and applies by implication to conveyances of lands.

5. Same—Repeal—Exceptions.

The Code, sec. 3867, and Revisal, sec. 5453, provides that the respective clauses therein shall not "affect any act done, or any right accruing, accrued, or established," in their repeal of former public laws, or laws of a general nature. Hence the provisions of chapter 18, Acts of 1858-9, and of the Revised Code, sec. 29, validating the registration in the right county, by certified copy of a deed which had been registered in the wrong county in the manner specified, have not been repealed; and, if otherwise, registration in like manner could be made under section 1599 of the Revisal.

6. Deeds and Conveyances—Probate—Registration—Wrong County—Remedial Acts—Interpretation of Statutes.

Statutes intended to correct and remedy errors of registration and of probate of deeds to lands in the wrong county are highly remedial and should be liberally construed, so as to embrace all cases clearly within their scope, and is a proper exercise of legislative power, favored by the courts.

7. Appeal and Error—Nonsuit—Scope of Inquiry.

Upon a nonsuit taken, in this case, in deference to the decision of the trial judge that sufficient evidence of the loss of the original deed in the plaintiff's chain of title to the lands in controversy had not been intro-

duced to let in parol evidence of its execution and contents, and it appearing that the exclusion of the deed was the real question involved, it is *Held* that the reason for the nonsuit should extend to the entire adverse ruling.

APPEAL by plaintiffs from *Bragaw, J.,* at January Term, (264) 1912, of PASQUOTANK.

This is an action to recover a tract of land in Pasquotank County. The only question now presented is whether a deed from Enoch and Fred B. Sawyer to Cary Weston and Joseph Seguine, dated 3 February, 1820, and offered in evidence by the plaintiff, was properly excluded by the court. The deed was proven in the court of pleas and quarter sessions of Camden County, and recorded on 3 April, 1821, in the office of the register of deeds of that county. A duly certified copy of the registry of this deed was, on 29 January, 1910, ordered to registration by the Clerk of the Superior Court of Pasquotank County and recorded by the register of deeds in said county, 21 April, 1910. This deed was a necessary link in the plaintiff's chain of title. The court having excluded the deed from the evidence, and having held there was no sufficient proof of the original, the plaintiffs excepted to the ruling, submitted to a nonsuit, and appealed.

Winston & Biggs, Ward & Thompson, and Meekins & Tillett for plaintiff.

W. B. Rodman, W. M. Bond, and A. D. MacLean for defendant.

WALKER, J., after stating the case: The general rule undoubtedly is that a deed must be registered in the county where the land it conveys is situated, registration taking the place of livery of seizin, attornment, or other ceremony which the law formerly required to pass title. Rev. Stat., ch. 37, sec. 1; Rev. Code, ch. 37, sec. 1; Revisal (1905), sec. 980. But as probates were sometimes taken by officers who (265) had mistaken their powers, or who, having the power, had exercised it in the wrong way, and because deeds, owing to the uncertainty as to the boundary lines of counties, and perhaps for other reasons, had, in many instances, been registered in the wrong counties, the Legislature, with its usual wisdom, deemed it proper to validate such void or defective probates and registrations by a series of enactments, many of which will be found in the Revisal of 1905.

The Laws 1858-9, ch. 18, as well as the Rev. Code, ch. 37, sec. 29, had provided for just such a case as we have before us; but the defendant's counsel contend that as they were omitted from The Code of 1883 and the Revisal of 1905, and as the plaintiffs had not caused the registration in Pasquotank County of a certified copy of the registry in Camden County until 1910, they lost their right, under those acts, to

have the deed registered in the former county, where the land lies, The Code, by section 3867, and the Revisal, by section 5453, repealing all public and general statutes not contained therein; but by section 3868 of The Code, and section 5454, such repeal does not "affect any act done, or any right accruing or accrued or established, or any suit or proceeding had or commenced in any case before the time when such repeal shall take effect"; and it may, perhaps, admit of doubt, under those sections—though we do not decide the question or intimate any preferential opinion in regard to it—whether it was intended that The Code and Revisal should operate as a repeal of the act of 1858-9 and the previous enactment in chapter 37, sec. 29, of the Revised Code.

It is sufficient for our present purpose that we consider the Revisal of 1905, sec. 1009, which provides that "Wherever the judges of the Supreme or the Superior Courts, or the clerks or deputy clerks of the Superior Courts, or courts of pleas and quarter sessions, mistaking their powers, have essayed previously to the first day of January, 1889, to take probate of deeds or any instrument required or allowed by law to be registered, and have ordered said deeds registered, and the same have been registered, all such probates and registrations so taken and had are validated." It must be conceded that our case is embraced by the words or terms of this statute, and being within the letter, is it also (266) within the spirit of the law? It is evident from the general scope of all the legislation upon this important subject, that it was intended to ratify and validate what had erroneously been done by officials having general or special powers of probate and registration, so that the essence of what was done should not be sacrificed to the form of doing it, and to save rights of property where no substantial departure from legal requirements appeared, but merely an irregularity which could be cured without injury to the rights of others. The object of probate and registration in the county where the land lies was intended to give notice to creditors and purchasers for value, or others whose rights might otherwise be seriously and unjustly impaired by the deed, and this idea is emphasized in the act of 1885, ch. 147; Revisal, sec. 980, which differs somewhat in phraseology from prior enactments relating to the same subject, viz.: Laws 1715, ch. 7; Rev. Statutes and Rev. Code, ch. 37, sec. 1. A deed is good and valid between the parties thereto without registration, and may be proved on the trial as at common law. *Warren v. Willeford,* 148 N. C., 474; Pell's Rev., 980 and note.

In view of these settled principles, we may the more easily construe section 1009 of the Revisal, with reference to the registration of a deed in the wrong county, upon a probate taken according to law, or which, though originally void, has been validated by the Legislature; but before doing so, one position of the defendant requires attention. It is argued

by counsel that section 1009, which was taken from the Laws 1871-2, ch. 200, as amended by Laws 1889, ch. 252, and Laws 1891, ch. 484, does not refer to probates taken by the county courts, but to those of the clerks of said courts; but, in our opinion, the probates of the county courts were intended to be validated. The phraseology and punctuation, as well as the grammatical construction, of the statute, lead us to that conclusion. 36 Cyc., 1117. If the other meaning had been intended, the preposition "of" would have been inserted before the words "courts of pleas and quarter sessions." The section also validates registrations made upon such probates. It is provided by Revisal, sec. 988, that "A duly certified copy of any deed or writing, required or allowed to be registered, may be registered in any county; and the registry (267) or duly certified copy of any deed or writing when registered in the county where the land is situate may be given in evidence in any court of the State." This section is taken from Acts of 1858-9, ch. 18, and while its meaning, as it appears in the Revisal, is not very clear, when we refer to the original act and consider its context, we find no serious difficulty in construing it. The act of 1858-9 recites that wills, deeds, and other written instruments had been recorded in the wrong counties, and the act was passed to remedy the mischief by allowing certified copies of wills, deeds, and other writings thus erroneously registered to be recorded in the proper counties. This is expressly provided as to wills by the original act, and by clear implication the same rule is extended to deeds. But Rev. Code, ch. 37, sec. 29, provided that any deed for land, made prior to the year 1830 and registered in any county where any part of the land is situated, or in any adjoining county, or a copy of such deed duly certified by the register of deeds of the county wherein it was recorded, may be registered in the proper county. This section is not in The Code of 1883 or the Revisal of 1905, and counsel of defendant contend that it is, therefore, repealed by section 3867 of The Code and section 5453 of the Revisal; but section 3868 of The Code and section 5454 of the Revisal provide that the repealing clauses shall not "affect any act done, or any right accruing, accrued or established," and we think that the Rev. Code, ch. 37, sec. 29, and the act of 1858-9, ch. 18, so far validated the registration of this deed in Camden County as to bring it within the protection of the saving clauses of The Code (sec. 3868) and Revisal (sec. 5454); and even if the right to have the deed or a certified copy registered in Pasquotank was lost by a repeal of that part of the Revised Code, yet it may be registered in like manner under section 1599 of Revisal. The validation of the registry in Camden, to the extent stated, was "an act done or accomplished or a right accrued," and the machinery for transferring the registration to the proper county is found in the Revisal, sec. 1599, if otherwise it had been lost.

(268) A review of the legislation upon this matter satisfies us that it was intended to correct and remedy errors of registration as well as those of probate. They go hand in hand, and the one without the other would be of little or no avail. The statutes are highly remedial, and should be liberally construed, so as to embrace all cases fairly within their scope. It is constructive legislation; we are saving titles, and not destroying them. It has been said that "such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power." *McFaddin v. Evans Co.,* 185 U. S., 505. It was further held that to validate defective probates and registrations is a proper exercise of legislative power and favored by the courts. Speaking to this question, the Court in *Webb v. Den,* 17 How. (U. S.), 576, said: "In the early settlement of most of our States, the forms of conveyances of land were very simple; and they were usually drawn either by the parties themselves or by persons equally ignorant of the proper forms of certificates of acknowledgment required by law. In some States the statutes concerning acknowledgments and registry were stringent, while the practice was loose and careless. And in some the courts, by unnecessary strictness in their construction of the statutes, added to the insecurity of titles, in a country where too many have acted on the supposition that every one who can write is fit for a conveyancer. The great evils likely to arise from a strict construction applied to the *bona fide* conveyances of an age so careless of form have compelled legislatures to quiet titles by confirmatory acts, in order to prevent the most gross injustice. The act in question is one of these; it is a wise and just act; it governs this case, and justifies the court in admitting this deed in evidence. . . . The registration being thus validated, copies of such deeds stand on the same footing with other legally registered deeds, of which copies are made evidence by the law." See, also, 6 A. & E., 939; *Barrett v. Barrett,* 120 N. C., 131; *Gordon v. Collett,* 107 N. C., 364; *Vanderbilt v. Johnson,* 141 N. C., 370.

(269) The county of Camden adjoins Pasquotank, and the copy of the deed duly certified by the register of the former county was properly registered in the latter county, and the certified copy of this final registry should have been admitted in evidence. What the legal effect of the deed will be, in its bearing upon the facts of the case as they are disclosed by the evidence, we cannot now decide. There was error in refusing to admit the deed.

Defendant's counsel contend that the nonsuit was taken in deference to the judge's decision that sufficient evidence of the loss of the original deed had not been introduced to let in parol evidence of its execution and contents, but it appears to us that the reason for the nonsuit should not

be confined within such narrow limits, but extended to the entire adverse ruling. The exclusion of the deed was the real question involved, as it was a necessary link in the plaintiff's chain of title.

Reversed.

Cited: *S. c.*, 168 N. C., 98.

YADKIN RIVER POWER COMPANY v. J. H. WISSLER ET ALS.

(Filed 13 November, 1912.)

1. Electric Corporations—Eminent Domain—Several Exercises of Power—Interpretation of Statutes.

The power of eminent domain conferred on electric public-service corporations by the statutes, Revisal, secs. 1570-7, inclusive, and sec. 2575 *et seq.*, is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible.

2. Electric Corporations—Eminent Domain—"Reasonable Necessity"—Bad Faith—Oppression—Power of Courts—Interpretation of Statutes.

While any person affected by a petition of an electric public-service corporation in condemnation proceedings may "answer the petition and show cause against granting the same, and may disprove any of the facts alleged in it" (Revisal, sec. 2584), and while the rights, privileges, and easements to be acquired by such companies must be "reasonably necessary" for the conduct of their business, and this reasonable necessity may in its ultimate phases become a judicial question, a perusal of the entire statute discloses that the extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of fact tending to show bad faith on the part of the companies or an oppressive or manifest abuse of their discretion. *Love v. R. R.*, 81 N. C., 434, cited and distinguished.

3. Corporations—Rights of Way—Definition—Surface Boundaries—Obstructions—Preservation of Lines—Interpretation of Statutes.

While ordinarily and in its proper acceptation the "right of way" is understood to be an easement in the lands of another attaching to some specific portion of the lands defined and ascertainable by specific surface boundaries, the doctrine may not be so limited under the construction of the provisions of our statutes applicable to electric public-service corporations as to confine them to a right of way delimited by surface boundaries, and it may be extended to the cutting or removal of trees or obstructions outside of the boundaries when required for the reasonable preservation and protection of their lines and other property. Revisal, secs. 1572, 1574, 2575, 2576.

(270) APPEAL by plaintiff from *Peebles, J.*, at July Term, 1912, of LEE. Petition to condemn a further right or privilege in defendants' land, heard on appeal from clerk of Superior Court.

The petition filed before the clerk in due form and properly served on the parties is as follows:

"This, the petition of the Yadkin River Power Company, respectfully showeth:

"1. That the petitioner is a public-service corporation, duly chartered and incorporated under the laws of North Carolina, and, as such, possesses the power and right to construct lines for the transmission of electricity for power or light, and either or both of said purposes, and for other purposes specified in its charter, together with the right to maintain and operate such lines during its corporate existence; and that it possesses the right of eminent domain under the laws of this State to enable it to locate, build, protect, maintain, and operate its said lines.

"2. That it has built and completed the construction of a line of towers and wires for the purpose of transmitting electricity for
(271) light and power and other purposes permitted by its charter, and over and across the lands of the defendants herein.

"3. That your petitioner has acquired from the defendants the right, privilege, and easement of building and maintaining its said line across said lands, upon a right of way 100 feet in width, 50 feet on each side of the center of the power line thereon constructed, and has secured said privileges from defendants under and by virtue of condemnation proceedings instituted in the Superior Court of Lee County, North Carolina.

"4. That there is now standing upon the lands of said defendants, within 100 feet of the lines of said right of way and on both sides thereof, certain trees which, on account of their height and proximity to said power line, are a constant menace and source of danger to said line and the safe operation thereof.

"5. That said trees are marked with blazes recently made thereon, so as to be easily identified, being 185 in number, more or less.

"6. That it is necessary, for the protection, maintenance, and safe and prudent operation of said power line, and for the protection of the public, to have the privilege of cutting said trees, and your petitioner has endeavored to acquire from the defendants, by agreement, the right and privilege of cutting said danger trees on both sides of the right of way and easement of petitioner across said lands, but has not been able to do so, and has failed to secure said right or privilege because of the exorbitant price demanded therefor by defendants, and it is necessary to have the privilege and right of cutting said trees valued in accordance with

chapter 32, Revisal of 1905; and your petitioner institutes this proceeding for the purpose of obtaining such privilege and of having defendants' compensation for cutting said danger trees fixed.

"7. That petitioner has given security for the costs of this proceeding in accordance with section 1574 of said Revisal.

"8. That the lands of the defendants, over which petitioner has acquired the right of way and easement as aforesaid, and from which it desires to cut the danger trees hereinbefore described, lie in Deep River Township, Lee County, and are described and defined as follows: Known as the Wissler and Borden lands, formerly known as the William H. Jones lands, lying in Deep River Township, Lee County, (272) North Carolina, adjoining the lands of M. Rosser, Lizzie Woodell, and others, and particularly defined and described upon the plat hereto annexed and made a part hereof, and the said easement or right of way across said lands, together with the danger trees your petitioner desires cut, are fully described and located on said plat hereto attached.

"9. That the petitioner desires only to cut the danger trees on both sides of the easement and right of way across said lands and along the line marked out and located as aforesaid, for the purpose of protecting its said line for transmitting electricity; and, except for cutting said danger trees, the petitioner is not to interfere with the rights of the defendants, and the defendants shall have full power and a right to use the lands from which the said danger trees shall be condemned for any and all purposes not inconsistent with the right and privilege of cutting said danger trees.

"10. That the owners of the land from which the above described trees are to be cut, and their residences, as far as known, are as follows: Mrs. Minnie Wissler, Chatham County, N. C.; Mrs. Sallie J. Borden, Wayne County, N. C.

"Wherefore the petitioner respectfully prays:

"1. That this court make an order for the appointment of three competent and disinterested freeholders, residing in this county, whose duty it shall be to appraise the value of the right and privilege to cut said danger trees from the lands of the defendant hereinbefore described, and that the court fix a time and place for the first meeting of said commissioners.

"2. For the decree declaring the petitioner entitled to the right and privilege of cutting said danger trees upon the lands aforesaid, upon the payment of just compensation therefor, to be fixed by the commissioners in accordance with law.

"3. For such other and further relief as to the court may seem just."

Defendants entered the following demurrer:

"1. The petition does not state a cause of action.

(273) "2. The court is without power to grant the relief prayed for, or any relief, upon the facts set up in the petition.

"3. The petition does not confer any jurisdiction upon the court, and the court is without jurisdiction in the premises.

"4. Right sought to be acquired by the plaintiff, and the land, right or easement sought to be effected, is not sufficiently described."

On the hearing before the clerk there was judgment sustaining demurrer, for that "plaintiff has no right to the relief prayed for in its petition, and there is no jurisdiction in the court to grant the same."

This ruling was affirmed on appeal, and the Superior Court having entered judgment sustaining the demurrer and that defendants go without day, plaintiff excepted and appealed.

McIver & Williams for plaintiff.
A. A. F. Seawell for defendant.

HOKE, J. The power of eminent domain has been expressly conferred by statute on these electric companies which have dedicated their property to the public service. Revisal, secs. 1571-77 inclusive, and sec. 2575 *et seq.*, and this legislation has been sustained as applying to plaintiff company in *Wissler v. Power Co.*, 158 N. C., 465. The authorities also very generally hold that the right is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. *Hopkins v. R. R.*, 94 Md., 257; *Gardner v. R. R.*, 117 Ga., pp. 522, 527; *R. R. v. Wilson*, 17 Ill., 123; 15 Cyc., 576. A principle fully recognized by this Court in *R. R. v. Olive*, 142 N. C., 257, and *Thomason v. R. R.*, 142 N. C., 318.

The power granted to this and other companies of like kind having been expressed in very general terms, they can only acquire by condemnation such "rights, privileges, and easements" as may be reasonably necessary to carry on and effect the *bona fide* purposes of the enterprise, and while section 2584 of the act provides that any person whose rights are affected may "answer the petition and show cause against granting the same, and may disprove any of the facts alleged in it," and

(274) while this "reasonable necessity" may in its ultimate phases become a judicial question, a perusal of the entire statute will clearly disclose that the extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of fact tending to show bad faith on the part of the companies or an oppressive or manifest abuse of their discretion—a position which presents the most feasible method of dealing with the

subject, and in our opinion accords with the better considered cases. *Durham v. Riggsbee,* 141 N. C., 128; *In re R. R.,* 77 N. Y., 248; *R. R. v. Gas Agent,* 63 N. Y., 326; *R. R. v. Telegraph Co.,* 30 Col., 133; *R. R. v. Spier,* 56 Pa. St., 325; *R. R. v. R. R.,* 72 Ohio St., 368; *Telegraph Co. v. R. R.,* 23 Utah, 474; *In re R. R.,* 46 N. Y., 546; *R. R. v. Gott,* 25 Mo., 540; 2 Lewis Eminent Domain (3 Ed.), sec. 601; 15 Cyc., 637; *Biddle v. Water Co.,* 190 Pa. St., 194.

It is true that in *R. R. v. Love,* 81 N. C., 434, the Court said that both the value and extent of the right of way in proceedings of this character should be referred to the commissioners, but an examination of the case will disclose that the special statute considered on that appeal expressly provided that the "quantity as well as the value of the easement should be determined by the commissioners," and accordingly, in a subsequent case, *R. R. v. R. R.,* 104 N. C., pp. 658-665, decided intimation is given that the principle did not apply to the acquisition of a right of way under the provisions of the general law.

The extended discretion accorded to public-service corporations by this interpretation of the statute does not, in our opinion, afford just ground for apprehension that the rights obtainable will be greatly abused, for it must be remembered, as suggested in some of the cases, that the ordinary uses of that portion of the right of way not actually required for the needs of the company remain with the owner, and the amount of compensation to be made, dependent as it is largely on the width of the right of way and the extent of the easement, will act in wholesome restraint of any disposition to seek more than is actually required.
A contrary position, too, would be to seriously embarrass and at (275) times threaten the success of enterprises giving promise of great benefit to the communities affected.

Ordinarily and in its proper acceptation, the term "right of way" is understood to be an easement in the lands of another attaching to some specific portion of the land, defined and ascertainable by specific surface boundaries (*Joy v. St. Louis,* 138 U. S., 44; *R. R. v. Paddock,* 75 Ill., 616); but our statute applicable to these companies in question is much broader in its scope and terms and must be given a more extended meaning.

Thus in section 1572, Revisal, they are authorized to "treat with the owner of any lands over which their lines are proposed to be erected for a right of way for planting, repairing, and *preservation* of their poles or other property."

Under section 1574, the proceedings for condemnation must set forth the "use, easement, privilege, or other right claimed by the company." In section 2575, also made applicable to these companies, it is provided

"that such company may at any time enter upon the lands through which they may desire to conduct their lines," etc. . . . . "lay out the same as they may desire, and may also enter on such contiguous lands along the route as may be necessary for depots, warehouses, etc., and other buildings required for the accommodation of their offices, servants," *and for the "protection of their property."*

Again, in section 2576, it is enacted: "For the purpose of constructing its works and necessary appurtenances thereto, or of repairing them after they shall have been made, or of enlarging or otherwise altering them, the company may, at any time, enter on any adjacent lands, and cut, dig, and take therefrom any wood, stone, gravel, or earth which may be deemed necessary: *Provided,* that they shall not, without the consent of the owner, destroy or injure any ornamental or fruit trees."

From these and other portions of the act it appears that the power of condemnation granted to these companies is not confined to a right of way, delimited by surface boundaries, but may be extended to cutting of trees or removing obstructions outside of these boundaries when (276) required for the reasonable preservation and protection of their lines and other property.

The terms, rights, and privileges used in our statute are broad enough to include the right sought in the present petition (6 Words and Phrases, p. 5583), and in view of the positions stated, sustained as they are in reason and authority, we are of opinion that the petitioner on the facts as they now appear should be allowed to condemn the right to cut these trees, paying for this right and privilege, as in other cases, the value of the trees cut and the damage done to the land by reason of cutting the same. *R. R. v. McLean,* 158 N. C., 498. There is error.

Reversed.

W. E. YORK AND WIFE, MAGGIE YORK, v. MARY McCALL, EXECUTRIX OF J. R. McCALL, DECEASED.

(Filed 30 October, 1918.)

1. Executors and Administrators—Wills—Assets—Legacies—Procedure—Clerk—Judgments—Appeal and Error.

A petition may be entered before the clerk of the Superior Court for the recovery of a legacy and prosecuted as in other cases of special proceeding (Revisal, sec. 144); but before a recovery may be had it is necessary that the executor should have assented to the legacy, or admitted assets in his hands, or it is proved that assets had come into his hands applicable to the claim, or that they should have been acquired by him and held

in the proper performance of the duties incident to the position of executor; and upon failure of the devisee to thus establish assets in the hands of the executor, a judgment entered in his favor by the clerk is reversible error.

2. Executors and Administrators—Demonstrative Legacies—Payment—General Assets.

A legacy payable from the rents and profits of certain lands belonging to the estate of the deceased, and then under certain contingencies payable by the executor out of certain other lands, is a demonstrative legacy, and, in case of both sources failing, is payable out of the general assets of the estate.

3. Executors and Administrators—Wills—Demonstrative Legacies—Pleadings—Issues—Accounting—Designated Funds—Payment.

In defense of a proceeding against an executor to recover a legacy which by the express terms of the will was to be paid out of the rents and profits of certain lands which had been leased to the executor, and upon failure thereof, out of certain other lands in which the testator had an interest, but which had subsequently been acquired by the executor, the plea was interposed by the executor that there were no available assets, and none could have been acquired by him, and, further, that the general personal property of the executor had been consumed by the testator's family and used in their support, prior to his qualifying: *Held*, (1) the answer did not raise an issue in bar to an accounting, and only pleas of that character will prevent such course; (2) it was the duty of the executor to pay the plaintiff's legacy from the funds designated and in hand, or which should have been by proper administration of the assets, including the rents from the specified lands to the extent they were due and payable under the lease.

4. Executors and Administrators—Receivers—Payment of Legacies—Jurisdiction—Courts.

Ordinarily the appointment of a receiver must be made by the judge and not by the clerk, for the latter has no power to make the appointment unless it is given in express terms by statute, or is necessarily incident to the powers conferred upon him; and the appointment of a receiver to take charge of property of an intestate, in which the executor is personally interested, and pay over the rents and profits to a specific legatee, as directed in the will, is for the judge to do, and is void if it is attempted by the clerk.

5. Executors and Administrators—Demonstrative Legacies—Ultimate Devisees—Parties.

When there is a devise that the rents and profits of the "home place" of the testator be paid upon a specific devise, providing for its payment out of certain other property in the event of its failure or insufficiency to do so, and where there are ultimate devisees whose interests will be affected, such devisees who are to ultimately take under the will are necessary parties to the proceedings to recover the specific legacy, and in their ab-

sence an order of the clerk affecting them is error; and in its discretion the court may remand the cause to the clerk for further proceedings. Revisal, sec. 614.

(278) APPEAL by plaintiff from *Whedbee, J.*, at March Term, 1912, of SCOTLAND.

Case heard on appeal from clerk of Superior Court. The suit was a petition to recover a legacy of $500 in the will of J. B. McCall, deceased, to his daughter Maggie, now married to her coplaintiff, W. E. York. This legacy, by the terms of the will, was payable primarily upon the "rents of the home place" under lease at the time of his death to defendant, the duration and terms of which do not appear, and at the termination of the lease the same homestead was devised chiefly to others. Before the clerk, on perusal of the pleadings, there was judgment for the legacy, appointing a receiver to take charge of said home place and pay said legacy from rents. On the hearing in the Superior Court, his Honor being of opinion that there were issues arising on the pleadings to be determined, entered judgment remanding the cause, with directions to settle and certify the issues to the Superior Court for trial by jury in term.

Plaintiff excepted and appealed.

Walter H. Neal and J. W. Dixon for plaintiff.
G. B. Patterson for defendant.

HOKE, J. By express enactment in this State (Rev., sec. 144), a petition may be entered before the clerk of the Superior Court for recovery of a legacy and prosecuted as in other cases of special proceedings. Unless, however, the executor has assented to the legacy or the admission of assets otherwise is made to appear, a recovery can be had only on proof that assets have come into the hands of the executor applicable to the claim or that they should have been acquired and held in the proper performance of the duties incident to the position. Croswell on Executors and Administrators, p. 360; Pritchard on Wills, sec. 773.

According to the terms of the will annexed as an exhibit and made a part of the complaint, this is what is called a demonstrative legacy, payable primarily out of the "rents of the home place," and then under certain contingencies payable by the executrix as part owner of a place in South Carolina known as the "Neck Place," and, in case of both sources failing, and under principles of law applicable, out of the
(279) general assets of the estate. 1 Underhill, sec. 406, p. 555; 18 A. & E. (2 Ed.), p. 722.

From a perusal of pleadings in the cause it appears that James B. McCall, the testator, died in 1894, having made his last will and testa-

ment and appointing his daughter, Mary, the present defendant, as executrix. That the testator at the time of his death owned the "home place," which was then under a lease to this daughter. He also had a claim on the "Neck Place," a tract of land in South Carolina, and which has since been acquired by this daughter under the terms of the will, and also a lot of personal property. By the terms of the will the executor is charged with the duty of paying plaintiff's legacy from funds designated and in hand, and with the proper administration of assets available or which should have been, in the proper performance of her duties, including the rents of the "home place," certainly to the extent of those rents that were due and payable under the lease. There is nothing in the answer which raises any issue in bar of an accounting by defendant, and it is only pleas of that character which prevent such a course. *Oldham v. Reiger,* 145 N. C., 254; *Jones v. Wooten,* 137 N. C., 421; *Royster v. Wright,* 118 N. C., 152; *Carr v. Askew,* 94 N. C., 194. It is true, she avers in general terms that no assets have come to hand and that none could have been acquired by her, and, further, that the general personal property left by the testator was all consumed by the family and used in their support prior to defendant's qualifying; but on the facts presented and admitted in the pleadings, these averments only raise questions of fact affecting the course and result of the account, and may not be considered as pleas in bar. *Yelverton v. Coley,* 101 N. C., 248; *Bevins v. Goodrich,* 98 N. C., 217; *Carr v. Askew, supra; Grant v. Hughes,* 96 N. C., 186.

While holding that there are no issues of fact in bar of an account raised by the pleadings, the judgment as entered by the clerk cannot be sustained. As we have endeavored to show, in an action of this character a judgment for the legacy may only be entered on showing assets in hand applicable to the claim, or that such assets should have been acquired in the proper performance of defendant's duties. And (280) that portion of the judgment appointing a receiver must also be set aside. A clerk of the Superior Court is not allowed to appoint a receiver to take charge of property unless the right is given in express terms or is necessarily incident to powers which are so conferred. Possibly, under section 35 of The Code, a clerk might make such an appointment when it was necessary to the proper preservation of the estate, but as a general rule the appointment of a receiver must be made by a judge. Revisal, sec. 846 *et seq.; Parks v. Sprinkle,* 64 N. C., 637. And in any event, no order affecting the interest of an owner of property should be made unless such owner is a party and has been given opportunity to be heard.

In suits of this character it has heretofore been usual to make all persons interested in the distribution of the estate parties, to the end that the judgment should conclude them and the better afford protection to the executor. Pritchard on Wills, sec. 782.

But in any event, before any orders or judgments are made in the present case affecting the rights and interests of the ultimate devisees and owners of this "home place," such owners certainly should be made parties of record. The court had the right in its discretion to remand the cause to the clerk for further proceedings. Revisal, sec. 614. And for the reasons and to the extent stated, we think his Honor's order setting aside the judgment of the clerk should be affirmed. But on the pleadings as they now appear, we are of opinion that judgment should be entered that the defendant account. That if the lease has expired, and it is proposed to ask for orders making further appropriation of the rents of the "home place" to satisfaction of plaintiff's claim, the owners of that property must be made parties.

Further proceedings will be had in accordance with this opinion, and the costs will be paid equally by parties plaintiff and defendant.

Modified.

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(281)

FRANK HITCH LUMBER COMPANY v. WALTER R. BROWN.

(Filed 11 September, 1912.)

1. Deeds and Conveyances—Standing Timber—Period of Cutting and Removing—Reverter.

The timber on lands conveyed, and not cut and removed within the period for those purposes specified in the deed, belongs to the grantor therein.

2. Deeds and Conveyances—Timber—Period of Cutting and Removing—Severed Timber—Personalty—Parol Contract.

The timber on lands which had been cut but not removed from the land by a grantee in a deed for the timber thereon in the period allowed for its cutting and removal, is personal property, not requiring a written instrument, under the statute of frauds, to convey it; and a sale thereof by parol is sufficient to pass the title.

3. Same—Statute of Frauds—Parol Evidence—Questions for Jury.

There was evidence in this case tending to show that the owner of lands, having conveyed the standing timber thereon, after the expiration of the period of time for its cutting and removal, sold and conveyed the land by deed, and at the same time said to the grantee that he had sold him the land "and everything there is on it"; that the grantee mentioned

severed logs, etc., that were on the land, which the grantor said was included in the transaction: *Held*, it was not necessary that the deed to the lands specify the cut timber, and the parol evidence of the sale of the logs was sufficient to be submitted to the jury upon the question as to whether the logs were included in the sale.

APPEAL by defendant from *Cline, J.*, at April Term, 1912, of BERTIE.

Claim and delivery, to recover the possession of certain saw-logs.

In January, 1903, James Morris sold the poplar, pine, and gum timber on his tract of land in Bertie County to Brown & Bundy, who assigned the contract to the plaintiff. The timber was to be cut and removed from the land within eight years from 1 January, 1903. Brown & Bundy "cut a lot of saw-logs" and left them on the land after the time for cutting and removing them had expired. The Morris land was sold and conveyed to T. J. White, who sold and conveyed it to the defendant, W. R. Brown.

In his own behalf, the defendant testified: (282)

"When I bought the land I asked Mr. White about the timber. He said 'the time was out on it, and it all now belongs to me. I sell you the land and everything there is on it. I can show you the timber deed and satisfy you about it.' When I bought the land from White, I bought the logs that were on the land. When I bought the land I got a deed for it. I asked him about the timber. I told him I wanted a straight deed for everything there—to be no strings to it. I told Mr. White about the timber logs and stuff, and he said he sold me his entire holdings."

After Brown bought the land and, as he alleges, the saw-logs, White sold the logs and conveyed them to plaintiff on 10 May, 1911, and immediately brought this action to recover the logs. In the pleadings the plaintiff describes the property as "a certain lot of gum, poplar, and cypress saw-logs on the James Morris land, in the possession of defendant."

The defendant requested the court to charge the jury that if White sold the logs to Brown at the time he sold the land to him, they would answer the first issue "No," as the plaintiff would not be the owner of the logs. The court stated, in response to this prayer, that there was no evidence of a sale of the logs to defendant. Verdict and judgment for the plaintiff, and defendant excepted and appealed.

Winborne & Winborne for plaintiff.

Winston & Matthews for defendant.

WALKER, J., after stating the case: There was error in the refusal to give the prayer for instructions. The defendant testified that he had

bought the logs from White. This was the statement of a fact, and not a conclusion of law as to the construction of the timber deed. It may be that he referred to the timber deed as conveying the logs, but it does not so appear. The jury might well have inferred that White had sold him the logs independently. Besides, White said to him: "The time is now out, and it all belongs to me. I sell you the land and everything there is on it." "I told Mr. White about the logs and stuff, and he said he sold me his entire holdings." This surely was some evidence of a sale
(283) of the logs. They were personal property, the trees having been severed from the land and converted into saw-logs. A parol conveyance was sufficient to pass the title. *Wall v. Williams,* 91 N. C., 477. If White sold the logs to defendant, it can make no difference that it was done by parol and was not inserted in the deed, it not being necessary that the sale of the logs should be in writing. *Nissen v. Mining Co.,* 104 N. C., 309.

The timber cut and not removed after the time fixed by the contract had expired belonged to White, who had the right to sell it to the defendant. This is settled by numerous cases. *Hornthal v. Howcott,* 154 N. C., 228; *Bateman v. Lumber Co.,* 154 N. C., 248; *Bunch v. Lumber Co.,* 134 N. C., 116; *Corey v. Lumber Co.,* 140 N. C., 462; *Hawkins v. Lumber Co.,* 139 N. C., 160; *Strasson v. Montgomery,* 32 Wis., 52. The evidence of a sale to defendant, which was disregarded by the learned judge, if again offered, must be submitted to another jury, with proper instructions as to its legal effect.

New trial.

Cited: Hardy v. Lumber Co., ante, 125; *Lumber Co. v. Riley,* 163 N. C., 255; *Palmer v. Lowder,* 167 N. C., 333.

ROBERT KELLY v. YADKIN RIVER POWER COMPANY.

(Filed 20 November, 1912.)

Master and Servant—Negligence—Safe Place to Work—Night Work—Lights—Blasting—Evidence—Questions for Jury—Nonsuit.

In an action for damages for personal injuries negligently inflicted, there was evidence tending to show that the plaintiff was required to work, on a dark, cloudy night, in digging holes, for the defendant power company for the erection of electric towers, about 6 or 7 feet deep, where blasting was being done; and while the plaintiff was digging in one of these holes he was told by defendant's foreman to "come out of the

hole," as blasting was then to be done in two others; that the plaintiff at once came out of the hole he was digging, but the foreman, with the other men, had run away with the only lantern there, leaving him in darkness, so that in running from the place of danger he fell across a sill which had been left over the opening of a hole, to his injury: *Held*, it being the duty of the defendant to have provided the plaintiff with a safe place to get away from the hole, its failure to supply a light, under the circumstances, was actionable negligence; and under the conflicting evidence in this case, it presented a question for the determination of the jury; and a judgment of nonsuit was erroneous.

APPEAL by plaintiff from *Peebles, J.*, at July Term, 1912, of (284) LEE.

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

Hoyle & Hoyle for plaintiff.
McIver & Williams for defendant.

CLARK, C. J. This is an action for personal injury. The plaintiff's witnesses testified that they were required by the foreman to work at night, digging holes for the erection of steel towers. These holes were 2 by 4 feet and 6 to 7 feet deep. Four holes were being dug, and the plaintiff was digging in one of them when the blast was to be set off in two others. According to plaintiff's testimony, the foreman started off with the only lantern, and said, "Come on out of the hole." The plaintiff got out, and, when he did so, found that they had all gone with the light, and not knowing which way to run, he started to run towards the receding lantern, and fell on a tie that was lying across one of the holes already dug, which was 7 feet deep, 4 feet long, and 4 feet wide. He says it was a cloudy night; that there were no lights about the hole and nothing around it to keep him from falling in, and that when he fell in he was very seriously injured; that after he fell into the hole he got out before the blast went off; that he could not get out of his own hole (which was then 6 feet deep) in time to start when the rest did, and that when he got out the rest were all gone.

The evidence for the defendant is sent up, and if believed by the jury would tend to show that the defendant was not negligent, and that the plaintiff was guilty of contributory negligence. But upon the close of all the evidence a nonsuit was directed, and the case must be taken solely upon the evidence most favorable to the plaintiff and with the most favorable inferences that the jury could reasonably have (285) drawn therefrom. *Morton v. Lumber Co.*, 152 N. C., 54; *Johnson v. R. R.*, 122 N. C., 955, and cases there cited. If there is conflicting evidence, the motion will be denied. *Gates Co. v. Hill*, 158 N. C., 584.

If the evidence for the plaintiff renders it probable that the defendant neglected its duty, it is for the jury, not for the court, to decide whether it did so or not. *Fitzgerald v. R. R.*, 140 N. C., 535. "An employer owes to his employee the duty to be reasonably careful to provide safe appliances and machinery, a safe place in which to work, and a reasonably safe way for getting to and from his work." *Myers v. Lumber Co.*, 131 N. C., 252.

Taking the case in the aspect of the evidence most favorable to the plaintiff which could have been found by the jury, the plaintiff while working in a hole 6 feet deep and near two blasts which were about to be shot off, was told by the foreman to "run." But before he could get out to run, the foreman had run away with the only light and left him in darkness. The plaintiff knew that it was time to run, and not to stand on the order of his running. In the darkness and confusion he fell into another hole and was injured. It is true that if there had been daylight or other sufficient light, he might have seen the hole and have avoided falling into it. It is also true that he scuffled out before the blast went off. But in the darkness, not knowing how soon the blast would go off, and not having light sufficient to see the hole, he fell in and, according to his testimony, was injured. The defendant should have provided a sufficient light or the foreman should have held his light until he had seen that the plaintiff could have gotten into a safe place. It may be that he did so. But it is otherwise, if the jury should believe the plaintiff's evidence.

There was sufficient evidence of negligence to carry the case to the jury. The judgment of nonsuit is

Reversed.

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(286)

WINDER C. WOMACK v. A. G. CARTER, ADMINISTRATOR.

(Filed 23 October, 1912.)

1. Pleadings—Several Statements—Same Course—Contracts—Money Had and Received—Torts—Waiver.

The complaint in an action to recover a certain sum of money alleged (*a*) it was due by reason of defendant's taking possession of his lands, leasing and collecting the rents to plaintiff's use in the stated sum, which had not been paid, but held by defendant for his use; (*b*) that the said lands were leased by the defendant, the rents collected by him in the said amount, which were payable to plaintiff, but which were paid to defendant and collected by him and wrongfully converted by him to his own use; (*c*) that defendant wrongfully took possession of the land by his tenants

and withheld the same, a reasonable rental being in the said sum: *Held*, the complaint stated a cause of action in three several ways, the rents sought to be recovered arising from the same transaction, there being no difference whether the rents were received under a contract of lease between plaintiff and defendant or under defendant's wrongful entry and his receiving its rental value; and under the last allegation the plaintiff could waive the tort and recover in contract for money had and received to his use.

2. Pleadings—Several Statements—Same Cause—Judgments—Demurrer.

When the complaint in an action to recover rent alleges, in the three several ways, that a certain amount was due the plaintiff, denominating them as several causes of action, so that it clearly appears, beyond any doubt, that the amount specified in each so-called cause of action was for the same rent, and the plaintiff is entitled to recover on two of his "causes of action," or counts, defendant's demurrer to those causes alone is bad.

3. Pleadings—Action for Rents—Lands—Description—Definiteness—Motions—Demurrer.

In an action to recover rents for plaintiff's lands alleged to have been wrongfully in defendant's possession and collected by the defendant from his lessees, it is not necessary that the lands be described with the particularity required when title is in dispute, or as in an action of trespass, and if the defendant had been uncertain of the nature of the charge against him, he should have moved the court, in its discretion, for a more definite and certain statement of the cause of action (Revisal, sec. 496), which would probably be granted, if made in good faith. The description of the lands as belonging to plaintiff, in a certain county, which defendant took into his possession at a specified time, *Held*, sufficient.

4. Pleadings — Cause of Action — Interpretation — Sufficient as a Whole — Demurrer.

When a cause of action is stated in three several ways, which taken together are sufficient, a demurrer against one of these statements is bad, though taken alone it is insufficient; for a complaint cannot be thus overthrown unless it is wholly insufficient, or fatally defective as a whole.

5. Appeal and Error—Pleadings—Definiteness—Motion—Demurrer—Amendments—Discretion of Court—Practice.

On this appeal from a judgment sustaining a demurrer to the complaint, it being held that the defendant's remedy was by motion to make the complaint more definite, the judgment of the Superior Court is reversed without prejudice to the right of the plaintiff to plead *de novo*, or of the defendant to move for a more definite statement of a cause of action, if so advised, both matters to be addressed to the discretion of the lower court.

APPEAL by plaintiff from *Peebles, J.*, at July Term, 1912, of (287) LEE.

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

Hoyle & Hoyle and J. W. Ruark for plaintiff.
McIver & Williams for defendant.

WALKER, J. Plaintiff brought this action to recover the sum of $1,140, and in his complaint he states his cause of action in three different ways: (1) That defendant's testator took possession of certain land situated in Sanford Township, Moore County (now Lee County), the property of the plaintiff, leased the same to tenants and collected the rents for the use of the plaintiffs, to the amount of $1,140. That said amount has never been paid to plaintiffs, but is now held by defendant for their use. In the next count, if it may be so called, it is alleged, in substantially the same words, that the land of plaintiffs was leased by defendant's testator to tenants, and the rents collected by him, the only difference between the two counts, if there be a difference, being that it is alleged in the second count that the said real estate belonged to plaintiffs and the rents were payable to them, but instead of paying
(288) them to plaintiffs, the defendant's testator collected the same to the amount of $1,140 and wrongfully converted them to his own use. The third count alleges, in substance, that defendant's testator wrongfully took possession of the land by his tenants, and unlawfully withheld the same from plaintiffs, a reasonable rental for the land being $1,140.

The defendant demurred upon the ground that while the complaint alleges a wrongful possession of the land by defendant's testator, and demands the rents and damages, it does not describe the premises with sufficient certainty, so that they may be identified by the defendant and he may intelligently answer the complaint.

Plaintiff moved for judgment on what he calls the first and second causes of action. This motion was denied, and properly so, as the complaint states but one cause of action in three several ways. It is all one and the same transaction, and plaintiff seeks, in the end, to recover $1,140, which was received by the defendant, as rent, for his lands. *Simpson v. Lumber Co.*, 133 N. C., 95. Whether it was received under a contract of lease between plaintiffs and defendant's testator, or whether the testator entered upon the land wrongfully and received its rental value, can make no difference. Plaintiffs would be entitled to recover the $1,140 in either view—in the last, because they could waive the tort and recover in contract for money had and received. For the same reason the court should not have sustained the demurrer, as it did. In the first place, the entire complaint showed clearly and beyond any possibility of doubt, and defendant could surely not have been misled thereby, that plaintiffs were seeking to recover the rental value of their land, which had been collected from his tenants by defendant's testator.

But the demurrer is based upon the specific ground that the land is not sufficiently described, and is bad if there is a sufficient description, even if that kind of objection can be taken by demurrer. The land is described as belonging to plaintiffs, and situated in Sanford Township, Lee County, and the same which defendant's testator took into his possession and leased to tenants, and for which he collected the (289) rents in May, 1910. This would seem to be sufficiently definite in an action of this nature. In *Whitaker v. Forbes,* 68 N. C., 228, it was alleged that the defendant unlawfully and forcibly entered upon a tract of land in Enfield, Halifax County, the property of plaintiff, and did then and there pull down and destroy a frame house of great value, for which damages for the tort were prayed. Defendant demurred upon the ground "that the complaint does not sufficiently describe the lot and premises on which the trespass were done." With reference to the ruling by which the demurrer was sustained, this Court, by *Justice Boyden,* said: "The sole question in the cause is as to description of the land and premises in an action of trespass. It is not necessary to decide how this would be in an action for the recovery of the land, but we think the authorities are abundant that the description is all that is required in an action for trespass *quare clausum fregit.* It is true that by the rules of pleading in England adopted at Hil. Term, 4 W. IV., in trespass *quare clausum fregit* the name of the close or abuttals must be stated, or a special demurrer will be sustainable; but those rules have never been in force in our State, having been adopted since our separation from the mother country. We presume that it was an omission to notice the fact that these rules were not in force here, which misled the defendant in filing a demurrer in this case, as it is clear that previous to the adoption of this rule it was entirely unnecessary to describe the *locus* by name or abuttals. See 1 Lan., 347, note 1, where it is expressly said 'that it is sufficient for the plaintiff to allege the trespass to have been done in a ville or parish only, without mentioning any place, for it is not material; and if the plaintiff does mention a place, the defendant may justify in another place without a traverse, and the plaintiff must ascertain a place in a new assignment.' In Buller's Nisi Prius, 92, it is said that, 'if in trespass *quare clausum fregit* a man declare generally in such a ville, the defendant may plead *liberum tenementum,* and if the plaintiff traverse it, it is at his peril; for the defendant, if he have any part of the land in the whole town, he shall justify it there; and therefore the better way for the plaintiff is to make a new assignment.'
. . . . If in an action *quare clausum* the plaintiff set out the (290) abuttals of his close, he must on the trial prove every part thereof.
Buller's Nisi Prius, 98. This makes it hazardous to attempt such de-

scription. It has been the unvarying practice in our State for the last fifty years to declare as in the case before us, and in such action it has never been deemed necessary to describe the close by name or by the abuttals."

We do not think the defendant could well be misled to his prejudice by the description; but if he was uncertain as to the nature of the particular charge against him, he should have moved the court for a more definite and certain statement of the cause of action, under Revisal, sec. 496. *Allen v. R. R.*, 120 N. C., 550. The court no doubt would have granted the application, if made in good faith.

Again: The demurrer was evidently directed against the last statement in the complaint, which we may, for the sake of argument, call a count, and the court erred in sustaining the demurrer as to that detached portion, as upon the whole complaint it could be seen that a sufficient cause of action was alleged.

A complaint cannot be overthrown by a demurrer unless it is wholly insufficient. It must be fatally defective before it will be rejected as bad. *Blackmore v. Winders,* 144 N. C., 216, and cases cited; *Bank v. Duffy,* 156 N. C., 87; 4 Enc. Pl. & Pr., 74. Plaintiffs have stated a good cause of action for money had and received to their use (27 Cyc., 878); and also for its conversion. *Paalzow v. Estate Co.,* 104 N. C., 439; *Womble v. Leach,* 83 N. C., 86.

The demurrer should have been overruled. If defendant, when the case goes back, still entertains, in good faith, a doubt as to what land is meant, the court may require a more specific description for his enlightenment. We do not know but that the court should be liberal in requiring more definite statement in a pleading, where the application for a better one is made, not vexatiously, but for the sake of being better informed as to the exact nature of the allegation, so that the party who seeks more light may the better answer the charge. This motion,
(291) of course, is addressed to the discretion of the court. *Allen v. R. R.*, 120 N. C., 548; *Smith v. Summerfield,* 108 N. C., 284; *Conley v. R. R.*, 109 N. C., 692.

Without expressly commending or approving the form in which plaintiff has stated his cause of action in the complaint, good though it may be, we are of the opinion that the defendant's remedy, if he had any just ground to ask for a better pleading, was by motion, and not by demurrer.

The case is remanded in order that the parties may proceed as they may be advised. We reverse the judgment sustaining the demurrer, but without prejudice to the right of plaintiff to plead *de novo,* if so

minded, or of defendant to move for a more definite statement of the cause of action, even if it lacks in certainty or fullness. We leave the matter of amendment to the discretion of the judge.

Reversed.

Cited: *Tyler v. Lumber Co.*, 165 N. C., 166.

J. P. SEAWELL v. EMANUEL PERSON AND J. S. McLAUGHLIN.

(Filed 23 October, 1912.)

1. Leases, Written — Contracts — Breach — Measure of Damages — Lessee's Services—Evidence.

The plaintiff leased the defendant certain farming lands for the purpose of cultivation by written agreement, and in the contract agreed to furnish a certain amount of guano, and failed or refused to furnish the guano, and entered upon the leased premises and rented it to another for the crop year covered by the defendant's lease: *Held*, (1) the defendant could recover upon the plaintiff's breach of contract; (2) it was competent for the defendant to introduce the written lease in evidence, and prove the value of his services rendered thereunder, as an element of damages.

2. Mortgages—Maturity—Seizure by Mortgagee—Expenses—Damages.

One who has sold a mule and secured the purchase price by a chattel mortgage thereon is not entitled to recover his expenses in keeping the mule which he has seized before the maturity of the mortgage.

3. Contracts, Breach of—Admissions—Verdict—Appeal and Error.

The plaintiff in this case, having admitted that he had broken his contract with the defendant, for which damages are sought by the latter by way of counterclaim, it is *Held* that the defendant is entitled to recover the damages arising therefrom.

APPEAL by plaintiff from *Justice, J.*, at May Term, 1912, of (292) MOORE.

This is an action to recover personal property, the plaintiff claiming to be the owner thereof under a chattel mortgage, executed by the defendant Person on 18 February, 1911, to secure $210, of which $160 was the purchase price of a mule and $50 for supplies to be furnished.

The defendant admitted the execution of the mortgage, but denied that he was indebted to the plaintiff. He alleged that on the day the chattel mortgage was executed, the plaintiff rented him a farm known as the Rhodes place, for the year 1911, by written lease, and agreed to

furnish him four tons of guano and $50 in supplies; that he entered into possession of the Rhodes place and did work thereon in preparing the crop of the value of $60; that within about sixty days after he entered into possession of said land the plaintiff, without cause, seized the mule and guano he had sold to him, took possession of the land, and prevented him from cultivating the crop.

The plaintiff admitted the execution of the lease, subject to an objection as to its competency. The plaintiff testified "that shortly after the rental contract, of date 18 February, 1911, and during the latter part of the month of March or the first of April, in 1911, one of Person's mules died, and that the plaintiff took possession of the mule he had sold to Person for $160, retained the same and sold the mule to another party and retained the purchase price thereof, and also retook from the defendant Person all the guano which the plaintiff had delivered to the defendant Person under the rental contract; that the plaintiff at said time rented the Rhodes place to another party by the name of Thomas, and that Thomas cultivated it during the year 1911; that prior to this time and after the rental contract had been made with the defendant

(293) Person, Person had done considerable work in preparing the lands known as the Rhodes place rented to Person for cultivation in cotton. Plaintiff testified that he did not claim anything from the defendant Person in view of this conduct, except the sum of $39.95, covering the items advanced Person for supplies to make the crop on the Rhodes place prior to the plaintiff's retaking the mule and fertilizers and placing the Rhodes place in possession of another tenant, Thomas."

The plaintiff offered evidence tending to prove that the supplies he furnished were of the value of $39.95, while the evidence of the defendant was to the effect that they were worth $28.85. The defendant also offered evidence as to the work done by him.

The jury returned the following verdict:

1. In what amount, if any, is defendant indebted to plaintiff on account of advancements? Answer: $39.95.

2. What was the value of the labor done by the defendant on Rhodes place under the contract of leasing? Answer: $45.

Judgment was rendered in favor of the defendant, and the plaintiff appealed, assigning the following as errors:

(1) That the court erred in admitting the contract of rental entered into between the plaintiff and the defendant Emanuel Person, dated 18 February, 1911, introduced as evidence, as shown in the record.

(2) That the court erred in admitting the evidence of W. M. McLaughlin, in answer to the question as to what was the reasonable value

of the work that Emanuel Person had done on the Rhodes place at the time he quit, as shown in the record as the second exception.

(3) The court erred in sustaining the objection of the defendants to the question asked the witness C. B. Fry, as to what was the expense of keeping the mule that the plaintiff retook from the defendant Person before the plaintiff sold said mule, as shown by the record.

(4) That the court erred in sustaining the objection of the defendants to the question asked the witness C. B. Fry, regarding what the plaintiff obtained for the mule he retook from the defendant Person at a sale of the mule, as shown on the record.

(5) That the court overruled the motion of the plaintiff to set (294) aside the verdict of the jury, as shown in the record.

(6) That the court erred in rendering the judgment appearing in the record.

Clegg & Clegg for plaintiff.
U. L. Spence for defendant.

ALLEN, J. The plaintiff, upon his own admissions, entered upon the land he rented to the defendant in violation of his contract, and failed to furnish the guano, as he had agreed to do.

This gave to the defendant a right of action to recover damages for the breach (*Barneycastle v. Walker,* 92 N. C., 201; *Herring v. Armwood,* 130 N. C., 181), and it was necessary and relevant to introduce the contract and to prove the value of the services, as an element of damage.

We are unable to see any theory upon which the plaintiff can charge the defendant with the expense of keeping the mule, as he admits he seized it before his mortgage was due, and when there was, so far as the record discloses, no semblance of an excuse for doing so.

The sixth assignment of error presents the question of the sufficiency of the verdict to sustain the judgment, in the absence of a finding that the plaintiff broke the contract, and it would not be free from difficulty but for the admission by the plaintiff of facts which clearly constitute a breach.

We find nothing in the record of which the plaintiff can complain. The defendant was allowed to recover only one item of actual damage, when he might reasonably have claimed others, and in some aspects of the evidence it may be that he was entitled to have an issue submitted as to punitive damages.

No error.

(295)

W. M. FIELDS v. W. G. BROWN AND G. C. GRAVES.

(Filed 23 October, 1912.)

1. Fraud—Deceit—Pleadings—Parties—Possession—Claim to Property.

In an action to recover possession of a mule taken in exchange for a horse, and for damages for deceit and false warranty as to the horse, a demurrer of a codefendant on the ground that his name appeared only in the title, without allegation as to him, should not be sustained when it is alleged in the complaint that the defendants were in joint possession of the mule, and appeared that both had replevied the mule, and given the bond required by statute, it being evidence against the party demurring, not only as to his possession, but as to his claim to the property.

2. Fraud—Deceit—Contract—Election—Affirmance—Damages—Procedure.

One who has fraudulently been induced to enter into a contract may elect to repudiate the contract and recover back what he may have received under it, and recover what he may have parted with, or its value; or he may affirm the contract, keeping whatever property or advantage he may have derived under it, and recover in an action of deceit the damages caused him by the fraud.

3. Same—Equity—Rescission.

While, as a rule, a party to a contract induced by fraud may not elect to rescind it and recover damages for the fraud, the rule is based upon a perfect rescission of the contract, where the defrauded party has sustained no damages except those he may have actually paid thereunder; and it has no application where he may not thus be placed in *statu quo*, as where he has suffered damages which the rescission and the damages based thereon cannot repair.

4. Fraud—Deceit—Contract—Replevin—Consistent Causes of Action.

An action for deceit in the making of false representations inducing plaintiff to exchange a mule with defendant for a horse is not necessarily inconsistent with a previous replevin to recover the mule.

5. Fraud—Deceit—Contracts—Damages—Right of Action—Conditions Precedent.

In an action for deceit in the making of false representations inducing the plaintiff to exchange a mule for defendant's horse, the plaintiff may enforce his rights under the contract and at the same time maintain his action for deceit, without offering to return the benefits he may have received under the contract, as a condition precedent.

6. Fraud—Deceit—Tort—Waiver—Damages—Implied Promise to Pay.

In an action of deceit, in making false representations which induced the plaintiff to exchange his mule for defendant's horse, the plaintiff may waive the tort and recover his damages as for money had and received upon an implied promise of the defendant to pay it.

7. Fraud—Deceit—Scienter—Evidence.

In an action of deceit in making false representations which induced the plaintiff to exchange his mule for defendant's horse, there was evidence tending to show that the defendant made the false representations that the horse was sound of body and limb, without defect, and was gentle, safe, and was an "all-round" good horse, suitable to the plaintiff's needs, etc., which were calculated, intended to, and did deceive: *Held*, the evidence is sufficient to prove the defendant's *scienter*.

8. Courts—Jurisdiction—Pleadings—Damages Alleged—Part Recovery.

When the complaint states a cause of action for deceit and false warranty, alleged in good faith, in such sum as will confer jurisdiction upon the Superior Court, that court does not lose its jurisdiction thus acquired by failure of the plaintiff to prove the damages alleged in its entirety; and, *Held*, in this case, that if the lower court was correct in holding that no damages for deceit in the sale of a horse could be recovered, yet the recovery upon the warranty alone in a sum less than that necessary to be alleged to confer jurisdiction would not oust the jurisdiction acquired by the court.

APPEAL by plaintiff from *Justice, J.*, at May Term, 1912, of MOORE.

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

McIver & Williams and W. R. Clegg for plaintiff.
G. W. McNeill and U. L. Spence for defendant.

WALKER, J. Plaintiff brought this action to recover possession of a bay mare mule, named Nell, which he exchanged with the defendant for a bay mare, and for damages for deceit and false warranty. It was alleged in the complaint that defendant Brown, who was the owner of the bay mare at the time of the exchange, falsely repre- (297) sented to plaintiff that the mare was sound, in good condition and possessed of fine qualities, and, particularly, that she was (1) sound of body and limb in every particular; (2) was without defect in every respect; (3) that she would work anywhere she was hitched—to wagon, plow, buggy, or elsewhere; (4) that she was gentle and safe for ladies and children to drive; (5) that she was an all-round good horse, suitable in all particulars for the needs of the plaintiff on the farm. That the representations were false, intended to deceive, and did deceive the plaintiff, and induced him, with other promissory representations, to make the trade. There was also a count for false warranty, upon the same grounds.

Defendant G. C. Graves demurred because there were no allegations as to him in the complaint and his name was not mentioned, as he avers, except in the title of the case. The demurrer was sustained, and we

think erroneously so. There was an allegation that Graves and Brown were in joint possession of the mule, and while this is denied in the answer, it must be taken as true upon demurrer. If Graves was in possession with Brown, plaintiff properly joined him in this action for the recovery of the property. *Haughton v. Newberry,* 69 N. C., 456; *Webb v. Taylor,* 80 N. C., 305; *Bowen v. King,* 146 N. C., 385. Besides, Graves replevied the property with Brown, both giving bond with Mr. George W. McNeill as surety thereon, and taking the same from plaintiff's possession. This is some evidence, not only of Graves' possession, but of his claim to the property, and he will not now be heard, under these facts, to assert that he is not a proper party.

The plaintiff has elected, as he had the right to do, to sue for the mule, upon the ground that the fraud avoided the contract of exchange, and, therefore, that he is entitled to be restored to its possession and to have judgment for any resulting or consequential damages he has sustained by the deceit and false warranty. *Pritchard v. Smith, ante,* 79. A person who has been fraudulently induced to enter into a contract has the choice of several remedies. He may repudiate the contract, (298) and, tendering back what he has received under it, may recover what he has parted with or its value; or he may affirm the contract, keeping whatever property or advantage he has derived under it, and may recover in an action of deceit the damages caused by the fraud. While his affirmance may preclude him from rescinding the contract, it does not prevent his maintaining an action of deceit. Moreover, if sued upon the contract, he may set up the fraud as a defense, or as a basis of a claim for damages by way of recoupment or counterclaim. And in a proper case the defrauded party may be entitled to the equitable remedies of rescission and cancellation or reformation. As a general rule, however, the defrauded party cannot both rescind and maintain an action of deceit. If he elects to rescind the contract, he may recover what he has parted with under it, but cannot recover damages for the fraud. The latter rule, as applied to a perfect rescission of the contract, is based, not alone upon the principle that the party has elected his remedy, but also on the fact that he has sustained no damage. 20 Cyc., 87, 88, and 89, and notes. This rule, of course, is bottomed upon the theory that he has suffered no loss that will not be fully repaired by the return to him of what he has given up. If, however, a perfected rescission does not place the injured party in *statu quo,* as where he has suffered damage which the rescission and the remedies based thereon cannot repair, there is no principle of law which prevents him from thereafter maintaining an action of deceit, and in such cases a recovery has uniformly been allowed. 20 Cyc., 89 and notes, citing *Faris v. Lewis,* 2 B. Mon.

(Ky.), 375; *Lenox v. Fuller,* 39 Mich., 268; *Warren v. Cole,* 15 Mich., 261; 1 Bigelow on Fraud, 67. So an action for deceit in the making of false representation inducing plaintiff to sell goods to defendant has been held not necessarily inconsistent with a previous action of replevin to recover the goods. *Lenox v. Fuller,* 39 Mich., 268; *Welch v. Seligman,* 72 Hun (N. Y.), 138, 25 N. Y. Suppl., 363. See, also, *Dean v. Yates,* 22 Ohio St., 388; 20 Cyc., 89, note. Since the defrauded party to the contract has the right to affirm it, retain its benefits, and also recover damages for the fraud, he may sue to enforce his rights under the contract and at the same time maintain an action for (299) deceit. Where a person by the practice of fraud obtains money from another under such circumstances that he has no right to retain it, the defrauded party may waive the tort and recover the money in an action for money had and received, upon the theory of an implied promise to pay it. . . . A return or an offer to return what plaintiff has received under the contract induced by the fraud is not a condition precedent to his maintaining an action of deceit (if he does not disaffirm), since he is entitled to the benefit of his contract plus the damages caused by the fraud. 20 Cyc., 90 and 91, and notes. See, also, *May v. Loomis,* 140 N. C., 350.

The demurrer should have been overruled. The court, upon the evidence, directed a judgment of nonsuit against the plaintiff, under the statute, as to the deceit, upon the ground, as we were told at the hearing, that there was no proof of any *scienter.* An examination of the testimony convinces us that there was evidence of the fraud and the *scienter,* and of every other element required to make the fraud actionable. The case, in this respect, is not unlike *Whitmire v. Heath,* 155 N. C., 304; *Robertson v. Holton,* 156 N. C., 215; *Hodges v. Smith,* 158 N. C., 256, and same case at this term, 159 N. C., 525. Upon the general subject of what is sufficient to constitute actionable fraud and deceit, see, also, *Unitype Co. v. Ashcraft,* 155 N. C., 63; *Cash Register Co. v. Townsend,* 137 N. C., 652; *Whitehurst v. Ins. Co.,* 149 N. C., 273; Pollocok on Torts (7 Ed.), 276, and other authorities cited in *Unitype Co. v. Ashcraft, supra.* The nonsuit was, therefore, erroneous.

There was evidence that defendant Brown made the representations; that they were calculated and intended to deceive, and did deceive. *Lunn v. Shermer,* 93 N. C., 164; *Black v. Black,* 110 N. C., 398; *Ashe v. Gray,* 88 N. C., 190 (*s. c.,* on rehearing, 90 N. C., 137), all actions against horse-traders.

But if the ruling as to the deceit had been correct, the court erred when it disregarded the cause of action as to the false warranty. Plaintiff had originally stated a cause of action within the jurisdiction of

the court, and the mere fact that he failed to prove a part of it did not oust the jurisdiction as to the other part. This is clearly estab-
(300) lished by the cases. This Court said in *Long v. Fields,* 104 N. C., 221: "It has been settled by a line of decisions in this Court, and manifestly upon mature consideration, that where there is a warranty of soundness in the sale of a horse, the vendee may declare in tort for a false warranty and add a count in deceit, or, under the new procedure, a second cause of action in the nature of deceit, and though the sum demanded be less than $200 the action will not be deemed one founded on contract, and the Superior Court will have jurisdiction," citing *Bullinger v. Marshall,* 70 N. C., 520; *Ashe v. Gray,* 88 N. C., 190; *s. c.,* on rehearing, 90 N. C., 137; *Harvey v. Hambright,* 98 N. C., 446. See, also, *Bowers v. R. R.,* 107 N. C., 721. In *Brock v. Scott,* 159 N. C., 513, *Justice Allen* thus stated the rule: "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. 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 determines the jurisdiction. *Sloan v. R. R.,* 126 N. C., 487; *Cromer v. Marshall,* 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." In *Martin v. Goode,* 111 N. C., 288, the Court said: "Should the sum demanded be reduced under $200, by failure of proof, or by sustaining a demurrer to any part thereof, or to some of the causes of action, the jurisdiction would not thereby be ousted, except when the sum is so palpably demanded in bad faith as to amount to a fraud on the jurisdiction." To the same effect is the language of the present *Chief Justice* in *Sloan v. R. R., supra.* If the plaintiff in good faith alleges a cause of action within the jurisdiction of the Superior Court, the latter does not lose its jurisdiction thus acquired by the failure of plaintiff to prove the allegation in its entirety, or because he has fallen short of proving all or any part of it. The allegation of the pleading made in good faith fixes the jurisdiction of the court. More closely following our case, perhaps, is *Ashe v. Gray,* on the rehearing, 90 N. C., 137, in
(301) which the Court said: "The complaint being for a tort, sustains the jurisdiction, though the charge of a *guilty knowledge* of the falsity of the representations which influenced the plaintiff in making the contract of exchange may not have been proved, and for the want of which no issue was asked to be made up." This seems to be conclusevly against the ruling of the court by which the action was dismissed as to the false warranty.

The judgment must be reversed and a new trial had according to the law of the case as we have declared it to be.

Reversed.

Cited: Machine Co. v. Bullock, 161 N. C., 14.

C. N. SIMPSON, JR. v. R. M. GREEN & SONS.

(Filed 13 November, 1912.)

Contracts, Written—Vendor and Vendee—Principal and Agent—Parol Evidence—Technical Breach of Contract—Substantial Recovery.

Upon an action for damages for breach of contract in the sale of a soda fountain, it appears that the plaintiff signed a written contract of purchase requiring that the trimmings of the fountain should be shaded green, and among others it contained the stipulation that "the sole authorized business of our agents is to solicit contracts on this printed form, and no agreement or representation will be recognized by us unless it is written hereon": *Held,* the plaintiff having accepted and used the fountain for several months, cannot maintain his action upon the ground that a certain part did not come up to the verbal representations of the vendor's selling agent; and, further, the fact that the trimmings of the fountain were white, instead of green, on the evidence presented, was only a technical breach of the contract, and did not afford a basis for a substantial recovery.

APPEAL by plaintiff from *Justice, J.,* at August Term, 1912, of UNION. Action heard on appeal from a justice's court.

At close of testimony, on motion, there was judgment of non- (302) suit, and plaintiff excepted and appealed.

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

Redwine & Sikes for plaintiff.
Stack & Parker for defendant.

HOKE, J. From the facts in evidence, it appears that defendant sold and conveyed to plaintiff, under a written contract, dated 21 December, 1910, and containing full specifications, a soda fountain, with usual fixtures, etc. The same was installed on 23 March, 1911, and has been used by plaintiff since that date; that some cash, $100, was paid on execution of contract; $200 more on arrival of goods, and, in order to get bill of lading for same, remainder of purchase price was evidenced

by plaintiff's notes, payable monthly, and these notes seem to have been paid at the time of action brought; that on 21 August, 1911, plaintiff instituted present suit for damages for breach of contract, claiming that the fountain did not come up to specifications and charging that the carbonator was not of the kind described, nor the trimmings of the counter; the contract requiring that these trimmings should be shaded green, and they proved to be white. The written contract contained, among others, the following stipulation: "The sole authorized business of our agents is to solicit contracts on this printed form, and no agreement or representation will be recognized by us unless it is written hereon." Having accepted and used the fountain for several months, the plaintiff must be considered as holding it under the terms of the contract, and a perusal of the testimony will disclose that plaintiff rests his principal grievance, not on the ground that the carbonator differs from the specifications of the contract, but that the same does not come up to certain verbal assurances of defendant's agent, made at the time of sale and not contained in the written agreement between the parties. Under the written stipulation, above quoted, these verbal assurances constitute no part of the contract, and our authorities are to the effect that they may not be considered in an action for its breach. (303) *Machine Co. v. McClamrock,* 152 N. C., 405; *Medicine Co. v. Mizell,* 148 N. C., 384. On the question of the white and green trimmings, the evidence as to pecuniary injury is entirely too indefinite to be made the basis of any substantial recovery, and any technical breach of the contract in this respect should, in our opinion, be treated as waived. See *Parker v. Fenwick,* 138 N. C., 209. There is no error, and the judgment directing a nonsuit is

Affirmed.

Cited: Piano Co. v. Strickland, 163 N. C., 253.

EMPORIA CONCRETE AND CONSTRUCTION COMPANY v. BOARD OF COMMISSIONERS OF GRANVILLE COUNTY.

(Filed 30 October, 1912.)

Contracts—Interpretation—Monthly Estimates—Final Estimates—Measure of Damages—Evidence—Quantum Valebat.

In an action to recover upon a written contract to construct and repair a public road, it thereunder appeared that payments to the plaintiff were to be made, from month to month, upon the certificate of the defendant's

engineer as to the amount and value of the work performed by the plaintiff within the month, deducting 10 per cent until the final completion and acceptance of the entire work, when the percentage so retained and the balance due, as then estimated and certified by the engineer for the whole work, should be paid, expressly providing that in making the final estimate the engineer should not be bound by the preceding estimates and certificates which were to be given by him monthly, but that they were to be considered as "approximate to the final estimate." The defendant annulled the contract before completion, as it had a right to do according to its provisions, and in the plaintiff's action to recover for the balance due, it is *Held*, the measure of its damages was the reasonable value of the work done that had not been received in the monthly payments, the monthly estimates by the very terms of the contract not being conclusive, but only to be received as evidence of the value of all the work which the plaintiff had done.

APPEAL by plaintiff from *Carter, J.*, at April Term, 1912, of (304) GRANVILLE.

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

Buford & Palmer and T. T. Hicks for plaintiff.
B. S. Royster and Graham & Devin for defendant.

WALKER, J. This action was brought to recover $1,838.50 for work and labor done and materials furnished by the plaintiff for the defendant, in the construction and reparation of fifteen miles of a public road, under a written contract between the parties. It was stipulated therein that the work done in each monh, which the engineer certified had been performed in accordance with the contract, should be paid for on the 15th day of the next month, but that 10 per cent should be deducted and withheld by defendant until the final completion and acceptance of the entire work, when the said percentage so retained, together with the balance due, as estimated and certified by the engineer, for the whole work, should be paid by the defendant. Provision was made for a final estimate by the engineer, but it was expressly agreed that the engineer, in making the final estimate, should not be bound by the preceding estimates and certificates which had been made from month to month, but they were to be considered as "approximate to the final estimate," and were not to be taken or construed as an acceptance of the work or a release of the contractor from responsibility therefor, until the final estimate had been made and the work, in its entirety, accepted as completely performed according to the terms of the contract. It was also provided that the contract could be annulled at the discretion of defendant, in which case the contractor (plaintiff) should be paid "pro rata

according to the amount of work remaining to be done, under the contract, as compared with the cost of the whole work specified therein," with the right reserved to the contractor, if the work should be resumed, to receive the prices fixed by the contract for the same, that is, for any work thereafter done. It appears that monthly estimates, and certificaes thereof, were made, as required by the contract, but the work was suspended or discontinued by the defendant, who complained (305) of defective construction, but the case was given to the jury under an instruction which assumed, and so directed them, that there had been no violation of the contract by the plaintiff.

The only question in the case was, how much the plaintiff was entitled to recover for the services rendered and materials furnished in the performance of its part of the contract. There was no final estimate of the work, and no certificate given by the engineer that all the work had been done according to the contract. But plaintiff contended that, in the absence of such an estimate and certificate, the previous monthly estimates and certificates should be regarded as final and conclusive of the amounts due the plaintiff, and requested the court to so instruct the jury, which request was refused, and plaintiff excepted. In their brief, counsel for plaintiff very frankly stated that, if plaintiff was not entitled to this instruction, the judgment should be affirmed, and they abandon all other exceptions appearing in the case. The court instructed the jury to find what was the value of plaintiff's work, as he would be entitled to recover its reasonable worth. The jury were told that, by the very terms of the contract, the monthly estimates were not final and conclusive, and that as no final estimate was made, they should consider all the evidence and assess plaintiff's damages at such sum as they found to be the reasonable worth of what was done in the performance of the contract and for which no payment had been made. The jury returned a verdict in favor of plaintiff for $500. Exceptions were duly noted and an appeal taken from the judgment on the verdict. We think the instruction was correct. His Honor would not have been warranted in a charge to the jury that the monthly estimates and certificates should be final and conclusive, when the contract expressly states that they shall not be. Such an instruction would have the effect of making a contract for the parties to which they had not assented, instead of construing the one they had made. The contract evidently contemplated two sets of certified estimates, those to be submitted monthly and, at the completion of the work, a final estimate which should be conclusive when duly certified as correct by the engineer. If the monthly (306) estimates covered all the work done and should be taken as *prima facie* correct, the instruction would still have been erroneous, as it re-

quired the court to charge that they were final and conclusive, and entitled the plaintiff to recover $1,786.10 and interest. The court gave the plaintiff the full benefit of the monthly estimates, as evidence of the amount due the plaintiff, and the charge was as favorable, in this respect, as the law permitted it to be.

Plaintiff's counsel relied on *Burgin v. Smith,* 151 N. C., 561; *McDonald v. McArthur,* 154 N. C., 122; *Sweet v. Morrison,* 116 N. J., 19; *Condon v. R. R.,* 14 Grattan, 302, and other cases of their class, but we think they have no bearing upon the question now before us. If there had been a final estimate, or even if the work had been accepted under certified monthly estimates, without the provision in the contract as to the inconclusive character of such estimates, those cases might, and perhaps would, be pertinent authorities; but the facts in this case and those upon which the decisions were based in the cases cited, are essentially different. In the absence of any stipulation fixing the price of the work performed by plaintiff, it was entitled to receive its reasonable worth, and no more. This the jury has ascertained to be $500.

A contract similar, in substantial respects, to the one upon which this suit is based, was considered and construed in *O'Brien v. Mayor of New York,* 139 N. Y., 543, and the conclusion we have reached is in full accord with the decision in that case. It may be that the facts disclosed in the record are stronger in favor of the defendant than those in the case we have cited were in favor of the defendant in that case. If there is any difference in the two cases, it is in favor of defendant in the case at bar.

No error.

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(307)

F. F. BAYNES ET AL. v. R. N. HARRIS.

(Filed 7 November, 1912.)

1. Compromise—Admissions—Evidence.

A distinct admission of an independent fact during an attempt to compromise is admissible in evidence, though an offer made for the purpose of effecting a settlement is not.

2. Appeal and Error—Evidence—Harmless Error.

A new trial will not be granted on appeal for the refusal of the trial judge to admit competent nad material evidence, when it appears that substantially the same evidence ruled out was thereafter given by the same witness.

3. Deeds and Conveyances—Equity—Reformation—Material Mistake.

When, without indication of fraud or imposition, a deed to lands is sought to be reformed for mistake, upon the ground that more timber had

been bought than that contained in the boundaries described, the misapprehension of the grantee, alone, is insufficient, for the mistake must be mutual to both parties for the application of the equitable doctrine of reformation.

APPEAL by plaintiffs from *Carter, J.*, at April Term, 1912, of GUILFORD. Action to correct and reform a deed.

This issue was submitted without objection: "Did plaintiffs contract to purchase of defendant the land described in article 1 of the complaint? Answer: No."

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

Sapp & Williams, Morehead & Morehead for plaintiffs.
A. L. Brooks, C. A. Hall for defendant.

BROWN, J. This action was prosecuted by plaintiffs to correct and reform a deed executed by defendant to plaintiffs, the latter alleging that the instrument did not include all the land purchased by plaintiffs from defendant, and paid for, and that a part of the land was omitted either by mutual mistake of both parties to the deed or by the mistake of the plaintiffs and the fraud of defendant.

There are only two assignments of error: one to evidence and (308) one to the charge of the court. We do not think either can be sustained.

The court excluded a certain declaration of the defendant to witness Medearis, to the effect that defendant told Medearis that he had made a mistake in representing the "amount of this land." The court excluded it upon the ground that the evidence of Medearis showed the alleged statement was made during compromise negotiations.

We are not inclined to agree with his Honor's ruling, as a distinct admission of an independent fact during an attempt to compromise may be given in evidence, though an offer made for the purpose of effecting a settlement cannot be, and the reason for the distinction is very plain. *Hamblett v. Hamblett,* 6 N. H., 333; *Eastman v. Mfg. Co.,* 82 Am. Dec., 205.

Our Court has held that "An offer to compromise is inadmissible as evidence, yet admissions of facts made in the same conversation are. And there is no doubt that such admissions are competent evidence when made to one whom the party knows has no authority to compromise." *Daniel v. Wilkerson,* 35 N. C., 330.

But we do not deem it proper to grant a new trial for such alleged error, as the plaintiffs received the full benefit of such evidence later

on without objection, when Medearis testified in reference to the same conversation in substance that defendant Harris said he sold Mr. Baynes more than he deeded.

The plaintiff excepted to that part of his Honor's instructions in which he said: "Now, the court charges you, as a matter of law, that if there was no definite representation as to a larger area of land, upon which representations the minds of the parties met and upon which they contracted, that a mere mistake by the defendant as to the area of his land would not authorize you to find that there was a contract for a larger area."

The plaintiffs admit in their evidence that they can read, and did read the deed, and that they "got all of the land the deed called for, but not all they bought." The defendant denies that he contracted to sell any more than the deed conveys. That was the clear-cut issue of fact submitted to the jury, and it was decided adversely to the plaintiffs.

The deed could not be reformed because the plaintiffs alone misunderstood what they were purchasing. (309)

It is too well settled by this Court to require the citation of authorities that a court cannot make for parties a contract which they did not make, and did not intend to make, for themselves; and that to reform an instrument on the ground of mistake, the mistake must be mutual to both parties; and when the mistake is made by one party only, there can be no ratification or correction to the contrary, in the absence of fraud and imposition upon the part of the other. Kerr on Mistake, sec. 72, p. 146.

"Reformation of a deed on the ground of a mistake in the description cannot be had unless the mistake was common to all parties thereto." *Land v. Bond,* 154 Mass., 354.

In *Elks v. Ins. Co.,* 159 N. C., 619, *Justice Allen,* speaking for the Court, says: "It is elementary that it is necessary that the minds of the 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 Pars. Con., 475. See, also, 34 Cyc., pp. 910 and 915, where all the authorities are collected.

The mistake of the plaintiffs in this case, if made, is unilateral, and does not entitle them, in view of the finding of the jury, to a reformation of the deed.

No error.

Cited: In re Smith's Will, 163 N. C., 466; *In re Clodfelter's Will,* 171 N. C., 530.

(310)

H. T. OSBORNE, AMINISTRATOR, v. SOUTHERN RAILWAY COMPANY.

(Filed 30 October, 1912.)

Railroads—Crossings—Signals—Negligence—Look and Listen—Contributory Negligence—Evidence—Nonsuit—Questions for Jury.

In an action for damages against a railroad company for the negligent killing of plaintiff's intestate by the defendant's train while crossing its track on a public road in a buggy with another, there was evidence tending to show that, before attempting to cross the track, the intestate stopped, looked, and listened, and did not see or hear the approaching train until the horses were on it; and that there was an obstruction to the view which rendered it impossible to sooner see the train; that the intestate could have been seen by the engineer on the train a distance of 300 or 400 feet, and conflicting evidence as to whether the usual signals for the crossing had been given by those in charge of the locomotive: *Held*, a charge by the court, under this evidence, that the plaintiff's cause of action was barred by the contributory negligence of the intestate, would be an expression of opinion by the court upon the question as to whether the intestate had exercised the care required of him under the circumstances, which is prohibited by the statute. Revisal, sec. 535. *Cooper v. R. R.*, 140 N. C., 209; *Mayes v. R. R.*, 119 N. C., 758, cited and applied.

APPEAL by defendant from *Whedbee, J.*, at July Term, 1912, of GRANVILLE.

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

B. S. Royster for plaintiff.
Hicks & Stem and T. T. Hicks for defendant.

WALKER, J. Plaintiff's intestate was struck by one of defendant's engines and killed, while riding on a wagon with J. E. Puckett over a crossing. There was evidence to the effect that the men in the wagon looked and listened and did not hear or see the train which was approaching. They could not see it because of obstructions. The plaintiff's witness, J. E. Puckett, testified: "When I got there, I stopped, looked, and listened. Neither saw nor heard the train before the horses were on the track; I was unable to see it on account of the orchard, fence, honeysuckle vines, and the cut." He also stated that a train could not be seen until he had reached a point a few feet from the track, or very near it. There was also evidence that the engineer did not give any signal for the crossing by blowing the whistle or ringing the bell of the engine, and evidence to the contrary. There was evidence tending to

show that a person on the crossing could have been seen by the engineer when 300 or 400 feet from it. The evidence upon the material question in the case was conflicting.

Defendant requested the court to enter a judugment of non- (311) suit upon the evidence, as plaintiff's intestate was guilty of such contributory negligence in driving upon the crossing, without looking or listening, as barred his recovery. The judge could not have done so without deciding an issue of fact, which he is forbidden to do, that being the function of the jury. Pell's Revisal, sec. 535, and cases cited in note.

The evidence favorable to defendant's view of the case may be ever so strong and persuasive, but if there is a conflict of testimony, it must be left to the jury, and they must find the facts. This is a case where there was a serious dispute as to the facts, which, of course, carried the case to the jury.

It is our duty, upon a motion for a nonsuit, to consider the evidence in the view most favorable to the plaintiff, for at least one reason, which is, that the jury may adopt his version of the facts as the true one. It would be contrary to all our decisions to discard the proof in his favor and consider only that favorable to the defendant, or to permit the latter to overthrow the former, even if it is more reasonable and convincing. Such a course would contravene the express terms of the statute, and would nullify its plain and explicit injunction, that we, as judges, should confine ourselves to the law of the case and leave the finding of facts tc the jury.

The ruling of the court is sustained by *Cooper v. R. R.,* 140 N. C., 209, in which *Justice Hoke* said: "(1) A traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty. (2) Where the view is unobstructed, a traveler who attempts to cross a railroad track under ordinary and usual conditions without first looking, when, by doing so, he could note the approach of a train in time to save himself by reasonable effort, is guilty of contributory negligence. (3) Where the view is unobstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen, and is induced to enter on a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler (312) of the danger, and not imputed to him for contributory negligence. (4) There may be certain qualifying facts and conditions which so complicate the question of contributory negligence that it becomes

one for the jury, even though there has been a failure to look or listen, and a traveler may, in exceptional instances, be relieved of these duties altogether, as when gates are open or signals given by watchman, and the traveler enters on the crossing reasonably relying on the assurance of safety."

Applying these principles to the case, it will appear by a bare reading of the evidence that it should not have been withdrawn from the jury by granting a nonsuit. The jury, by their verdict, evidently found that the intestate and J. E. Puckett did look and listen, in the exercise of that degree of care characteristic of the man of ordinary prudence, and, further, that no signal from the approaching train was given. *Hinkle v. R. R.*, 109 N. C., 473; *Alexander v. R. R.*, 112 N. C., 720; *Russell v. R. R.*, 118 N. C., 1098; *Norton v. R. R.*, 122 N. C., 910.

In *Mesic v. R. R.*, 120 N. C., 490, after stating that it is the duty of a traveler on the highway, when he approaches a railroad crossing, to look and listen, even though the railroad may have been negligent, the Court says: "The rule, however, does not prevail where to look would be useless on account of obstructions, natural in themselves, or such as had been placed by accident or design by the company's employees on their tracks. . . . and when at the same time the engineer had failed to sound the whistle or ring the bell for the crossing, and in consequence of this failure the plaintiff had been induced to go upon the track and take the risk." The principal authorities are cited in *Cooper v. R. R., supra,* and explained, and no further reference to them or comment on them is required to clarify the subject. The principles governing such cases as these are too well known and too firmly established to be misunderstood or to require any vindication.

It cannot now be successfully argued, because there was evidence that the intestate could have seen the coming train, that therefor he did see it. His opportunity to see and to hear was a circumstance, if it existed, which the jury could consider in ascertaining whether he did (313) see, but was not conclusive evidence of the fact. In *Mayes v. R. R.*, 119 N. C., 758, the present *Chief Justice* says: "We do not understand the defendant to complain that the jury was not instructed that the looking and listening must be done with proper care, but his proposition is, that if the plaintiff looked and listened and might have seen or heard, and did not see or hear, as a proposition of law he did not look and listen. That, however, is a matter of fact, and not a proposition of law. By 'looking and listening' the jury must have understood, under the terms of the charge, 'looking and listening with proper attention.' Defendant is traveling in a circle when he argues that if the plaintiff looked and listened with care, he saw or heard the

approaching train, if he could have done so; and if he did not see and hear it, when he might have done so, then he did not, with proper attention, look and listen." This answers defendant's main contention.

There was no error in the case, that we have been able to discover, after a careful examination of it.

No error.

Cited: Johnson v. R. R., 163 N. C., 441.

COBB BROTHES & CO. v. W. B. GUTHRIE.

(Filed 3 October, 1912.)

Wagering Contract—"Cotton Futures"—Pleadings—Allegations of Answer—Burden of Proof—Evidence.

In an action to recover moneys paid out, and commission, for the purchase of cotton by the plaintiffs to defendant's use, where the defense is set up, by verified answer, that the transaction was a gambling contract in "cotton futures," the burden is cast upon the plaintiffs to prove that the transaction was a lawful one, and that the parties intended actual delivery, not merely optional with either party (Revisal, secs. 1690, 1691), and the defendant's letter in this case, being the only evidence, promising payment and asking for indulgence, is insufficient.

APPEAL by plaintiffs from *Whedbee, J.,* at July Special Term, (314) 1912, of DURHAM.

Action to recover $280. From a judgment for defendant, the plaintiffs appeal.

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

Johnson & Johnson for plaintiffs.
J. Lathrop Morehead for defendant.

BROWN, J. This action is brought to recover $280 alleged in the complaint to be due the plaintiffs by defendant. The character of the transaction is stated in the complaint as follows: "That the consideration of the said account stated was the sum of $280 paid out and expended, including plaintiffs' commissions, by plaintiffs for the use and benefit of defendant and at his special instance and request, in and about the purchase and sale of 200 bales of cotton."

The defendant pleaded as a defense to the action chapter 39 of the Revisal of North Carolina, 1905, entitled "Gaming Contracts," and the amendments thereto, and especially section 1689 of said Revisal of North Carolina. The answer was duly verified by defendant.

Plaintiffs introduced in evidence (which was all of the evidence) the following letter from the defendant:

DURHAM, N. C., December 10, 1910.

COBB BROS. & Co.,
Norfolk, Va.

DEAR SIRS:—I am in receipt of yours of the 8th instant, showing debit of $280. I will send you a remittance at the very earliest possible moment; so be a little patient with me, please.

W. B. GUTHRIE.

The defendant having pleaded in a verified answer that the transaction was a gambling contract in "cotton futures," the burden was cast upon the plaintiffs to prove that the transaction was a lawful one, that actual delivery of the cotton was intended by the parties, and not merely that it was optional upon either party to call for actual delivery. (315) Revisal, secs. 1690, 1691.

The only evidence offered, viz., the letter of the defendant, fails to meet the requirements of the law. *Burns v. Tomlinson,* 147 N. C., 647; *Garseed v. Sternberger,* 135 N. C., 502; *Burrus v. Witcover,* 158 N. C., 384. The judgment of the Superior Court is

Affirmed.

T. H. POE v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 30 October, 1912.)

1. Nonsuit—Appeal and Error—Plaintiff's Evidence—Contradictory.

The court on an appeal from a judgment of nonsuit, in viewing the evidence in the light most favorable to the plaintiff, cannot act upon a portion of the testimony of plaintiff's witness which sustains the contention of the defendant, though such testimony impairs the force of the other statements made by him.

2. Telegraphs—Negligence—Delay in Delivery—Evidence.

In an action for damages for the negligent delay in the delivery of a telegram by a telegraph company, a delay in the delivery of four hours from one point in the State to another, about one hundred miles apart, is some evidence of negligence.

3. Telegraphs—Delay in Delivery—Mental Anguish—Means of Conveyance—Physical Condition—Negligence—Evidence—Damages.

When there is evidence of negligence on the part of defendant telegraph company in the delay of a telegram announcing the death of a sister, it is competent for the plaintiff to introduce evidence tending to show that his physical condition was such at the time to prevent his availing himself of the only means he had of reaching his destination in time for the funeral, by going part of the distance by train and a part by private conveyance, and that by reason of the delay in delivering the telegram he was prevented from taking an all-rail journey, for which he did not have the money, but could have borrowed it, and that he suffered mental anguish in consequence.

APPEAL by plaintiff from *Whedbee, J.*, at July (Special) Term, 1912, of DURHAM.

This is an action to recover damages for mental anguish, al- (316) leged to have been caused by the negligent failure of the defendant to deliver a telegram. At the conclusion of the evidence for the plaintiff, his Honor entered judgment of nonsuit, upon motion of defendant, and the plaintiff excepted and appealed.

Bryant & Brogden for plaintiff.
Fuller & Reade for defendant.

ALLEN, J. Applying the rule that, upon a motion to nonsuit, the evidence must be viewed in the light most favorable to the plaintiff (*Mizzell v. Mfg. Co.*, 158 N. C., 267), and that we cannot act upon the portions of the testimony of a witness which sustains the contention of the defendant, although they may impair the force of other statements made by him (*Dail v. Taylor*, 151 N. C., 289; *Hamilton v. Lumber Co.*, 156 N. C., 523), we are of opinion that it was error to enter judgment of nonsuit upon the plaintiff's evidence.

It was admitted that a telegram, addressed to the plaintiff at West Durham, was delivered to the defendant at Asheboro at 7:50 o'clock of the morning of 16 September, 1911, informing him of the death of his sister at Denton in Davidson County, and requesting him to come at once, and that the defendant undertook to transmit and deliver the same.

The plaintiff offered evidence tending to prove that he was well known in West Durham; that he lived within one-fourth mile of the depot; that he was about his home during the morning, and that the telegram was not delivered to him until about 12 o'clock.

In the absence of any explanation, a delay of four hours in delivering a telegram from one point to another in the State, about one hundred miles apart, is some evidence of negligence. *Meadows v. Telegraph Co.*, 132 N. C., 41.

The plaintiff also offered evidence tending to prove that if the telegram had been delivered promptly, he could and would have left Durham at 10 o'clock on the morning of 16 September, and would have arrived at Denton about 4:30 o'clock P. M. of the same day, before the funeral of his sister; that after the telegram was delivered, he could not reach Denton by rail in time to attend the funeral; that his physical
(317) condition was such that he could not safely go from Durham to Thomasville on a later train and drive about seventeen miles to Denton, and that he suffered mental anguish.

He testified, among other things:

Q. Had you been to see your sister at any time recently before this message? A. Somewhere about five or six weeks.

Q. Was she sick at that time? A. Yes, sir.

Q. Where was she at the time you went to see her? A. At Mr. Putnam's.

Q. Where was that? A. At Denton, N. C.

Q. What train did you go on when you went to see your sister? A. On the evening train. I left West Durham somewhere about 10 o'clock in the morning.

Q. What time did you get to Denton? A. About 4:30 in the evening.

Q. How did you go? A. I went from here to Thomasville and changed trains there and went out on the Piedmont road.

Q. From here to Thomasville, what road do you travel on? A. On the Southern.

Q. What road from Thomasville to Denton? A. Piedmont road.

Q. Was there any other railroad there? A. No, sir.

Q. Did that road run on Sunday? A. No, sir.

Q. Was there any train that you could have reached Denton on before Monday after the morning train passed West Durham on Saturday morning? A. No, sir; not until 4:30 Monday evening.

Q. State whether or not, if you had gotten the telegram on Saturday morning before the west-bound train arrived, state whether or not you would have gone? A. Yes, sir; I would have gone as quick as I could get there.

Q. Could you have gone? A. Yes, sir; by rail.

Q. Did you have sufficient money to pay your way by rail? A. No, sir; but I could borrow it, I suppose, from others.

Q. Did you have some money? A. Yes, sir.

Q. Mr. Fuller asked you about the team. You said you never made a trip over that road? A. No, sir.

Q. What else did you say about the money to hire a team?
(318) A. I didn't have it, though I could borrow it. I had just about enough to make railroad fare.

Q. What was your condition at that time as to sleep and health? Were you able to have made the trip at night if you had been there and had money to hire a team and could have gotten one? A. Not safely. I didn't want to undertake it.

Q. You don't know whether you could have succeeded or not? A. No, sir.

Q. State whether or not your failure to get to the funeral of your sister has caused you any mental suffering or anguish? A. Yes, sir; it certainly has.

There is also evidence on the part of the plaintiff which detracts materially from the evidence we have quoted, but we are not at liberty to rest our opinion upon contradictions in the evidence, as the law commits to the jury the duty of determining the weight that shall be given to the evidence.

Reversed.

Cited: Ridge v. R. R., 167 N. C., 521; *Hadley v. Tinnin,* 170 N. C., 86; *Barnell v. Smith,* 171 N. C., 537.

J. W. DOLES, ADMINISTRATOR OF FRANK BROWN, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 11 September, 1912.)

1. Carriers of Passengers—Negligence—Boarding Passengers—Starting of Train—Contributory Negligence—Evidence—Questions for Jury.

Upon conflicting evidence, in an action against a railroad company for damages for the negligent killing of plaintiff's intestate, as to whether the defendant's passenger train suddenly moved forward at once after "all aboard" had been called by the conductor and immediately after the signal for starting had been given, preventing, in the presence of the engineer and porter, the plaintiff's intestate from gaining a foothold on the steps of the car he was endeavoring to enter as a passenger, because of the speed of the train, in consequence of which he was knocked under the cars by a truck left there by an express company, and killed; or as to whether the intestate's death was attributable to his own negligent act in attempting to board the car of a moving train after having been warned not to do so, the question of defendant's actionable negligence is one for the determination of the jury. *Roberts v. R. R.,* 155 N. C., 79, cited as controlling.

2. Carriers of Passengers—Negligence—Dominant Cause—Joint Tort Feasors—Indemnity—Contribution.

When the negligence of a railroad company causes the passenger getting aboard of its passenger train to be thrown against a truck of an ex-

press company left by the latter company near the train, and thence beneath the moving train, to his death, and the railroad company is sued for damages for the wrongful death thus inflicted, assuming that the truck was negligently left in a position to contribute to the injury, the negligence of the railroad company would be the dominant cause thereof; but if otherwise, the two companies would be joint tort feasors, and, in this case, there would be no right of indemnity or contribution existing in favor of the railroad company against the express company, its codelinquent. *Gregg v. Wilmington*, 155 N. C., 18, cited and distinguished.

(319) APPEAL by defendant from *Cline, J.*, at March Term, 1912, of NORTHAMPTON.

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

S. T. Stancell, Peebles & Harris, and Gay & Midyette for plaintiff.
Mason & Worrell and Murray Allen for defendant.

WALKER, J. It is not necessary to make an extended statement of the facts in this case. The plaintiff's intestate, Frank Brown, was killed at Suffolk, Va., while, as alleged, he was boarding the defendant's passenger train at that place, bound for Margarettsville in this State. The plaintiff's testimony tended to show that the intestate purchased a ticket for his passage from Suffolk to his destination, and was in the act of getting upon the passenger coach just after the conductor had given the call, "All aboard!" when the train was started—"at once after the signal was given," and the intestate, who was unable to gain a foothold because of the speed of the train and the crowded condition of the steps and platform of the car, was knocked under the cars by a truck of the Southern Express Company, which had been left on the platform at the station, within a few feet of the passing train, and killed.

One witness testified that the train started with a jerk and
(320) "with full force," while passengers were trying to alight from the train and the intestate was attempting to get on the steps, and that plaintiff could have been seen by the engineer and the porter, who called for passengers to get aboard.

On the contrary, there was evidence tending to show that the train started at its usual speed, and that intestate was leaving the car and jumped on the truck and was killed. There was also evidence that he was warned not to leave the car by the porter, who told him that he would have the train stopped so that he could get off safely.

It may be said generally that some of the evidence tended to show negligence on the part of the defendant, which approximately caused the intestate's death, while there was other evidence which tended to

prove that the intestate's death was caused entirely by his own fault in jumping from a rapidly moving train. The court submitted the case to the jury in a charge which fully explained every phase of the evidence and clearly set forth the law applicable to the facts as they might find them to be.

The charge of the court was in accordance with the principles laid down in *Roberts v. R. R.,* 155 N. C., 79, and the essential facts of the two cases cannot well be distinguished. That case must control our decision in this one on all the points raised by the defendant, except the contention that the court should not have entered a nonsuit upon the evidence as to the Southern Express Company. The defendant objected to this ruling of the court, and relies upon *Gregg v. Wilmington,* 155 N. C., 18, to sustain his objection. But we do not see the analogy between the two cases. In that case, Wolvin's negligence was active and the efficient cause of the injury, while the negligence of the city of Wilmington was merely passive, in allowing the dangerous condition, brought about by Wolvin's negligence, to exist in one of its streets. The city did not actually coöperate with Wolvin in committing the wrong to the plaintiff's intestate.

In *Gregg v. Wilmington,* 155 N. C., 24, approving what is said by Judge Cooley in his treatise on Torts (3 Ed.), p. 254, we stated the general rule to be, according to the maxim, that no man can make his own conduct the ground for an action against another (321) in his own favor. If he suffers because of his own wrongdoing, the law will not relieve him. The law cannot recognize equities as springing from a wrong in favor of one who was concerned in committing it. Where two or more persons have participated in the commission of a wrong, the general rule undoubtedly is that a right to contribution or indemnity will not arise in favor of the one held responsible by the injured party. 38 Cyc., 493. There are exceptions to the rule, but this case is not included in any of them.

Churchill v. Holt, 131 Mass., 67 (41 Am. Rep., 191), seems to be a strong authority against the contention of the defendant. It appeared that Churchill left his hatchway in an unsafe condition. Defendant's servant, in the performance of his master's business, interfered with it, so that it became more dangerous, that is, the danger already existing by the fault of Churchill was increased, and Mrs. Meston fell into the hatchway and was thereby injured, and recovered damages of Churchill. It was held that Churchill was not entitled to indemnity or contribution from the defendant Holt, whose servant interfered with the hatchway. With respect to the right of indemnity, upon the facts presented, the Court said: "In such a case, both parties, whether they act with a

common purpose or independently, aid in creating the danger or nuisance, and it is impossible to apportion the degree of their respective negligence, or to determine by whose individual negligence the injury was caused. They are both wrongdoers, whose unlawful acts contribute to produce the injury. They are *in pari delicto,* and therefore neither can recover indemnity or contribution of the other. The plaintiffs contend that they had the right to go to the jury upon the question whether the sole cause of the injury to Mrs. Meston were the negligent acts of the defendants' servant. We must presume that proper instructions were given as to other aspects of the case; but in the aspect of the case supposed in the instruction we are considering, that is, if the jury found

(322) that the plaintiffs negligently left the hatchway in a dangerous condition, and that the acts of the defendants' servant merely made it more dangerous, it is impossible for the jury to find that the fault of the plaintiffs did not contribute to the injury. It is like the case of a man injured by falling into a hole dug partly by one person and partly by another. The acts of both aid in creating the danger which causes the injury, and it cannot be ascertained whether the acts of one excluding the acts of the other would have caused the same injury. If the acts are unlawful, both are wrongdoers, *in pari delicto,* and though each would be liable to the person injured, neither could recover indemnity or contribution of the other." *Churchill v. Holt,* 131 Mass., 77 (41 Am. Rep., 193).

When the same case was before the Court on a former appeal, it was said: "The rule that one of two joint tort feasors cannot maintain an action against the other for indemnity or contribution does not apply to a case where one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability. In such case the parties are not *in pari delicto,* as to each other, though as to third persons either may be held liable." But that is not our case. Here the express company left the truck near the track of the railroad company, and if this was a negligent act, it would not have harmed the intestate if the defendant had not also been negligent. The two acts concurred in producing the injury, and, upon the assumption that the express company was negligent, it and the railroad company were joint tort feasors, as to the plaintiff and as between themselves, and there is no right of indemnity or contribution. It may also be said that the defendant's wrong was the active and dominant cause of the injury, without which it would not have occurred, and it, therefore, has no ground whatever upon which to base a claim for compensation against its codelinquent. *Comrs. v. Indemnity Co.,* 155 N. C., 219. We find

No error.

(323)

R. T. STANLEY v. SOUTHERN RAILWAY COMPANY.

(Filed 13 November, 1912.)

1. Railroads—Excursion Trains—Protection for Passengers—Anticipated Results.

It is the duty of a railroad company to have a sufficient number of officers in charge of its train to preserve order, and it is held in this case that only two men, the conductor and the trainmaster, were not force sufficient for an excursion train of twelve or fourteen coaches, of both white and colored people, carried separately, when drinking and rowdyism thereon might reasonably have been anticipated.

2. Railroads—Excursion Trains—Protection for Passengers—Police Powers—Interpretation of Statutes.

It is no defense that those in charge of an excursion train of twelve or fourteen coaches leaving from a North Carolina city, and containing white and colored passengers, had no authority to arrest passengers who were rowdy and shooting pistols in the coaches, in an action for damages sustained from a pistol shot by one of the passengers, for under our statutes the railroad company had the right to swear in officers to take charge of the train. Revisal, secs. 2605, 2606, 3757 (*b*).

ALLEN, J., concurring in result; BROWN, J., dissenting.

APPEAL by plaintiff from *Whedbee, J.*, at August Term, 1912, (324) of GUILFORD.

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

John A. Barringer for plaintiff.
Wilson & Ferguson for defendant.

CLARK, C. J. The plaintiff was a white passenger on a mixed excursion train from Greensboro to Norfolk and return, in August, 1910. There were twelve or fourteen cars in the train. The colored passengers were in the forward cars and the white passengers in the rear cars. On the return, just before the train arrived at Franklin, Va., the plaintiff, who was riding in the second white car behind the rear colored car, being unable to get a seat, went forward to find a friend, Luther Edmundson, and as he got to the front door of the front white passenger car he saw eight or ten negroes, in a drunken condition, just inside the rear colored coach in front of him, trying to take a bottle of whiskey from Luther Proctor, another white man whom he knew. According to his evidence, the negroes had knocked Proctor down and were beating him over the head. They were cursing and in a boisterous condition. The plaintiff

was standing in the door of the white car next the colored coach when he saw the negroes beating Proctor over the head and having him down on the floor. Knowing Proctor, he stepped across the platform and caught Proctor by the arm and attempted to help him up. When he did so, the negroes began to curse him, and one of them struck him over the head and staggered him to the platform. Proctor got loose from them, and the plaintiff then undertook to leave the negroes and get back to the white car, and as he got back to the door of the white car, one of the negroes shot him through the body. He testified that he took hold of Proctor and pulled him out from under the negroes to keep them from killing him. There were no officers in sight at the time nor any on the train. The defendant had no one aboard except an engineer and fireman on the engine, a flagman, who rode in the rear coach, his proper place, a conductor, and a trainmaster. There were fourteen (325) coaches in the train. Pistols were being fired by the people in the colored car, who were rowdy and boisterous. The conductor, when asked why he did not keep order, said he had no authority to arrest the men.

Under Revisal 1905, secs. 2605, 2606, 3757 (b), the railroad had the right to swear in officers at Greensboro to take charge of the excursion train. It certainly was the duty of the defendant to have a sufficient number of officers in possession of the train to preserve order. This was not done, and, indeed, it may be said even as a matter of law, that two men, the conductor and trainmaster, were not force enough to preserve order in a mixed excursion train of fourteen coaches, especially as part of them were white and part colored and there was drinking and rowdyism, which might reasonably have been anticipated.

The evidence, which must be taken in the light most favorable to the plaintiff, shows that the negroes were drinking in Norfolk; that they had firearms and whiskey and were drinking and shooting along the trip back. Certainly the jury might well have found, if the evidence had been submitted to them, that the defendant was negligent in not having a more efficient force and in not having taken more effective precautions to prevent such an occurrence as this.

It was argued to us that the plaintiff was guilty of contributory negligence in going into the colored car. But taking his evidence to be true, he was standing at the front end of the white coach, and seeing a white man being brutally treated by the negroes and in danger of losing his life, he went forward a few feet to rescue him. It cannot be held as a matter of law that this was contributory negligence. The plaintiff was simply obeying the most ordinary dictates of humanity.

Upon the evidence, the case should have been submitted to the jury, with proper instructions. The judgment of nonsuit is

Reversed.

ALLEN, J., concurring in result.

BROWN, J., dissenting: I am of opinion that the motion to nonsuit was properly allowed. As I read the record, there is no just ground upon which to hold the defendant liable for negligence in failing to protect the plaintiff in a sudden affray in which he voluntarily (326) took part without reason for doing so.

The carrier is not an insurer of the lives of its passengers, and is not required to foresee and guard them against all assaults, but only such as from the circumstances may reasonably be expected to occur. *Penny v. R. R.*, 153 N. C., 296; *Britton v. R. R.*, 88 N. C., 536.

Mr. Hutchison states the true rule as follows:

"The negligence for which the carrier is held liable is not the wrong of the fellow-passenger or the stranger, but is the negligent omission of the carrier's servants to prevent the wrong from being committed. In order that such omission may constitute negligence, there is involved the essential element that the carrier or his servants had knowledge, or with proper care could have had knowledge, that the wrong was imminent, and that he had such knowledge or the opportunity to acquire it sufficiently long in advance of the infliction of the wrong upon the passenger to have prevented it with the force at his command." Hutchison on Carriers, sec. 980, page 1124, and cases cited.

The Supreme Court of Indiana holds that "If a passenger is violently assaulted or ejected from the train by a fellow-passenger while the conductor is absent, or attending to his duties in another part of the train, not knowing of the assault or that it was threatened, the carrier cannot be held liable therefor." *R. R. v. Arnold,* 26 Ind. App., 190. In that case many authorities are cited.

I am unable to find any decided case or text-writer which warrants holding the defendant liable under the evidence in this case, and none is cited in the opinion of the Court.

Cited: Brown v. R. R., 161 N. C., 576; *Mills v. R. R.,* 172 N. C., 267.

(327)

JAMES M. NORFLEET, ADMINISTRATOR, v. PAMLICO INSURANCE AND BANKING COMPANY.

(Filed 3 October, 1912.)

1. Partnership Obligations—Joint and Several.

An obligation of a partnership to its creditors is joint and several, and is the undertaking or promise of each of its members.

2. Same—Notes—Contracts—Interpretation—Agreement as to Collateral—Insurance, Life—Notes—Accounts—Application of Proceeds of Security.

The proceeds of a policy of life insurance which had been hypothecated by the deceased at a bank, as collateral for a note for borrowed money, with the further agreement "that any excess of collateral upon this note shall be applicable to such other note or claim" held by the bank against the borrower, etc., is by the terms of the contract, expressed or implied, applicable to the payment of insurance premiums collected by a firm of which the deceased had been a member, as agents for the bank, and which had not been paid over to it; and to the payment of a note made to the cashier of a bank for its use and benefit and being for money loaned by the bank to the deceased. *Bank v. Scott*, 123 N. C., 540, cited and applied.

3. Suits—Notes—Beneficial Owner—Parties.

An action may now be sustained by the beneficial owner of a note made to another for his use and benefit.

APPEAL by plaintiff from *Carter, J.*, at June Term, 1912, of EDGECOMBE.

This case was submitted upon a case agreed, the material facts of which are as follows: On 5 March, 1905, Leon A. Williams executed a note to the defendant for $3,000, payable on demand, and in the body of the same he agreed that the proceeds of certain policies of insurance on his life, payable to his estate, which he had deposited with defendant, as collateral, to secure his said note, should be applied to the payment of the note, and any surplus should be held by the defendant upon the following terms and conditions, which we copy from the note: "If I shall come under any other liability, or enter into any other agreement with said bank, while it is the holder of this obligation, it is hereby agreed and understood that any excess of collaterals upon this
(328) note shall be applicable to such other note or claim held by the said Pamlico Insurance and Banking Company against said Leon A. Williams, and in case of any exchange of the collaterals above named, the provisions of this note shall extend to such new collaterals."

Leon A. Williams, on 16 November, 1909, executed to one Job Cobb, in his own name, though as cashier of defendant bank and for it, his note for $44.64, the consideration being a debt which he owed the bank.

The original debt of $3,000 has been paid, except the sum of $181.50, for which a renewal note was given by Williams, which is now due and unpaid. On 1 October, 1909, the firm of Williams, Weddell & Co., of which Leon A. Williams was a member, had been engaged in the insurance business as agents of defendant, and on said date were indebted to defendant, as its agents, in the sum of $828.30, for premiums collected and not paid to defendant. This debt is now due, no part thereof having been paid. The firm is insolvent. Leon A. Williams died insolvent on 24 October, 1911, and plaintiff is his administrator. Defendant, after demand, made a statement to plaintiff of its administration of the said collaterals, showing the total proceeds of the policies in its hands to be $1,985, and it was thereupon agreed that defendant should retain so much of the said proceeds as is legally applicable to its claims, the same to be determined by the court under the submission, and pay the balance to the plaintiff. It was admitted, as part of the facts, that defendant, by its cashier, demanded of Leon A. Williams, 1 October, 1909, the payment of the open account due by Williams, Weddell & Co., to which Williams replied: "You have, to secure it, everything I possess now, and I can do nothing for you." The balance due on the original debt ($181.50) is not in controversy. The court held, upon the admitted facts, that defendant had a lien on the proceeds of the policies, under its contract with Leon A. Williams, for the debts of $44.64 and $828.30, and adjudged that said amounts and the costs be retained by defendant out of said proceeds, and the balance paid to plaintiff, who appealed from the judgment.

James M. Norfleet for plaintiff. (329)
G. M. T. Fountain & Son and Marshall C. Staton for defendant.

WALKER, J., after stating the case: The plaintiff contends that as the liability of Leon A. Williams for the open account is not of the same kind as that upon his note for which the policies were deposited as collateral, the former is not within the terms of the contract, one being an individual and the other a firm. But we are unable to accept this view, as we think the words of the contract are sufficiently broad and comprehensive to embrace an express, and if not expressed, then an implied promise to pay the bank the amount of the premiums collected by his firm as insurance agents for it. Partners are liable on their obligations to creditors jointly and severally. It is the undertaking or promise of the partnership, as well as of each of its members. But apart from this, the debt for premiums collected by the firm and not paid over, is within the very terms of the agreement as to the collaterals.

This case is so much like that of *Hallowell v. Bank,* 154 Mass., 359 (*s. c.,* 13 L. R. Anno., O. S., 315), and the reasoning of the Court in that case so strongly commends itself to us, that we might content ourselves with a bare reference to it, were it not for the zeal and confidence with which the contrary view was urged upon us. The clause of the collateral note construed in that case was as follows: "On the nonperformance of this promise (a demand note for $25,000), said bank applying the net proceeds (of the collaterals, being shares of stock) to the payment of this note and accounting to me for the surplus, if any; and it is hereby agreed that such surplus, or any excess of collaterals upon this note, shall be applicable to any other note or claim against me held by said bank." After disposing of a preliminary question, as to whether the surplus proceeds of the collaterals were applicable to the payment of a firm debt until there was a final default in the payment of the original note, the Court says: "The question remains whether the bank is entitled to hold security for the bills, which were accepted by Smith's firm and not by him individually. It cannot be denied that the acceptance were 'claims against him,' and that the words used in his note (330) were broad enough to embrace firm acceptances unless there is some reason in the contract, the circumstances, or mercantile practice, to give them a narrower meaning. *Singer Co. v. Allen,* 122 Mass., 467; *Chuck v. Freen,* Mood and M., 259. The clause pledging the property for any other claim against the debtor is not inserted with a view to certain specific debts, but as a drag-net to make sure that whatever comes to the creditor's hands shall be held by the latter until its claims are satisfied. Corey on Accounts and Lindley on Partnership have made it popular to refer to a mercantile distinction between the firm and its members. But we have no doubt that our merchants are perfectly aware that claims against their firms are claims against them, and when a merchant gives security for any claim against him, and there is nothing to cut down the literal meaning of the words, he must be taken to include claims against him as partner."

This principle is affirmed in 22 Am. and Eng. Enc. of Law (2 Ed.), 871; 31 Cyc., 821 (c) and 822 (c) and notes, where the cases are collected. While such an agreement will be construed so as to execute the intention of the parties and to give effect to every part thereof, yet it will be construed strictly, so as not to extend the obligation beyond the meaning contemplated. This is not unlike contracts generally, which must be so interpreted as to ascertain from the context what the parties intended, so as to enforce the undertaking according to their understanding of it.

The language of the contract in this case is exceedingly broad, and the contract is sufficient to include, according to its terms and by its very words, "any other liability" or obligation arising out of "any other agreement of Leon A. Williams with the bank," and also "any other note or claim." We can hardly think of any more certain language that could have been employed by the parties to embrace this particular kind of obligation, if they had in mind, and intended at the time, to secure it by the deposit of the collaterals. It was not intended to confine the securities merely to a liability in the form of a note, but to any kind of liability evidenced by note or created by agreement, or in the shape of a claim, and the language was broadened by the use of (331) the words "liability," "agreement," and "claim," in order to extend the operation of the contract to almost every conceivable obligation.

Chief Justice Marshall, in *Barry v. Foyles,* 26 U. S. (1 Peters), 311, said: "This suit is brought on a partnership transaction, against one of the partners. The declaration states a contract with the partner who is sued, and gives no notice that it was made by him with another. Will evidence of a joint *assumpsit* support such a declaration? Although it has been held from the 36 H. 6 Ch., 38, that a suit against one of several joint obligors might be sustained, unless the matter was pleaded in abatement, yet with respect to joint contracts, either in writing or by parol, a different rule was formerly adopted, upon the ground of a supposed variance between the contract laid and that which was proved. This distinction was overruled by *Lord Mansfield* in the case of *Rice v. Shute,* 5 Burn, 2611. The same point was afterwards adjudged in *Abbott v. Smith,* 2 W. Black, 695, and has been ever since invariably maintained. The principle is, that a contract made by copartners is several as well as joint, and the *assumpsit* is made by all and by each. It is obligatory on all, and on each of the partners." It was accordingly held that evidence of a joint *assumpsit* may be given, at common law, to support a declaration against one of the partners upon his several liability.

We are of the opinion that the defendant is entitled to retain a sufficient amount from the proceeds of the collaterals to pay the firm debt, and we entertain the same view in regard to the note of $44.64, given by Leon A. Williams to Job Cobb for the bank, Cobb being at the time its cashier. Under the old procedure, suit upon this note would have been in the name of Job Cobb to the use of the bank, as he is the holder of the legal title; but now it would be brought in the name of the bank, the beneficial owner of the note. It can make no difference that the note is payable to Job Cobb, when it is admitted to be the property of the bank and to have been given for a debt due to it, the amount of the note having been credited to Williams on the books of the bank at the time it was given.

We have not brought to our aid, in construing the contract,
(332) the interpretation which Leon A. Williams himself put upon it, when, in reply to a demand from the bank for payment of the firm indebtedness, he said: "You have, to secure it, everything I possess, and I can do nothing further for you." It was not necessary that we should lay any stress upon his own construction of his agreement with the bank, as his intention is clearly manifested to us without this additional light.

We have carefully examined the authorities cited by the plaintiff's counsel, and do not think they apply to this case, or that they should influence our decision in any degree. They are cases in which it was attempted to divert the proceeds of collaterals deposited to secure a specific debt to the discharge of some other obligation of the pledgor not mentioned in the agreement of the parties, or to his general indebtedness. The case of *Bank v. Scott,* 123 N. C., 540, was of this kind, and the Court held that the collaterals could not be applied to the payment of debts with which the pledgors were not connected, but should be used only in discharge of the debts, specified in the collateral agreement, upon which they were liable as principals, indorsers, or sureties. The two cases are not exactly alike in their facts, but the principle upon which *Bank v. Scott* was decided is applicable to the case at bar, and sustains our view of the law.

Our opinion, on the whole case, being with the defendant, we affirm the judgment entered by the court upon the case agreed.

Affirmed.

Cited: Milling Co. v. Stevenson, 161 N. C., 513; *Corporation Commission v. Bank,* 164 N. C., 207.

J. EUGENE FOUST v. E. D. KUYKENDALL, GUARDIAN.

(Filed 30 October, 1912.)

Executors and Administrators—Sale of Lands for Assets—Offer—Acceptance—Different Lands—Order Set Aside—Procedure.

In proceedings to sell lands to make assets to pay debts of the deceased, an offer was made to purchase a part of the lands, ten acres, definitely describing them, at a certain price, whereupon the clerk ordered a private sale, by a commissioner appointed by him, at the price offered, and a fee-simple deed to be made "after said land has been set apart": *Held,* the order of the clerk was not an acceptance of the offer to buy the lands de-

scribed by metes and bounds, and was not binding upon the estate, and that the proposed purchaser had acquired no rights thereunder to demand the delivery of the deed; and further, that the action of the court was not erroneous in setting aside this order and directing that the lands set apart be sold publicly according to law.

APPEAL by Oldham from *Whedbee, J.*, at August Term, 1912, (333) of GUILFORD.

This proceeding was commenced for the partition of certain lands among the heirs of J. W. Foust, and the administrator of Foust was made a party.

It was admitted that it would be necessary to sell a part of said land for the payment of debts, and it was agreed that before the division was made, 10 acres on the east side of said land should be laid off for that purpose, by commissioners appointed by the court.

On 30 March, 1912, the clerk made an order directing "That J. H. Johnson, E. F. Paschal, and C. C. Townsend be and they are hereby appointed commissioners to lay off and set apart 10 acres on the east side of said tract of land, which said 10 acres is to be sold under order of this court in this cause at a later day to create assets with which to pay debts outstanding against the estate of the said Joseph W. Foust and the charges of administration. Said commissioners are authorized and directed to employ a surveyor of their own selection in laying off said 10 acres of land. And this cause is retained for further orders."

On 13 May, 1912, before said commissioners had laid off said 10 acres, J. D. Oldham made the following offer to the administrator of said Foust:

"I hereby offer you the sum of $350 at private sale for 10 acres of land of the Joseph W. Foust estate, said land to be laid off west of the lands belonging to L. A. Carmen and myself, in the town of Whitsett, N. C., and described as near as may be as follows: Beginning at my southwest corner and running nearly west about 950 feet to a stake or a stone; thence nearly north about 575 feet to a stake or a stone; thence nearly east about 650 feet to said Carmen's line; thence about south with said Carmen's line 351 feet to Carmen's corner; thence (334) with Carmen's line, about east about 300 feet to my corner with Carmen; thence with my line about south, to the beginning corner 224 feet.

"As an additional consideration for the purchase above proposed, I agree to release from the operation of a lease executed to me by the said Joseph W. Foust any lands included in same and not included in the proposed purchase.

"Said offer is made subject to be withdrawn if not accepted in ten days, and upon the express condition that a good title, free from all encumbrances, is to be given me. Cash to be paid upon the delivery of the deed."

The administrator reported this offer to the clerk on 21 May, 1912, and on the same day the clerk made an order in the cause, concluding as follows:

"Now, therefore, it is ordered and adjudged that J. B. Minor be appointed a commissioner to sell the land to said J. D. Oldham at private sale at said sum of $350, and he is ordered and directed to sell said land and to convey the same to the said J. D. Oldham by deed in fee simple upon the payment of the purchase money, and after said land has been set apart as heretofore ordered."

On 15 June, 1912, L. A. Carmen made an offer to pay $375 for the 10 acres to be allotted.

On 25 June, 1912, the commissioners set apart said 10 acres, which cover only in part the land described in the offer of said Oldham.

In July, 1912, the administrator reported the offer of said Carmen, and the clerk thereupon rescinded and set aside his order of 21 May, 1912, and directed that the 10 acres set apart by the commissioners be sold publicly according to law.

The said Oldham resisted this last order, offered to pay said sum of $350, and demanded a deed.

He excepted to said order, and appealed to the judge, and upon the approval of the order of the clerk by the judge, appealed to this Court.

Thomas C. Hoyle for Administrator.
John A. Barringer for Oldham.

(335) ALLEN, J. The offer of the appellant, Oldham, was to pay $350 for 10 acres of land described by metes and bounds. The acceptance, if the order of 21 May may be regarded as such, was to sell to him 10 acres, to be thereinafter set apart by commissioners, for the sum of $350, and when the land was allotted it was not the land described in the offer.

Under these facts, it would seem that the proposed purchaser would not be bound by his offer, and that he has acquired no rights in the land laid off by the commissioners.

If demand had been made on him after the 10 acres had been set apart for the payment of the purchase price of $350, he could have resisted payment successfully, upon the ground that he had made no offer to buy that lot of land, and as his offer, as made, has never been accepted, he has acquired no rights in the premises.

Affirmed.

J. E. LATHAM v. J. E. FIELD & SON.

(Filed 20 November, 1912.)

1. Principal and Agent—Broker—Definition—Presumptions—Knowledge Implied—Vendor and Vendee.

One dealing with a cotton broker engaged in the business of selling cotton on commission for several firms is presumed to know that the duties of a broker are to bring the seller and the purchaser together in the transaction as vendor and vendee, payment being made directly from the latter to the former; and where it appears that the transaction was made directly between the supposed broker and the purchaser, the bills of lading for the cotton, invoices, etc., being in the name of the former, the one from whom the supposed broker has purchased the cotton for himself cannot be held liable for damages on the ground that the cotton furnished did not come up to specifications, and that he had requested the purchaser to give this broker his business on a former occasion.

2. Same—Evidence—Questions for Jury.

In an action to recover the difference in value of cotton, on the ground that it had not come up to specifications, alleged to have been bought of the defendant through his broker, there was evidence tending to show that the transaction was made with the alleged broker as an individual transaction, as purchaser of the cotton from the defendant, and as vendor of the plaintiff: *Held*, that evidence tending to show that the alleged broker received a commission on the sale, *i. e.*, that he was allowed a percentage on the invoice price of the defendant, cannot be held as a matter of law to constitute the one selling the cotton to the plaintiff the defendant's broker; but under the conflicting evidence an issue of fact is raised for the determination of the jury.

HOKE, J., dissenting.

APPEAL by defendant from *Carter, J.*, at April Term, 1912, (336) of GUILFORD.

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

King & Kimball and Thomas S. Beall for plaintiff.
Douglass & Douglass, J. T. Norris for defendants.

CLARK, C. J. The plaintiff was a cotton merchant in Greensboro, N. C. The defendants were cotton merchants in Cartersville, Ga. Shortly prior to May, 1908, the defendant W. H. Field came to the plaintiff, in company with one J. D. Turner, a cotton broker in Greensboro, and stated that Turner would represent the defendant at Greensboro and that he hoped that the plaintiff would give Turner considerable business. In May, 1908, Latham asked Turner "if he would offer us

through any good house some strict low middling cotton." There is evidence that Turner then bought from Field at 9½ cents per pound 100 bales of cotton, which Turner sold as "strict low middling" to Latham at $10^{1}/_{16}$ cents per pound. Latham testified that the entire transaction was with Turner; that he received the invoice and bill of lading from him; that he paid Turner's draft on him for the cotton, and that he had no communication with the defendants about the transaction until the cotton had been received and paid for by him. The defendants con-

(337) firmed the sale of the cotton in writing to Turner; invoiced the cotton to Turner; made out the bill of lading to Turner; shipped the cotton to Turner, and drew a draft on him for the price of the cotton, which was paid.

It was in evidence that Turner was a cotton broker engaged in the business of selling cotton on commission for several firms besides the defendant.

The plaintiff contends that because of what passed between him and the defendant W. H. Field, that he supposed and had a right to suppose that Turner was acting as agent for the defendants, and as the cotton did not come up to the grade represented, he brings this action against the defendants for the loss.

The first issue is, "Did the defendants sell the plaintiff 100 bales of strict low middling cotton, as alleged in the complaint?" and the second issue is, "If so, did defendants deliver to plaintiff cotton of lower grade and less value than strict low middling, as alleged in the complaint?"

The defendants assign error as follows: The court stated to counsel, in the absence of the jury, "that he would in substance direct the jury to find both the first and second issues in favor of the plaintiff, if they believed the defendants' evidence," and defendants' counsel in consequence did not argue those two issues to the jury. In this there was error. The defendant W. H. Field stated explicitly on the stand that his firm had no communication with the plaintiff in regard to the sale of this cotton, and did not sell it to the plaintiff; that they billed it to Turner and made out the invoice to him, and drew the draft with bill of lading attached on Turner, and they did not know the plaintiff in the transaction and had no dealings with plaintiff in connection with this sale.

Besides, Turner was a broker, whose business was merely to bring parties together and who, unlike a factor or commission merchant, does not receive payment for cotton sold. "A broker usually does not have possession, disposal, and control of property, and should sell in the name of his principal. A broker is, strictly speaking, a middleman or intermediate negotiator between the parties, and is not in the fiduciary

relation of an agent to his principals, but must favor neither the (338) one nor the other of the parties between whom he effects a transaction." Cyc., 116, 186. "In the absence of proof of custom or usage to the contrary, the broker is not authorized to receive the payment, and consequently, if the purchaser pays to him and the principal does not receive it, there is no payment to the latter." 19 Cyc., 299, and cases there cited; A. & E. (2 Ed.), 965.

The plaintiff being aware of the duties of a broker as above recited, must have known that he was dealing with Turner as vendor and not as broker, if this evidence is true.

It is true that the defendant W. H. Field testified that he billed his cotton to Turner for 9½ cents, and allowed him one-sixteenth off the invoice price, which would have been Turner's commission. He says that he did this because Turner in effect had sold the cotton to himself. It may be that this was a circumstance which together with other circumstances, if left to the jury, might have induced them to find that the cotton was sold to the plaintiff through Turner, as their broker, notwithstanding the evidence above cited. But it was error in the court to hold as a matter of law that there was such sale from the defendants to the plaintiff through Turner as their broker, notwithstanding the denial of W. H. Field, on the witness stand, of any dealings between his firm and the plaintiff and denial of all knowledge that any one except Turner had any interest in the sale of the cotton.

For this error the defendants are entitled to another trial.

Error.

HOKE, J., dissenting.

Cited *S. c.*, 163 N. C., 356; *s. c.*, 166 N. C., 215.

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(339)

N. J. HARRIS ET AL. v. J. G. BENNETT ET AL.

(Filed 7 November, 1912.)

1. Process—Service—Pleadings—Appearance—Judgments.

It is not necessary to the validity of a judgment duly entered in the cause that the summons should have been served on defendants therein, when it appears of record that they filed their answer, which is equivalent to a general appearance.

2. Process—Irregularity—Appearance.

A voluntary general appearance by the defendants to an action cures all defects and irregularities in the process.

3. Process—Pleadings Not Signed—Irregularities—Jurisdiction—Judgment.

Parties defendant are held bound by a judgment in the cause, notwithstanding personal service of the summons was not made on them, when it appears by the record that the complaint was filed in due and proper form; a paper, in form and substance purporting to be the answer, though not signed, is found in the judgment roll, having been so filed for many years, and the judgment of the court itself recites that the case was heard upon complaint and answer; and the fact that the answer was not signed is a mere irregularity which does not affect the validity of the proceedings.

4. Infants—Parties—Appearance—Guardian Ad Litem—Process — Service — Interpretation of Statutes.

When it appears from the record that certain infant parties to the suit were represented by a guardian *ad litem*, and that their interests had been fully protected, the judgment entered therein will not be set aside upon the ground that the infants had not been personally served with summons and no order had been made appointing a guardian *ad litem* when the rights of innocent parties have intervened, the omission to serve the infants with process being cured by Revisal, sec. 441.

5. Infants—Guardian Ad Litem—Presumptions—Irregularities—Motion in Cause—Procedure.

When it appears from the record that infant parties to a cause had been represented by a guardian *ad litem*, who was recognized as such by the court in proceedings to judgment therein, the authority of the guardian to represent the infants cannot be attacked in an independent action, but only by motion in the original cause, for irregularity.

6. Infants—Judgments—Irregularities—Innocent Third Person—Intervening Rights.

The courts will not vacate an irregular judgment against an infant as of course, and it will not do so when it appears of record, or otherwise, that the infant has suffered no substantial wrong, and the rights of innocent third parties, who have purchased for value and without notice, have intervened and will be prejudiced.

7. Judicial Sales—Purchasers—Notice of Defects.

A purchaser at a judicial sale is only required to see that the court had jurisdiction of the parties and the subject-matter of the proceedings, and that the judgment authorized the sale.

8. Judgments—Irregularities—Remaindermen — Parties — Limitation of Action—Laches.

While the statute of limitations will not begin to run against an action by the remainderman to recover possession of lands until after the death of the life tenant, this principle does not apply to proceedings to avoid a judgment entered against his interest, to which he was either a party or apparently a party; for in such instances he may institute his action at any reasonable time within which laches may not be imputed to him.

9. Judicial Sales—Judgments—Irregularities — Third Person — Intervening Rights—Equity.

The devisees of the remainder in lands sues to recover the lands devised to them. The testator died insolvent in 1865, and his executors brought proceedings in 1868 to sell the testator's lands to make assets to pay his debts, and the lands in controversy were bought by the one under whom defendant deraigns his title. *Held*, in this case, no meritorious defense to the proceedings in which the sale of the lands was decreed is set up, which were regular upon their face, but only a defect in the service of infant defendants therein; and that no equitable purpose would be subserved in setting aside the decree of sale.

APPEAL by defendants from *Carter, J.*, at March Term, 1912, of NASH.

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

Jacob Battle for plaintiff.
T. T. Thorne and Bunn & Spruill for defendant.

WALKER, J. This action was brought by the plaintiffs to recover the possession of the land described in their complaint, it being a part of the "Culpepper place," formerly belonging to the late Nicholas (341) W. Arrington, who, by his will, devised it to his daughter, Tempie Ann Harris, for life, with remainder to her heirs, who are the plaintiffs. Mr. Arrington died in the year 1865, insolvent. He owed a very large sum, which his assets were wholly insufficient to pay. He appointed L. N. B. and L. F. Battle his executors, who qualified as such, and in 1868 commenced a special proceeding before the clerk of the Superior Court for a sale of his realty to pay his debts. The land was sold, including the "Culpepper place," and the sale was confirmed as to all of it except that place, and a resale ordered as to it. One of the executors having resigned, and the other having been removed, the Hon. B. H. Bunn was appointed administrator *de bonis non*, with the will annexed. Under the order of the court just mentioned, he sold the land, and it was purchased by Mrs. Tempie Ann Harris for $2,010, and she assigned her bid to Enos Ward and his associates, and the deed for the same was made to them. The defendants claim, by mesne conveyances, under them. In a second cause of action, the plaintiffs seek to determine adverse claims to real property, or to quiet their title, by removing a cloud therefrom. Their right to relief, as seems to be conceded by all the counsel, depends upon the validity of the proceeding for the sale of the lands of Mr. Arrington, to which we have referred.

Plaintiffs attack these proceedings upon the ground that they were not parties thereto, and therefore are not bound by the judgment therein

rendered; and if the fact be true, or, in law, they are not to be regarded as parties, their reduction follows inevitably. *Stancill v. Gay,* 92 N. C., 462; *Harrison v. Harrison,* 106 N. C., 282. But we think that they are bound by that proceeding, and that they cannot successfully assail it in this suit, nor can they assert its invalidity against the defendants, whose predecessors in the title were purchasers for value and without notice of any material irregularity therein.

The record of the proceeding for the sale of the land, which was made a part of the same, discloses that a summons was issued, but not served, but that the defendants named in the writ came in and answered.

(342) This is equivalent to appearance, and waives the service of process, the object of which is to bring the defendants into court and to subject them personally, by service of the writ, to its jurisdiction. If they come in voluntarily and appear or answer, the same result is accomplished. A general appearance cures all defects and irregularities in the process. *Wheeler v. Cobb,* 75 N. C., 21; *Penniman v. Daniel,* 95 N. C., 341; *Roberts v. Allman,* 106 N. C., 391; *Moore v. R. R.,* 67 N. C., 209. In the case last cited, *Justice Rodman* said: "The defendant nevertheless appeared and answered in bar. The irregularity was thereby waived. If no summons at all had been issued, the filing of a complaint and answer would have constituted a cause in court." This is elementary learning. But counsel for plaintiffs, in an exceptionally able and learned brief, contended that, in fact, no answer was filed, or any pleading which the law will regard as an answer.

The complaint was filed in due and proper form, and, as appears from the judgment roll, a paper purporting, in form and substance, to be the joint answer of the defendants, was also filed. It was not signed, but so far as the record of the proceedings shows, it was on file as a paper in the cause, and remained on file, as part of the judgment roll, for many years. The court recognized it as the answer, for it is recited in the judgment itself that the case was heard upon "complaint and answer," and that they formed the basis of the judgment, and the facts therein stated were those upon which the court acted. *Howerton v. Sexton,* 90 N. C., 581. The fact that the answer was not signed is a mere irregularity, perhaps an inadvertence, and does not affect the validity of the proceedings. We held in *Rollins v. Henry,* 78 N. C., 342, and *Keener v. Goodson,* 89 N. C., 273, that the provision requiring the signature of the judge to a judgment was merely directory, and the failure to sign would not invalidate it. *Howerton v. Sexton, supra.*

It is also objected that there was no personal service of the summons upon the plaintiffs, who, at the time, were infants, and no order appointing a guardian *ad litem* to defend the proceeding in their behalf. The

omission to serve the infants with process is cured by Revisal, sec. 441, as we will hold that they were represented by a guardian *ad litem.* It sufficiently appears, on the face of the record, that B. H. Sorsby, Jr., joined in the answer as guardian *ad litem* of the minor chil- (343) dren of Tempie Ann Harris, who herself united with the other defendants in the answer, and it also appears that the court recognized B. H. Sorsby, Jr., as guardian *ad litem* for the infants, it having acted upon the answer as a pleading in the cause, upon which the judgment was in part based. In *Sumner v. Sessoms,* 94 N. C., 371, discussing as similar question, the Court said: "It is true the record produced does not show that notice was served on the infant, or upon her guardian *ad litem,* nor does the contrary appear in the record, which, so far as we have it, is silent on the point. The jurisdiction is presumed to have been acquired by the exercise of it, and if not, the judgment must stand, and cannot be treated as a nullity until so declared in some impeaching proceedings instituted and directed to that end. The irregularity, if such there be, may, in this mode, be such as to warrant a judgment declaring it null, but it remains in force till this is done. The voluntary appearance of counsel in a cause dispenses with the service of process upon his adult client. The presence of a next friend or guardian *ad litem* to represent an infant party, as the case may be, and his recognition by the court, in proceeding with the cause, precludes an inquiry into his authority in a collateral proceeding, and requires remedial relief to be sought in the manner suggested, wherein the true facts may be ascertained. This method of procedure, so essential to the security of titles dependent upon a trust in the integrity and force of judicial action, taken in the sphere of its jurisdiction, is recognized in *White v. Albertson,* 14 N. C., 241; *Skinner v. Moore,* 19 N. C., 138; *Keaton v. Banks,* 32 N. C., 384, and numerous other cases, some of which are referred to in *Hare v. Holloman, supra,* all of which recognize the imputed errors and imperfections as affecting the regularity, and not the efficacy, of the judicial action taken." *Hare v. Holloman,* 94 N. C., 14. And in *Hughes v. Pritchard,* 153 N. C., 135, we said: "In this State, where a defective or incomplete service upon such infants has been made, but a guardian *ad litem* has been appointed in substantial compliance with the requirements of section 406, Revisal, and the court has proceeded to judgment in the action or proceedings, such defective or incom- (344) plete service upon the infants constitutes but an irregularity, which renders the judgment not void, but voidable only, which cannot be collaterally impeached, and which will not be vacated or set aside solely for such irregularity, when the rights of *bona fide* purchasers for value without notice have intervened. The reasoning which in-

duced the holding that such defects rendered the judgment merely irregular, are stated with great force and clearness by *Ruffin, J.,* in speaking for this Court in *Sutton v. Schonwald,* 86 N. C., 198, which case has since been many times cited with approval." *Rackley v. Roberts,* 147 N. C., 204. In *Carter v. Rountree,* 109 N. C., 29, where it appeared that an infant was not personally served with process in a proceeding to sell lands for assets, but service was made upon his mother, and a guardian *ad litem* was appointed to protect his interests, who answered for him, it was held that the judgment would not be disturbed, as the irregularity was cured by the statute. Code, sec. 387; Revisal, sec. 448; *Cates v. Pickett,* 97 N. C., 21; *Fowler v. Poor,* 93 N. C., 466; *Coffin v. Cooke,* 106 N. C., 376; *Yarborough v. Moore,* 151 N. C., 116; *Williamson v. Hartman,* 92 N. C., 236; *Howerton v. Sexton,* 90 N. C., 581.

We have held in a series of cases that the court will not vacate an irregular judgment against an infant as of course, and it will not do so when it appears from the record or otherwise that the infant has suffered no substantial wrong, and the rights of innocent third parties, who have purchased for value and without notice, have intervened and will be prejudiced. *Syme v. Trill,* 96 N. C., 243; *Williamson v. Hartman, supra; Howerton v. Sexton, supra.*

This is an action to quiet title by declaring void the judgment, sale, and conveyance under which defendants deraign their title, and in that view of it the plaintiffs cannot collaterally assail the judicial proceedings for mere irregularity. It is not void on its face, as we have shown. If they wish to attack it for irregularity, it must be done by motion in the original cause. *Rackley v. Roberts,* 147 N. C., 201, and cases cited. As said in *Rackley v. Roberts:* "We do not think the special proceeding could be assailed by an independent action for mere irregularity. The plaintiff should have proceeded by motion in
(345) the cause to set aside the judgment as to her. *Grant v. Harrell,* 109 N. C., 78; *Carter v. Rountree,* 109 N. C., 29. Before the adoption of the reformed procedure, in 1868, a judgment in a proceeding to sell land for assets would not be set aside upon the application of a minor who had not been served with process, provided a guardian *ad litem* to defend his interests had been duly appointed and there had been a real and *bona fide* defense in his behalf. *Hare v. Holloman,* 94 N. C., 14, citing *Matthews v. Joyce,* 85 N. C., 258, and other cases. See, also, *Cates v. Pickett,* 97 N. C., 21; *Sledge v. Elliott,* 116 N. C., 712. It was held in *Hare v. Holloman* that, where infant defendants are not served with process, but the record shows that a guardian *ad litem* was appointed for them, who proceeded in the cause and defended their

interests, the decree against the infants is not void and cannot be collaterally impeached. This was said, of course, with reference to the practice prior to 1868," citing authorities. The same principle obtains at this time, since the enactment of the statute which is now Revisal, sec. 441, in cases to which that section applies. The record in this case, on facts, shows that the court had jurisdiction of the cause and the parties, and that the decree authorized the sale of the land for assets. If in fact jurisdiction of the parties, that is, the infants, did not exist, they could have the judgment set aside in a direct proceeding, but not if the rights of an innocent purchaser, for value and without notice, who acted upon the apparent jurisdiction of the court, would be injuriously affected. He is only bound to see that the court had jurisdiction of the parties and the subject-matter of the proceedings, and that the judgment authorized the sale. He has the right to act upon appearances as disclosed by the record, although the facts may turn out to be different. *Fowler v. Poor,* 93 N. C., 466, and cases cited. A contrary doctrine would be fatal to judicial sales and the value of titles derived under them, as no one would buy at prices at all approximating the true value of property, if he supposed that his title might at some distant day be declared void because of some irregularity in the proceeding, altogether unsuspected by him and of which he had no opportunity to inform himself. *Sutton v. Schonwald,* 86 N. C., 198; *Rackley v. Roberts, supra.* (346)

We may well repeat here what is said in *Rackley v. Roberts,* 147 N. C., at p. 207, with respect to the facts of that case, which is much like this: "While it may not be necessary to the decision of this appeal, as we view it, to consider what may be the rights of Mrs. Roberts, as an innocent purchaser, for all the facts in regard to that question are not now before us, it may be well to refer again to the general doctrine settled by this Court, to the effect that, when there is a purchase under an order or judgment, the purchaser need only inquire if upon the face of the record the court apparently has jurisdiction of the parties and the subject-matter, in order to be protected, provided he buys in good faith and without notice of any actual defect." The decision in that case was followed by a motion in the cause to set aside the judgment for irregularity, upon the ground that process had not actually been served upon one of the parties, and with reference to somewhat similar facts in that case (*Glisson v. Glisson,* 153 N. C., 185), when it was brought to this Court by appeal, *Justice Brown* said: "It is true that courts have power to correct their records and set aside irregular judgments at any time, but it is settled practice that they will not exercise the power where there has been long delay or unexplained and unwar-

ranted laches on the part of those seeking relief against the judgment. *Harrison v. Hargrove,* 109 N. C., 346; *Carter v. Rountree, supra.* The decree was made 9 February, 1883, and this motion made 16 December, 1908. The administratrix had died and a quarter of a century elapsed before the petitioners moved in this cause. This is certainly a most unreasonable delay, and we are unable to discover anything in the record which excuses it. Coverture is no excuse, an deven that would not help Theodocia Spellman, who became discovert in 1885. Not only do petitioners fail to offer any satisfactory excuse for such laches, but they fail to allege meritorious grounds for the relief asked. It is true, they vaguely allege in their petition, 'That there were very few valid and *bona fide* debts against the estate of the said Daniel Glisson, and this affiant verily believes that the personal property would have paid said debts.' But on the hearing they offered no evidence whatever to the court in support of such belief, and nothing to show that they (347) had any defense against the original petition to sell the land for assets even if the decree should be set aside and petitioners permitted to answer. They offered nothing tending to controvert the allegations of the original petition. Unless the Court can now see reasonably that defendants had a good defense, or that they could make a defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside? *Jeffries v. Aaron,* 120 N. C., 169; *Cherry v. Canal Co.,* 140 N. C., 423." *Williamson v. Hartman,* 92 N. C., 236.

As plaintiffs are remaindermen, a suit to recover possession of the land, as in one aspect this one is, would not be affected by the statute of limitations until after the expiration of the life estate (*Joyner v. Futrell,* 136 N. C., 301; *Hallyburton v. Slagle,* 130 N. C., 482; *Woodlief v. Webster,* 136 N. C., 162; *Smith v. Proctor,* 139 N. C., 314), but a proceeding to vacate the judgment does not rest upon the same principle. It may be instituted by a party to the judgment, or one apparently a party and who may be prejudiced by it, at any time, so that action is taken seasonably and laches cannot be imputed to the complaining party.

In this case, it appears that the grounds upon which the prayer for relief is predicated are purely technical, and not at all meritorious. The estate of Mr. Arrington was hopelessly insolvent, his indebtedness far exceeding the value of the estate left to him after the ravages of the war. The last sale of the Culpepper place was made by Mr. Bunn, the administrator, in October, 1877—thirty-five years ago—and defendants having purchased in good faith and for full value, as the court found and adjudged, entered into possession and improved the land and established their home upon the premises. Plaintiffs had no meritorious defense to the proceeding in which the sale of the land was decreed, and

if for any cause, sufficient in law, the judgment should be set aside, the land would have to be resold to pay the testator's debts, the amount of which has been greatly increased by the accumulated interest. Besides, there is nothing to show that the interests of the minors were not properly safeguarded in the proceeding. Their mother, who had the life estate in the land under her father's will, seeing that the land must inevitably be sold to pay his debts, submitted to the decree, (348) as did all the other heirs, who had interests more valuable, perhaps, as would appear, than those of the infants, as their estates had vested in possession. If any case should be governed by the strict application of the principle we have stated, this is the one. It would be vain, indeed, if we should disturb the judgment under such circumstances, if not most unjust and inequitable.

The case was considered and decided by the learned judge upon the record alone, a bare inspection of it, as upon the plea of *nul tiel record*, and even in that view of it, we conclude that there was error. As there is no ground upon which the plaintiffs can succeed in the action, it should have been dismissed, and that course will be taken in the court below.

Reversed.

Cited: Brown v. Brown, 168 N. C., 14; *Wooten v. Cunningham,* 171 N. C., 127; *Rawls v. Henries,* 172 N. C., 216.

J. R. SYKES v. WILL ED. THOMPSON.

(Filed 20 November, 1912.)

1. Contracts—Illegal Consideration—In Pari Delicto.

The principle that the courts will not lend their aid to the enforcement of illegal agreements, or entertain an action to recover money paid on property transferred thereunder, is not applicable when the party seeking the relief is not *in pari delicto*, as where he has been induced to enter into the agreement by fraud and undue influence of the other party.

2. Same—Pleadings—Compounding a Felony—Demurrer.

The plaintiff alleges that the defendant had been the prosecuting witness in a criminal action against his sons, charged with obtaining from the defendant a certain sum of money under false pretenses; that the sons were then absent from home, and the plaintiff, to stop the prosecution, paid the money to the defendant, under his false and fraudulent representations that the charges in the indictment were true; that the plaintiff was totally unaware of the matters stated in the indictment, and after-

wards found them to be false. *Quœre*, as to whether the complaint, in this case, sets forth, as a basis of plaintiff's cause of action, an illegal agreement to suppress a criminal prosecution with sufficient definiteness; but if it does, it is *Held*, that the plaintiff and defendant were not *in pari delicto*, and a demurrer was bad.

(349) APPEAL by plaitniff from *Carter, J.*, at October Term, 1912, of ORANGE.

Action, heard on demurrer to complaint. The court, being of opinion that plaintiff's cause of action was founded on an illegal transaction, gave judgment sustaining demurrer, and plaintiff excepted and appealed.

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

W. H. Carroll for plaintiff.

S. M. Gattis and Bryant & Brogden for defendant.

HOKE, J. The complaint alleged that, on 22 April, 1911, defendant sued out a criminal warrant against A. J. and L. A. Sykes, sons of the plaintiff, charging them with having obtained goods of defendant by false pretenses, and made further statement of plaintiff's cause of action as follows:

"3. That at the time of the issuance of the said warrant, A. J. Sykes and L. A. Sykes had left Orange County to seek employment with a telephone company, which was operating in Wake County, to put up some poles and wires for them, and knew nothing whatsoever of the issuance of said warrant or the charge made therein at the time of their departure from home, and they were expecting to return as soon as they completed their work, if they should be able to get employment as aforesaid. Nor did the plaintiff in this case know at the time his sons left home that the defendant had made any charge whatsoever against them concerning the transaction herein set forth, or any other matter whatsoever.

"4. That the defendant, after procuring the said warrant from the justice of the peace aforesaid, placed the same in the hands of a deputy sheriff of Orange County, George Whitted, and ordered him to go to the house of plaintiff and arrest his said sons; that the said deputy sheriff thereupon came to the house of plaintiff for the purpose of arresting his said sons, but did not find them; that the plaintiff then made (350) inquiry, and found out that the said warrant had been issued against his sons by the said W. E. Thompson as aforesaid, and thereupon went to see said Thompson about the matter and to find out what the charges were against his sons; that the said Thompson then related to him that his sons had gotten a receipt for $340 from him at Efland for some sills, and after getting the receipt had refused to pay

him the said $340 or any part thereof. That during the different conversations had with the said Thompson on the same day, said Thompson by representations through himself and his attorney made this plaintiff believe that his sons had committed the offense set forth in the warrant aforesaid, and told this plaintiff that the boys could not come home, or, if they did, they would be arrested under this warrant and sent to the penitentiary, and that the best thing that plaintiff could do was to pay the $340 back to him for them; that the plaintiff, believing what the said Thompson and his attorney said was true, and fearing that his boys would not be able to return home, or, if they did, they would be sent to the penitentiary, told the said Thompson that he did not have the money in cash, but that he would make a mortgage to him in lieu of the money if this would be satisfactory; that the said Thompson then demanded of the plaintiff that he execute and deliver to him a note and mortgage payable in ninety days on his real estate for the sum of $360; that by such conduct and representations the plaintiff was made to have a note and mortgage for $360 drawn up, but the plaintiff, finding a friend who would let him have the money in lieu thereof, paid to the said Thompson the sum of $340 in cash.

"5. That after the plaintiff had paid the said Thompson the said sum of $340 in cash as aforesaid, he found out that the said charges against his sons were absolutely false, and he now charges herein the said Thompson induced him to pay the said sum of $340 in money by false pretenses and false representations and threats against his sons as aforesaid."

In Clark on Contracts (2 Ed.), p. 336, the author says: "It is a well-settled rule that in no case will the court lend its aid to the enforcement of illegal agreements. Further than this, if the agreement has been executed, in whole or in part, by the payment of money or transfer of property, the court will not, as a rule, entertain an (351) action to recover it back."

This general principle has been applied in several recent decisions of the Court, as in *Smathers v. Ins. Co.*, 151 N. C., 98; *Edwards v. Goldsboro,* 141 N. C., 60, and these and other cases here and elsewhere recognize that the rule as stated, or the second portion of it, is subject to well-recognized exceptions; one of them being when parties are not *in pari delicto.* In such case, if the facts otherwise justify it, a recovery may be sustained by the more innocent party, notwithstanding the illegal features of the agreement, and this qualification of the more general principle is usually allowed to prevail when the "party seeking relief has been induced to enter into the agreement by fraud or undue influence." *Wright v. Cain,* 93 N. C., 296; *Pinckston v. Brown,* 56 N. C., 494;

Webb v. Fulchire, 25 N. C., 485; *Hobbs v. Boatwright,* 195 Mo., 693; *Gorringe v. Reed,* 23 Utah, 120; *Austin v. Winston,* 11 Va., 33, 3 Amer. Decisions, 583; Clark on Contracts, p. 336; 15 A. & E., 1000, 1007, etc.

The general doctrine, with the modifications applicable to the facts presented, is very well expressed in the headnotes to the Missouri case, *supra,* as given in 113 Amer. St. 709, as follows: "The doctrine that the courts will not aid a plaintiff who is *in pari materia* with the defendant is not a rule of universal application. It is based on the principle that to give plaintiff relief in such a case would contravene public morals and impair the good of society. Therefore the rule should not be applied in a case in which to withhold the relief would to a greater extent offend public morals. The question of what is public policy in a given case is as broad as the question of what is fraud in a given case, and is addressed to the good common sense of the court. There may be such an inequality of conditions between persons *in pari delicto* that relief may be given to the more innocent, if there are collateral and incidental circumstances attending the transaction and affecting the relations of the parties which render one of them comparatively free from fault, or where the courts intervene from motives of public policy."

Recurring to the complaint, there is doubt if it sets forth, as (352) the basis of plaintiff's cause of action, an illegal agreement to suppress a criminal prosecution with sufficient definiteness to affect the same as a matter of law; but assuming it to be otherwise, we are of opinion that plaintiff's claim, on the facts as they now appear, comes well within the principle just stated and that the judgment sustaining defendant's demurrer is erroneous. Such judgment will be set aside and defendant allowed to answer.

Reversed.

C. T. TODD v. J. H. MACKIE.

(Filed 13 November, 1912.)

1. Contracts—Interpretation—Damages—Verdict—Facts Established—Issues—Answers—Subject-matter in Suit—Compromise—Notice.

In an action to recover damages for a breach of contract to sell lands, it was found by the jury in response to the first and sixth issues, that the defendant contracted to sell the lands to the plaintiff if he should recover them by judgment or compromise of a suit pending between himself and another. The suit in that action terminated by the defendant in this action receiving $4,500, but it was contended by the plaintiff that that suit was prosecuted in good faith or in fact, but that the defendant in the

present action received the sum of $4,500 for the sale of the land to the defendant, in that suit under a pretended compromise. The court having charged the jury that the compromise must have been made in good faith, and by their findings upon the issues the fact of good faith having been established, it is *Held*, (1) by the contract established between the parties the plaintiff cannot recover damages for a breach of defendant's contract to sell the land, as it was only operative in the event the defendant recovered the land contracted for, his right to compromise existing under the contract established; (2) there being no stipulation in the contract established requiring that the defendant submit to the plaintiff any matter of compromise arising in the pending suit, the defendant's failure to do so cannot create a liability to the plaintiff for the damages sought; (3) it was unnecessary for the jury to have answered the other issues in this case, relating to the plaintiff's readiness and ability, etc., to pay for the land, tender, etc.; these questions becoming immaterial by the answers to the other issues.

2. Pleadings—Judgment Non Obstante—Practice.

In this case, there being no matter set up in avoidance of the cause of action alleged, a judgment *non obstante veredicto* could not have been granted.

3. Appeal and Error—Basis of Assignments of Error—Procedure.

Assignments of error must be based upon exceptions duly taken, and the exceptions must have as their basis some ruling of the court appearing affirmatively in the record, and not depending for their existence upon statements made in the exceptions or assignments.

4. Appeal and Error—Record—Instructions—Presumptions.

The presumption on appeal is in favor of the correctness of the charge to the jury, and exceptions thereto will not be considered unless the charge is sent up with the record.

5. Appeal and Error—Certiorari—Laches—Procedure.

The plaintiff's motion for a *certioraro* having been disallowed at a former term of the Supreme Court without prejudice, for the purpose of allowing him to renew his motion after he had applied to the trial judge to correct the case in the particular set out in his petition, *Held*, the plaintiff should have again moved the court for the writ before the call of the district to which the case belonged, and it comes too late after argument and after the case has been submitted to the court for decision, which other business of the counsel, and their inadvertence to the time of calling the district, will not excuse. Supreme Court Rule 41.

APPEAL by plaintiff from *Daniels, J.*, at Fall Term, 1911, of YADKIN.

This action was brought to recover damages for breach of a contract to sell land. A cause of action for specific performance was alleged, but afterwards abandoned. The jury returned the following verdict:

1. Did the defendant contract in writing to convey to the plaintiff the lands described in the complaint, as alleged in the complaint? Answer: No.

2. Was the plaintiff ready, willing, and able to comply with his part of the contract?

3. Did the defendant, in violation of his contract with the (354) plaintiff, convey the said lands to D. E. Dobbins, and thereby render it impossible for him to comply with his contract?

4. What damage has plaintiff sustained?

5. Was the contract between plaintiff and defendant that the plaintiff was to have the lands if the defendant got the same by judgment or compromise of the pending suit between J. H. Mackie and D. E. Dobbins and wife? Answer: Yes.

6. Was this condition or proviso left out of the paper-writing sued on by the ignorance or mistake or inadvertence of the draftsman? Answer: Yes.

7. Did the plaintiff tender the purchase money to the defendant within three months from 1 May, 1909?

Plaintiff alleged that the defendant had not really compromised the suit with Dobbins, but had sold the land to him for $4,500, without plaintiff's consent, and that there was no compromise in good faith. He therefore requested the court to charge the jury that "If the defendant sold the land to Dobbins for the sum of $4,500 before the term of the court at which the case stood for trial, without the knowledge or consent of the plaintiff, then he would be liable to plaintiff for the difference between the price agreed upon and the price received." This instruction was refused, and plaintiff excepted. At the close of the charge, the judge asked counsel for the parties if any other instruction was desired, when the plaintiffs requested him to charge the jury, "that in passing upon the issues, they should take into consideration the motive of the defendant, whether he acted in good faith in making the compromise, which he claimed the right to make, or whether he meant to violate his contract in order to get an increased price." This instruction was given. No other instruction was requested.

Plaintiff excepted to the rulings of the court as follows:

1. The court charged that if the jury finds that the contract is as alleged by the defendant in his answer, then they are to answer the first issue "No."

2. The court charged the jury that if they answered the first issue "No," and the fifth and sixth issues "Yes," then they need not answer the other issues.

3. The court charged the jury that if the defendant sold the lands to Dobbins *bona fide* to settle a long existing lawsuit, he would (355) not be liable for damages.

4. The failure of the court to charge the jury that if the defendant sold the lands to Dobbins for the sum of $4,500 before the term of the court at which the case stood for trial, without the knowledge and consent of the plaintiff, then he would be liable to the plaintiff for the difference between the price agreed upon and the price received.

5. The court refused to have the jury answer the second, third, and fourth issues submitted.

6. The court failed to render judgment for the plaintiff, notwithstanding the verdict, from the record and facts admitted.

7. The court rendered judgment in favor of the defendant.

Plaintiff excepted and appealed from the judgment upon the verdict.

A. E. Holton for plaintiff.

E. L. Gaither for defendant.

WALKER, J., after stating the case: The charge of the court is not in the record, and therefore we cannot judicially see that instructions were given as stated in the first three exceptions. If the contract was correctly set forth in the answer, the jury could not answer the first issue in the affirmative, the contract as stated in the first issue being an unconditional one. The jury, by the answer to the fifth issue, have found what were the terms of the contract, viz., that defendant agreed to convey the land to plaintiff, subject, however, to the result of the pending suit between him and Dobbins. If the land came to him by the judgment or in the settlement, it was to be conveyed to plaintiff, but not so if it went to Dobbins. The court charged the jury that the compromise must have been conducted in good faith. The jury have, therefore, virtually found that defendant did not get the land in the compromise, though the right was reserved to him in the contract with plaintiff, as the jury find, to settle with Dobbins, which he did in good faith.

The answers of the jury to the first, fifth, and sixth issues made it unnecessary to answer the second and third issues. The negative answer given to the first issue, without regard to the answers to the fifth and sixth, had the same effect. The second and third issues (356) referred to the contract mentioned in the first, and if there was no such contract, there could, of course, be no performance or violation of it, and consequently no damages for its breach. *Purnell v. Purnell,* 89 N. C., 42; *R. R. v. Purifoy,* 95 N. C., 302. Under the terms of the contract, as stated in the answer and as settled by the verdict of the jury, defendant had the right to sell to Dobbins or to surrender the land in settlement of the suit between them of long standing. Plaintiff having

contracted to buy the land subject to this clear right, as expressed in the agreement between defendant and Dobbins, cannot complain if it was exercised in good faith, which the jury decided to be the fact.

The plaintiff's first or written prayer for instruction, if proper in itself, was substantially given in the court's response to the second, or oral, prayer. It does not follow, because the defendant sold the land without the knowledge or consent of plaintiff before the term of the court at which the case was docketed for trial, for the sum of $4,500, that defendant is liable for the difference between that amount and the price received. There was no stipulation in the contract between plaintiff and defendant, as found by the jury, that the land should not be sold without plaintiff's knowledge and consent. We suppose that plaintiff intended by this prayer to challenge the good faith of the transaction between defendant and Dobbins, and to insist before the jury that it was a mere subterfuge concocted to avoid compliance by the defendant with his promise to sell the land to plaintiff. If so, this contention was open to him under the instruction as to good faith, which was given by the court at the request of the plaintiff. If plaintiff desired a more specific issue or instruction, presenting the question whether the compromise was a sham or pretense intended for the purpose of evading the obligation of his contract, he should have asked for it. *Simmons v. Davenport,* 140 N. C., 407 (Anno. Ed.), and cases cited. The court properly entered judgment for the defendant upon the verdict. There is nothing which entitled the plaintiff to a judgment, in view of the findings of the jury. The motion for judgment *non obstante* (357) *veredicto* could not have been granted. There was no matter set up in avoidance. Referring to a similar motion, the Court said in *Moye v. Petway,* 76 N. C., 327: "The motion for judgment in favor of the plaintiff *non obstante veredicto* has nothing to rest on; that practice is very restricted and is confined to cases where a plea confessed cause of action and the matter relied upon in avoidance is insufficient. In such cases the plaintiff may sign judgment as on *nil dicit,* treating the plea as 'a sham one,' and, even of he traverses the matter relied on in avoidance, although the issue be found against him, he is still allowed to take judgment notwithstanding the verdict. This practice was adopted to discourage 'sham pleas.' Here there is no 'sham plea' in the case." *Ward v. Phillips,* 89 N. C., 215; *Walker v. Scott,* 106 N. C., 56; *Riddle v. Germanton,* 117 N. C., 387.

It appearing in the case that defendant did not get the land in his negotiation for a settlement of his dispute with Dobbins, and the jury having found, under instructions of the court given at plaintiff's request, that he acted in good faith, there is left nothing for the plaintiff's claim to rest upon.

We have adverted to the exceptions of plaintiff, found in the record, but they are really not before us, as they are not based upon any matter contained in the case or record proper. Assignments of error must be based upon exceptions duly taken, and the exceptions must have as their basis some ruling of the court appearing affirmatively in the record, and not depending for its existence upon statements made in the exception or assignment. In analogy to demurrers of the same nature are the would-be "speaking" exceptions. *Worley v. Logging Co.*, 157 N. C., 490; *Allred v. Kirkman, post,* 392. So with the assignments of error as to the instructions, we cannot consider, unless the charge is sent up with the record. This Court does not presume error, but it presumes against it, and error must be shown by the complaining party or appellant.

No error.

WALKER, J. This is an application for a writ of *certiorari* to supply certain omissions alleged to have occurred in the case on appeal. The plaintiff applied for a writ at the last term of this Court, but the writ was denied without prejudice, the Court allowing the plain- (358 tiff to renew his motion after he had applied to the judge for a statement that he would correct the case in the particulars set out in his petition for the writ, or some of them. Plaintiff made his motion to the judge, who, in the presence of the counsel of the parties, heard the matter and, by consent, took the papers to his home for the purpose of preparing his statement, which was filed by him on 2 July, 1912. In his written response to the application of the plaintiff for an amendment to the case on appeal, the judge makes the following statement of facts, and expressed his willingness that it be inserted in the case, to wit:

"Upon the first issue the court charged the jury as follows: 'That the defendant admits that he executed the paper introduced in evidence, but says that it did not contain the contract as agreed upon between the plaintiff and the defendant, in that by inadvertence and oversight of the draftsman a material part of the contract was omitted therefrom, to the effect that he was not to convey the land if he did not get it by compromise or judgment at the Spring Term of court which convened on 26 April, 1909; if the defendant has satisfied the jury that the contract is as alleged by the defendant in his answer, they will answer the first issue No; that if the defendant has not so satisfied the jury, they will answer the first issue Yes.' To this instruction the plaintiff excepted. The court charged the jury fully as to the burden of proof and as to the weight of the evidence by which the defendant must establish his contention, and to this portion of the charge there was no exception.

These are the only changes that, after a careful examination of the matter, I think ought to be made, but I believe in justice to your client I ought to make these."

Plaintiff did not renew his motion for a *certiorari* until after the argument of the case in this Court at the present term, which was 29 October, 1912, and, in fact, as we know, not until after the Court had fully considered the case, made its decision, and the opinion had been prepared to be handed down. Proceedings in this Court were therefore arrested in order that the Court might take the present applica-
(359) tion of the plaintiff into conference and pass upon it. It is alleged in the petition for the writ that counsel of the plaintiff were otherwise engaged and could not give that attention to the matter which it required, and that they forgot the time at which the case would be argued or the district would be called in regular order, and this is alleged as a sufficient excuse for not presenting the application sooner. It is well understood that petitions of this kind must be presented to the Court with reasonable and proper diligence. There must be no laches justly attributable to the party who makes the application, and, if there be any on his part, the consequences are visited upon him, and not upon the other party, who is innocent and diligent. We believe that in almost every stage of judicial proceedings the maxim is of universal application that the law aids those who are vigilant, and not those who sleep upon their rights, and this rule specially applies to proceedings of this sort. 4 Enc. Pl. & Pr., 136; 6 Cyc., 778 and 779, and notes. The practice has been established in this Court for many years that the writ of *recordari* or of *certiorari,* as a substitute for an appeal, should be applied for without any unreasonable delay, and that any such delay, after the earliest moment in the party's power to make the application, must be satisfactorily accounted for. We do not think the plaintiff in this case has reasonably accounted for his remissness in making the application. *Boing v. R. R.,* 88 N. C., 62; *Norman v. Snow,* 94 N. C., 431. Rule 41 of this Court requires that application for the writ of *certiorari* shall be made at the term to which the appeal ought to have been taken. We may safely say that the plaintiff should have applied for the writ a sufficient time before the call of the docket for the Tenth District to enable the Court to consider his application, and, if granted, to issue the writ and have the case amended so that it could be heard when it was called in regular order. We have never entertained an application for the writ after the argument has commenced, and surely not after the case has been submitted, taken into conference and decided by the Court, and certainly not except under extraordinary circumstances. Parties must take notice of the time when their cases will be

called in this Court, and we cannot hear them say that they were (360) either ignorant of the time or that, knowing the time allotted to the district from which the case comes to this Court, they had inadvertently neglected to be present and look after their interests. The writ is therefore denied.

We have, notwithstanding the denial of the writ, examined and considered the proposed amendment to the case, as indicated by the judge's statement, and find that if it had been inserted originally in the case on appeal it would not have changed our judgment. Plaintiff states in his application to the judge that the latter charged the jury that if they should find the land was sold to Dobbins in good faith to settle a long existing lawsuit, the defendant would not be liable for damages. This instruction, no doubt, was given in answer to the plaintiff's request that the case should be made to turn upon the good faith of the transaction between the defendant and Dobbins, and that the jury would give no effect to the agreement as stated by defendant in his answer, unless the compromise and settlement between defendant and Dobbins had been fairly conducted, in good faith, and without any intent to defeat the plaintiff's rights. This was really the pivotal question in the case, and the jury found against the plaintiff in regard to it, and it seems to us the controversy was thereby settled in favor of the defendant, and we do not see any ground, in this view of the case, upon which plaintiff could expect a recovery. The charge of the court, that the jury should answer the first issue "No" if they should find that defendant was not to convey the land to the plaintiff, unless he got it under the compromise with Dobbins, was plainly correct. Plaintiff alleged an absolute and unconditional promise to convey him the land at $4,500, and defendant alleged another and quite different contract, which was subject to the condition that, in the settlement and compromise with Dobbins, he should acquire the land. If they found this to be the case, they could not, of course, have said, in response to the first issue, that defendant had made the contract set forth therein, and, having found that the defendant had correctly stated the contract in his answer, and that the compromise was made in good faith, the judgment was properly given to the defendant, as the finding was necessarily fatal to the plaintiff's recovery. The issue between the parties was substantially (361) one of fact, which has been finally settled by the jury.

Certiorari denied.

Cited: Wheeler v. Cole, 164 N. C., 378.

L. C. ELLIOTT, ADMINISTRATOR, v. W. D. LOFTIN.

(Filed 13 November, 1912.)

Wills—Interpretation—Intent—Conversion—Realty — Descent and Distribution—Interpretation of Statutes.

A testator devised lands to his three sons, the rents to be used for their benefit till the youngest became twenty-one years of age, then the lands to be sold for cash and divided between them. The devisees died intestate, without wife or child, before the youngest became of age; *Held*, the intent of the testator controlling, there was not, under the terms of the will, a conversion of the lands into personality as of the death of the testator, but the lands remained realty to descend to the heirs at law of the blood of the testator. Revisal, sec. 1556, Rule 4.

APPEAL by defendant from *O. H. Allen, J.*, at March Term, 1912, of RANDOLPH.

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

Hammer & Kelly, John T. Brittain, and J. A. Spence for plaintiff.
H. M. Robins for defendants.

CLARK, C. J. The testator devised land to his three sons, "the rents to be used for their benefit," till the youngest became twenty-one years old; "then I will the said tract to be sold for cash and the money be equally divided among them." All three sons died before the youngest arrived at age. Neither of them left wife, child, or will, and their mother died before them, and they were the only children of the testator. The land was sold by a decree of court upon petition by the guardian of the youngest son, who survied his brothers. The sole question is whether by the terms of the will there was a conversion into personalty as of the date of the death of the testator, in which event the
(362) plaintiffs who are the next of kin on the mother's side shall share in the proceeds, or whether the will provided for the conversion into personalty only upon the arrival at age of the youngest son, in which case the land, or its proceeds, are realty and belong to the heirs at law of the blood of the testator. Revisal, 1556, Rule 4.

We are of opinion that the land has never been converted, because the contingency or condition provided in the will for conversion by a sale has never happened. *Brothers v. Cartwright,* 55 N. C., 113; *Tayloe v. Johnson,* 63 N. C., 381. Indeed, the facts of this case are stronger than in *Brothers v. Cartwright,* because the testator's intention is more

clearly manifested that the land should remain real estate until the arrival at age of the youngest son, for the will provides that the "rents" shall be used for the benefit of the brothrs until that time.

It is true that when a will provides that real estate shall be converted into personalty, without specifying the time at which the same is to be converted, and nothing is required to be done except a sale of the property, the law construes the proceeds as personalty from the death of the testator, because equity will hold that "to be done which ought to be done." But in this case it is evident that the land was not to be sold until the youngest son became of age, and that in the meantime it was to be held as realty.

Whether there was a conversion at the death of the testator, or whether the conversion was postponed till the arrival at age of the youngest son, depends upon the intention of the testator, and we think his Honor properly held that the proceeds of the land were realty.

Affirmed.

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BANKS PENDER, ADMINISTRATOR OF R. H. PENDER, v. CITY OF SALISBURY.

(Filed 13 November, 1912.)

1. Cities and Towns — Charter Provisions — Damages — Written Demand — Actions—Interpretation of Statutes.

The charter provisions of a town requiring that before an action shall be instituted against the city "upon any claim or demand whatsoever, of any kind or character," written notice shall first be presented to the board of aldermen, to be acted upon by them, etc.; and that "no action for damages of any character whatever, to either person or property, shall be instituted against the city unless, within ninety days after the happening or infliction of the injury complained of, the complainant, his executors or administrators, shall have given notice to the board of aldermen of such injury in writing," etc., are valid and enforcible as a salutary protection to the public against stale and fictitious claims, and to afford the city an early opportunity to investigate the claim while the evidence is fresh, so as to prevent fraud and imposition.

2. Same—Reasonable Requirements.

When it appears in an action against a city for damages for the negligent killing of plaintiff's intestate, that the plaintiff, as administrator, was afforded ample opportunity to comply with the charter provisions, requiring written notice to be given the board of aldermen of the claim, its nature, etc., within a certain time, in order to maintain an action thereon, recovery may not be had in the absence of his giving the required notice.

3. Cities and Towns — Charter Provisions — Damages — Written Demand — Waiver—Interpretation of Statutes.

The municipal authorities cannot waive the provisions of a city's charter requiring written demand to be made, in a certain prescribed manner, upon the board of aldermen, as a condition precedent to the bringing of an action for damages against the municipality.

4. Statutes—Repealing Acts—Local Laws—Interpretation of Statutes.

Section 5453 of the Revisal, providing for the repeal of "all public and general statutes," does not apply to a separate charter given a municipality; the restriction as to locality preventing it from being a general law.

APPEAL by plaintiff from *Ferguson, J.*, at February Term, 1912, of ROWAN.

Action to recover damages for the alleged negligent killing of (364) R. H. Pender.

The issue of negligence was determined by the jury in favor of defendant. Plaintiff appealed.

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

John L. Rendleman and L. M. Swink for plaintiff.
Craige & Craige, Stahle Linn, W. H. Woodson for defendant.

BROWN, J. The evidence shows that plaintiff's intestate was thrown from the footboard of defendant's hose wagon on the night of 17 December, 1909, and killed, when going to a fire at a rapid rate. He fell from the wagon at the intersection of two of the principal streets in the center of the city, which had just been surveyed and paved in vitrified brick, with best materials, under the supervision of an expert engineer employed by the city for this purpose. The complaint alleges that the city was negligent in that it failed to properly construct and maintain its streets and permitted a depression in its streets at the intersection of Church and Fisher streets.

The defendant denies the acts of negligence alleged in the complaint, and sets up contributory negligence, assumption of risk, and that intestate was a trespasser, and further alleges that the city had, previous to the accident, spent the sum of $200,000 in repairing and building streets and sidewalks, and had employed an expert engineer to map out, survey, and oversee the work and lay out the streets; that the intersection of the streets where intestate was injured was one of the streets the city had just built under the supervision of an expert engineer, and was surveyed and built in the most improved manner.

The defendant further alleges that neither plaintiff, as administrator of deceased, nor any other person, gave any notice of claim in writing

of death of intestate, within ninety days after its happening, to the board of aldermen of the city of Salisbury, stating the date and place of its happening or infliction of the injury, the manner of such infliction, the character of the injury, and the amount of damages claimed, as required by chapter 186, Private Laws of North Carolina, Session 1899, sections 92 and 93, being the charter of the city of Salisbury.

Plaintiff neither alleged nor proved that a notice and demand had (365) been made upon the city, as required by its charter.

1. As to the notice of claim: The charter of the city of Salisbury, chapter 186, sec. 92, provides as follows:

"No action shall be instituted or maintained against said city upon any claim or demand whatsoever, of any kind or character, until the claimant shall have first presented his or her claim or demand in writing to said board of aldermen, and said board of aldermen shall have declined to pay or settle the same as presented, or for ten days after such presentation neglected to enter or cause to be entered upon its minutes its determination in regard thereto. The statute of limitations shall not begin to run until the expiration of the ten days from such demand or until refusal by said board to pay such claim, provided such demand shall be made in thirty days from the time the cause of action arose."

Section 93: "No action for damages against said city, of any character whatever, to either person or property, shall be instituted against said city unless, within ninety days after the happening or infliction of the injury complained of, the complainant, his executors or administrators, shall have given notice to the board of aldermen of such injury in writing," etc.

These two sections of defendant's charter, taken together, are comprehensive enough to cover every possible claim or demand that may arise against a municipal corporation, and if valid, they effectually bar a recovery in this case.

Similar provisions are to be found in the charters of many cities and towns, and their validity has been very generally sustained as a salutary protection to the public against stale and fictitious demands. The purpose is to give the municipal authorities an early opportunity to investigate such claims while the evidence is fresh, so as to prevent fraud and imposition.

We have heretofore held that it is necessary both to allege and prove that a demand was made upon the municipal authorities before commencing action for damages, where such provision is incorporated in the charter. *Cresler v. Asheville,* 134 N. C., 311; *Terrell v. Washington,* 158 N. C., 281.

In this last case the validity of such charter requirement is (366) recognized and sustained, but the plaintiff was excused from making his demand in writing within the ninety days because the jury found that during that period the plaintiff was mentally and physically unable to make such claim, and that he did so within a reasonable time after recovering sufficiently to do so. *Born v. Spokane,* 27 Wash., 719; *Barclay v. Boslin,* 167 Mass., 597.

In the case at bar the claim in writing could have been presented by the administrator, and the record discloses no excuse for failure to comply with the statute. Such charter requirements have been generally upheld in other jurisdictions. *Cunningham v. Denver,* 58 Am. State, 212; *Comrs. v. Heaston,* 55 Am. State, 203, note. See note 15. *Elam v. Mount Sterling,* 20 L. R. A., (N. S.), 757, where many cases are cited. *Luke v. El Paso,* 60 S. W., 363, (Texas Civ. App.); *Melter v. Grand Rapids,* 155 Mich., 165; *Schmidt v. Fremont,* 70 Neb., 577; *Forsyth v. Oswego,* 95 N. Y., 107.

The decisions are based largely upon the words used in the charters, and we have cited those cases where charters are no more comprehensive than that of the defendant, which, as we have shown, is broad enough to cover any kind of demand.

The plaintiff contends that the charter of Salisbury is repealed by Revisal 5453, which provides for the repeal of all "public and general statutes not contained in this Revisal." The charter of Salisbury is not such a public and general statute as was intended to be repealed by this section. The defendant's charter does not apply to the State at large, and is therefore not general. The restriction of locality prevents it from being a general law. *High v. Jacksonville,* 51 Fla., 207.

The contention of plaintiff that the mayor was one of the first persons to arrive after the accident, and that therefore the city had notice of it, does not relieve plaintiff from the necessity of making a demand. The law requires that a demand, in writing, be made upon the board of aldermen, stating the nature and infliction of the injuries, etc., and the *amount of damages claimed therefor.* The city could not be charged with such notice simply because the mayor happened to help care (367) for intestate after he was injured.

The town authorities cannot waive this statutory requirement that a demand in writing be made, even if the mayor should have imagined that a suit was to be brought. In *Borst v. Sharon,* 48 New York Supp., 996; 14 American Digest, 1991, the Court says that "The municipal officers of a town cannot waive any statutory requirements as to notice of claim imposed for the protection of the municipality."

2. The conclusion we have reached renders it unnecessary to discuss the assignments of error relating to the issue of negligence. We have nevertheless examined them, and find them to be without merit. If any errors were made, they were in plaintiff's favor.

No error.

J. W. AUSTIN v. J. F. AUSTIN.

(Filed 13 November, 1912.)

1. Wills—Partial Intestacy—Presumptions—Burden of Proof.

The presumption of law is against partial intestacy, and the one who seeks to establish it has the burden of rebutting that presumption.

2. Same—"Home Place"—Adjoining Tracts of Land Cultivated as One—Devise of Home Tract—Evidence—Nonsuit.

A testate had acquired two adjoining tracts of land at different times; the first he called the "home place" and the other by a different name, but cultivated them together. He devised "the northern side of the dividing line of the home tract of land" to one of his sons, and "the south side of the dividing line of said tract" to another of his sons, and provided for the others of his children by bequests of his personalty: *Held*, by the devise of the "home tract" both tracts passed to his two sons to be divided as indicated; for there being no further evidence, the presumption is against intestacy as to the second tract of land acquired by the testator, and a judgment of nonsuit upon the evidence was properly granted.

APPEAL by plaintiff from *O. H. Allen, J.*, at March Term, (368) 1912, of STANLY.

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

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

CLARK, C. J. The testator, R. H. Austin, owned two adjoining tracts of land aggregating about 150 acres, which two tracts he cultivated together as one tract. One tract of land, of 53½ acres, which he called the "home place," he acquired in 1856. And the other, of 96 acres, which adjoined and which he called "the Thomas Whitley place," he purchased in 1881. He devised all his property, real and personal, to his wife, as long as she lived; and then he provided: "After me and my wife is gone. I want my son J. F. Austin to have the north side of the dividing line of the home tract of land, and my son W. R. Austin

to have the south side of said dividing line of said tract of land, to them and their heirs." He further provided that upon the same event all his personal property should be "equally divided among my other heirs," and appointed said J. F. and W. R. Austin his executors.

The plaintiffs claim that the testator died intestate as to the "Whitley" tract. If the devise is construed as embracing the whole of the 150 acres, there was a "dividing line" running east and west. But if the devise applied only to the 53½ acres which was originally the home tract, then there was no such dividing line.

The presumption is against intestacy. *Peebles v. Graham,* 128 N. C., 225. The burden was on the plaintiffs to rebut that presumption. *Blue v. Ritter,* 118 N. C., 582. Here there was nothing to rebut the presumption that the devise covered both tracts under the name of "the home tract." Both tracts were cultivated together as one tract; one lies south of the other and the dividing line between the two would give the northern side to one son and the south side to another. The testator remembered all his children and gave those excluded from a share in the land the whole of his personal property, to be equally divided between them.

(369) In *Woods v. Woods,* 55 N. C., 420, the devise was of "the tract of land whereon I now live and reside, containing 225 acres, more or less." The testator had originally settled on a tract of 225 acres, but had added several small adjacent tracts, making in all between four and five hundred acres, which were cultivated together as one tract. It was held that the devise carried all the adjacent tracts.

In *Stowe v. Davis,* 32 N. C., 431, the devise was of "the plantation where I now live." The testator had two adjacent tracts, known as "the home place" and the "Brown place." It was held that both tracts passed under the devise. The facts are almost identical with those in this case.

In *Bradshaw v. Ellis,* 22 N. C., 20, it was held that a devise of "my plantation" carried two tracts half a mile apart, because they had been cultivated together as one farm. Though here the original tract had been called "the home place" and the tract acquired in 1881 had been styled "the Whitley place," still the hedgerow between them had been cut down and the two tracts had been cultivated and treated as one. This, together with the presumption against partial intestacy, justified the court, in the absence of rebutting testimony, in granting a nonsuit. There was no evidence to go to the jury, and on the face of the will the court properly held that the devise applied to the entire tract of 150 acres.

Affirmed.

Cited: Coltrain v. Lumber Co., 165 N. C., 45; *McCallum v. McCallum,* 167 N. C., 311.

(370)

H. S. AMAN v. ROWLAND LUMBER COMPANY.

(Filed 3 October, 1912.)

1. Evidence—Negligent Burning—Sparks from Engine—Dry Brush—Nonsuit.

In an action for damages by fire alleged negligently to have been started by the defendant lumber company on its own premises and communicated to plaintiff's land, there was evidence tending to show that the defendant was operating a steam logging skidder, adjoining which it had cleared a space, known as a log-deck, by removing the trees and some of the undergrowth, piling them at a distance of 30 or 40 feet, that had become very dry and combustible at the time of the fire, which started in the dry tops of the trees removed in clearing the log-deck; that sparks had been seen the day before, coming from the skidder engine, and that a tram engine, operated by defendant, had been stopped in its operation at the dinner hour, its fire banked so that it could not emit sparks, from twenty to forty minutes before the fire was first seen; that there were no fires in the vicinity except those of the skidder and tram engines, and there were coals on the ground near the skidder engine: *Held*, under the principle that upon a motion to nonsuit the evidence is to be construed more favorable for the plaintiff, the evidence was sufficient to be submitted to the jury under the issue of defendant's actionable negligence.

2. Negligent Burning—Sparks from Engine—Dry Brush—Proximate Cause—Presumptions—Burden of Proof.

In this action for damages by fire alleged negligently to have been started by defendant lumber company on its own premises and communicated to plaintiff's land, instructions to the jury were correct, that if the defendant allowed combustible matter to accumulate on its land in such close proximity to its engine that it exposed adjacent property to unnecessary peril, and the fire was caused by sparks or coals from the engine, a *prima facie* case of negligence was made out, and they should determine, upon all the evidence, whether the combustible matter was fired by sparks from a negligently constructed or operated engine. The principles relating to the negligence of a railroad company in causing damage by fire originating either on or off of its right of way from a defective engine or one negligently operated, discussed by WALKER, J.

3. Instructions—Charge as a Whole—Appeal and Error.

When a charge construed as a whole is correct, and it appears that the jury must have understood it, it will not be held for reversible error that disconnected parts are objectionable.

4. Evidence—Negligent Burning—Defective Engine—Sparks.

In an action to recover damages for the alleged negligent burning by defendant of the trees on plaintiff's land caused by sparks from an engine operating a skidder on the defendant's premises, and these communicated to the plaintiff's land, evidence which tends to show that the engine had emitted sparks and that coals had come from the engine and were lying upon a log-deck adjacent to it, is competent as bearing upon the defective condition of the engine.

5. Evidence Excluded—Previous Testimony—Substance—Harmless Error.

The exclusion of testimony not held for error in this case, it appearing that the witness had already testified, in substance, to the same thing.

(371) APPEAL by defendant from *Carter, J.*, at August Term, (371) of SAMPSON.

This action was brought to recover damages for the burning of plaintiff's timber, alleged to have been caused by defendant's negligence in permitting sparks to escape from its engine. Defendant was engaged in operating a steam logging skidder for the purpose of removing saw-logs from its woods, to be carried over its tramroad to the mill. In order to operate the skidder, defendant had cleared a space adjoining it, and known as a log-deck, by removing the trees and some of the undergrowth and piling them 30 or 40 feet away from the skidder. The fire started in the tree-tops, which had become very dry and combustible during a long period of drought and warm weather. Some of the witnesses had seen sparks, on the day before the fire, coming from the defendant's engine at the skidder, and there were coals on the ground near the skidder. The log-deck or right of way, as it is called in the record, was covered with dry and inflammable grass and leaves, though one of the witnesses stated that the fire did not originate there, but in the tree-tops at the edge of the log-deck. It also appeared that defendant ran a dummy engine on its tramroad, near the place where the fire started, though no one saw any sparks emitting from it. There was no fire in the vicinity except the fires in the two engines. There was evidence that the fire broke out during the dinner hour, when the logging engine was shut down and its fires banked, so that it could not emit any sparks, but one witness testified that the fire may have been set out before the engine was stopped, as it was only from twenty to forty minutes from the time the draft of the engine was shut off until the fire was first seen in the tree-tops. There was other evidence not necessary to be stated. There was a verdict for plaintiff, and a judgment being entered thereon, defendant appealed.

(372) *Fowler & Crumpler for plaintiff.*
A. McL. Graham and G. E. Butler for defendant.

WALKER, J., after stating the case: The defendant asked for a judgment of nonsuit, and its refusal presents the main question in the case. The familiar rule is that the evidence, upon such a motion, should be considered in its most favorable light for the plaintiff, and every fact which it proves or tends to prove should be taken as established. With this guide before us, we are led unhesitatingly to the conclusion that the ruling of the court was correct. It is true, the fire did not originate

within the log-deck, but on its edge, where the defendant had caused very inflammable material to be piled, and the fire started in this brush-heap only 30 feet from the skidder, as the jury might well have found, there being circumstantial evidence that it was communicated from the engine of the skidder. The jury were fully instructed as to the law of the case, and they were told that if defendant allowed dry and combustible matter to accumulate on its land, in such close proximity to its engine that it exposed adjacent property to unnecessary peril, and the fire was caused by sparks or coals from the engine, a *prima facie* case of negligence was made out, and in this view, the case was properly submitted to the jury, upon all the evidence, to find the fact whether the brush-heap was fired by sparks from a negligently constructed or operated engine.

If the fire was not caused by the engine, or, if so caused, the engine was properly constructed and operated, the defendant is not liable, because in that event there has been no breach of a duty owing to the plaintiff. The best constructed engines may sometimes emit live sparks. If there was negligence in the construction or operation of the engine, and the fire proximately resulted therefrom, the liability of the defendant from the consequent danger is apparent. All this was correctly stated and explained to the jury by the learned judge who presided at the trial, and the charge of the court, when properly construed, was in perfect conformity with our decisions.

It can make no difference whether the sparks lighted on or off the right of way, if they kindled the fire and destroyed plaintiff's trees, there was a sufficient case of *prima facie* negligence for submission to the jury, upon the whole evidence, to find the ultimate fact of (373) negligence. This Court has been most pronounced in its opinion upon this subject, and has adhered steadily and strictly, without the shadow of turning, to the just rules which have heretofore been promulgated. We repeat them here once more:

"1. If fire escapes from an engine in proper condition, having a proper spark arrester, and operated in a careful way by a skillful and competent engineer, and the fire catches off the right of way, the defendant is not liable, for there is no negligence.

"2. If fire escapes from an engine in proper condition, with a proper spark arrester, and operated in a careful way by a skillful and competent engineer, but the fire catches on the right of way, which is in a foul and negligent condition, and thence spreads to the plaintiff's premises, the defendant is liable. *Moore v. R. R.*, 124 N. C., 341; *Phillips v. R. R.*, 138 N. C., 12.

"3. If fire escapes from a defective engine, or defective spark arrester, or from a good engine not operated in a careful way or not by a skillful engineer, whether the fire catches off or on the right of way, and causes damage, the defendant is liable." *Williams v. R. R.*, 140 N. C., 623.

These rules have been approved for a very long period and in numerous cases. *Ellis v. R. R.*, 24 N. C., 138; *Chaffin v. Lawrance*, 50 N. C., 179; *Aycock v. R. R.*, 89 N. C., 321; *Craft v. Timber Co*, 132 N. C., 151; *Haynes v. Gas Co.*, 114 N. C., 203; *Knott v. R. R.*, 142 N. C., 238; *Cox v. R. R.*, 149 N. C., 117; *Deppe v. R R*, 152 N C., 79; *Kornegay v. R. R.*, 154 N. C., 389; *Currie v. R. R.*, 156 N. C., 419; *Mizzell v. Mfg. Co.*, 158 N. C., 265; *Hardy v. Lumber Co , ante*, 113. Where the fire is caused by sparks falling from the engine on a foul right of way, the railroad is liable for the ensuing damage to others, as it is *per se* negligence to keep such a right of way which would constantly expose their property to the risk of fire. Where the act of negligence is charged to be a defective engine, it can make no material difference whether the spark lights within or without the right of way, and the following rule must prevail:

"The decided weight of authority and of reason is in favor of
(374) holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks or cinders (as the case may be) which have already been mentioned as necessary." S. & Redf. on Negligence, sec. 676.

The liability is fixed, first, if the fire was ignited on a foul right of way, and, second, if not on the right of way, then if the engine was negligently constructed or operated, the fact also being found that the fire originated from the engine and was the proximate cause of the damage —an event reasonably foreseeable as the natural and probable result of the negligent act. *Hardy v. Lumber Co., supra.* But in this case the tree-tops had been piled by the defendant, for its own purpose and convenience, so near the engine and had become so parched and inflammable by the effect of the dry weather upon it that it easily ignited from the sparks and was carried by the strong north wind, which had already set in that direction, to the plaintiff's adjoining land and timber, and thereby caused the damage of which he complains. This is what the jury evidently found, under the evidence and the charge of the judge, and it made out at least a case of actionable negligence against the defendant.

The criticism of the charge by defendant's counsel might be just and the exception to it well taken, if it could be restricted to the detached portion thereof which is the object of attack, as it is not quite as explicit,

perhaps, as it should have been, but when these isolated sentences or extracts are construed with the other parts of the charge, and viewing the latter in its entirety and thus reading it as a whole, as we are required to do (*S. v. Exum,* 138 N. C., 599; *S. v. Lance,* 149 N. C., 551), the meaning of the judge could not well have been misunderstood by an intelligent jury. We have recently said that "The charge is to be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded (375) as erroneous." *Kornegay v. R. R.,* 154 N. C., 389; Thompson on Trials, sec. 2407. This case is much like *Craft v. Timber Co., supra,* where we held that piling dry tree-tops or other combustible matter so near its track as to expose adjacent property to the danger of being destroyed or injured by sparks from one of its passing engines was an act of negligence, and, if the proximate cause of the injury, was actionable.

It does not appear, in this case, what was the precise extent of defendant's right of way, so called; but whatever it was, the fact remains that defendant accumulated dangerously inflammable material on its own premises, so near its skidder as to be ignited by a spark from the engine, and thereby communicated fire to plaintiff's trees, and the law, ancient and modern, requires that he should be recompensed for his loss. "If fire break out and catch in thorns, so that the stacks of corn, or the standing corn, or the field, be consumed therewith, he that kindleth the fire shall surely make restitution," was the Mosaic doctrine; and "So use your own as not to injure another" (*sic utere tuo ut non alienum lædas*) is that of the common law, which also recognizes and enforces the law of compensation.

The other exceptions require little, if any comment. The testimony of the witnesses Hobbs and the Hargroves was competent to show that the engine had emitted sparks the day before, as bearing upon its defective condition, and the fact that coals which had come from the engine were lying on the log-deck was also a relevant fact for the same reason. *Knott v. R. R., supra.* The exclusion of Hefty's testimony was not error. The judge might well have admitted it, but we think that the witness had just before testified substantially to the same fact.

We have carefully examined all the assignments of error, but have failed to discover any ground for a reversal.

No error.

Cited: In re Smith's Will, 163 N. C., 466; *Wheeler v. Cole,* 164 N. C., 380; *Hodges v. Wilson,* 165 N. C., 333; *McNeill v. R. R.,* 167

N. C., 394; *Reynolds v. Palmer, Ib.*, 454; *Montgomery v. R. R.*, 169 N. C., 249; *Lloyd v. Bowen*, 170 N. C., 220; *McCurry v. Purgason, Ib.*, 467; *McBee v. R. R.*, 171 N. C., 112; *Monk v. Goldstein*, 172 N. C., 519.

(376)

W. L. HURLEY & SONS v. ANG. RAY.

(Filed 13 September, 1912.)

1. Mortgages—Cropper—Lands Designated—Insufficiency.

In order to constitute a valid mortgage on a crop, the land upon which the crop is to be cultivated must be designated, and when the mortgage describes certain lands and provides that the mortgage also covers the crop on "any other lands the mortgagor may cultivate," it is effective as to the lands described and void as to the other crops in the absence of other and more definite description.

2. Mortgages—Cropper—The Crop Applicable.

Only the crops to be cultivated next after the execution of a mortgage may be included in the mortgage of crop to be raised on the lands designated.

3. Mortgages — Cropper — Land Designated — Any Other Crop Cultivated — Words and Phrases.

In a mortgage on crops on lands, the expression, "any other crops he (the lessor) may tend," is held to be substantially the same as if expressed, "any other crops he may cultivate."

4. Mortgages—Cropper Lands Designated—Other Lands—Description.

In a mortgage on crops to be grown on lands, the lands were designated as those whereon the mortgagor resided, and on any other lands he may tend, and on 25 acres joining certain other and designated owners. There was evidence tending to show that the mortgagor cultivated crops on the lands whereon he resided, and in an action by the mortgagee for the crops, it is *Held*, that it was competent for the plaintiff to show that the crops were cultivated by the defendant on the home place and on the 25-acre tract; and it was for the jury to determine as to the intention of the parties to include them in the mortgage.

5. Mortgages—Cropper—Lands Designated—Ownership—False Description.

The mere fact that a mortgagor of crops to be cultivated on certain designated lands described himself as the owner thereof, when he was not in fact the owner, will not of itself defeat the right of the mortgagee to recover the crops grown on the lands.

6. Contracts—Lands—Selection—Ownership.

One who is put into possession of a 50-acre tract of land under a parol agreement that he is to have 12 acres thereof to be by him selected, is not the owner of the 12 acres until it is selected and conveyed to him.

APPEAL by plaintiffs from *Cooke, J.*, at August Term, 1912, of MONTGOMERY. (377)

This action was commenced against the defendant, Ang. Ray, to recover a crop made in 1911, and Allen & Co. were permitted to interplead.

On 25 March, 1911, the defendant Ray executed to the interpleaders a chattel mortgage to secure $154.89, in which the words descriptive of the crop conveyed were as follows: "My entire crop of cotton, cotton seed, corn, dry feed and peas, which I may raise or cause to be raised during year 1911 on my own land and J. C. Currie's land, this being in the neighborhood of T. S. Leak, Hamp Baldwin, and others, and on or about on a road running from Malcolm Blue's to McLeod's mill, this being where I now live or near where I now live, in Rock Springs Township, N. C., all of which is now in my possession and upon which there is no encumbrance."

On 30 April, 1911, the said Ray executed to the plaintiffs a chattel mortgage to secure $392.29, due 1 November, 1911, in which the words descriptive of the crop conveyed were as follows: "My entire crop, such as corn and cotton, cotton seed and feed of all descriptions, to be raised on my land (or any other lands) that I may tend. Twenty-five acres of land, joining Hamp Baldwin and Jim Bennette, bought from J. C. Currie, the land where I now live, my house and premises, is on the land."

The mortgage to the plaintiffs was registered on 29 April, 1911, and the one to the interpleaders on 23 November, 1911.

It appears from the evidence that in 1910 the defendant was let into possession by one J. C. Currie of a large tract of land containing about 761 acres owned by said Currie, of which a 50-acre tract, called the Wilson tract, was a part; that the crop in dispute was raised on a part of this Wilson tract and on a part of the large tract adjoining the Wilson tract; that the defendant resided on the part called the Wilson tract; that at the time the defendant was let into possession, the defendant and J. C. Currie entered into a parol agreement that the defendant could select 12 acres of land from the Wilson 50-acre tract and call for deed for same from said Currie; that defendant built on said Wilson tract a dwelling-house and some outhouses, and also (378) raised a crop in 1910 and 1911 on the said lands, a part being on the Wilson tract and a part on the adjoining land; that at the time the defendant mortgaged the crops to the plaintiffs no land had been selected by the defendant, no land set apart or deeded to him; that after the seizure of the crop by the plaintiff and after the institution of this action, the defendant selected 12 acres of land of the Wilson tract,

mostly in the woods, adjoining the lands on which the crops in dispute were grown, practically leaving out all the land he had tended and on which most of the crops in dispute were grown, and obtained a deed for the land so selected.

W. L. Hurley testified: "I know the lands on which the crops were grown that were conveyed in this mortgage. I went over the lands before the mortgage was given, with the defendant. The lands that Ray cultivated lay right where his house is; joins Baldwin and Jim Bennett. Ray did not cultivate any other lands that year, that I know of. I don't know exactly how many acres there were. I seized the crops on Ray's land, that he claimed."

Randall Hurley testified: "I know the lands described in the mortgage; 25 acres; that is where he lives, where his house is. I have been over the lands and they are the lands described in the mortgage."

The defendant Ray, among other things, testified: "I did not raise any crop this year on any other land not described in the mortgage to W. L. Hurley & Sons."

There was other evidence tending to prove that the land cultivated in 1911 adjoined Bennett and Baldwin.

His Honor held that under the description in the mortgage to the plaintiffs they were entitled to recover the crops raised on the 12 acres of land deeded to the defendant Ray, and that they could not recover the crops raised on the other land, and plaintiffs excepted and appealed from the judgment rendered.

Charles A. Armstrong for plaintiffs.
R. T. Poole for interpleaders.

(379) ALLEN, J. The authorities fully sustain the position that to constitute a valid mortgage upon a crop there must be some designation of the land upon which the crop is to be cultivated (*Atkinson v. Graves,* 91 N. C., 99; *Rountree v. Britt,* 94 N. C., 106; *S. v Garris,* 98 N. C., 737; *Harris v. Allen,* 104 N. C., 87), and that a conveyance of the crops on lands described, and on any other lands the mortgagor may cultivate, is effective as to the crops on the lands described and void as to other crops (*Gwathney v. Etheridge,* 99 N. C., 571; *Weil v. Flowers,* 109 N. C., 217; *Perry v. Bragg,* 109 N. C., 304; *Crinkley v. Edgerton,* 113 N. C., 146).

It has also been held that the crop cultivated next after the execution of the mortgage may be conveyed, and no other (*Wooten v. Hill,* 98 N. C., 49; *Smith v. Coor,* 104 N. C., 139), and that when the mortgage conveys a crop to secure a note due in the fall of the year after its

execution, that the inference is unmistakable that the crop of that year is referred to and conveyed. *Taylor v. Hodges,* 105 N. C., 344.

We see no substantial difference between the language, "any other crops he may cultivate," and that of "any other crop he may tend," and if the description in the mortgage to the plaintiffs stopped here, we would follow the ruling of his Honor, but there are other and apt words of description, to wit, "25 acres joining Hamp Baldwin and Jim Bennett," which will not necessarily fail because of the statement that it was the land of the mortgagor or land bought from J. C. Currie.

In *Proctor v. Pool,* 15 N. C., 373, *Ruffin, C. J.,* speaking of inconsistent descriptions in a deed, says: "It is a general rule, that if the description be so vague or contradictory that it cannot be told what thing in particular is meant, the deed is void. But it is also a general rule, that the deed shall be supported, if possible; and if by any means different descriptions can be reconciled, they shall be, or, if they be irreconcilable, yet if one of them sufficiently points out the thing, so as to render it certain that it was the one intended, a false or mistaken reference to another particular shall not overrule that which is already rendered certain. 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 (380) from another, and each writer will be more or less precise or 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? In some cases it is clear that only that thing is meant in which all the particulars of the description concur. In others, the description may be by several particulars, and distinct things are found, of which one answers to the description and another to the other. It would seem in such case that the conveyance would be inoperative, because it was intended to pass one only, and it cannot be determined which one; though there is most respectable authority that both should pass, rather than neither. *Worthington v. Hylyer,* 4 Mass., 196. But there seems to be no danger of mistaking the intention of the parties when the thing is given by a particular name, by which it is well known, or by any other description which completely identifies it, although another particular be added, which does not apply, it is true, to the thing as before described, but is equally inapplicable to anything else. In such case the effect of the true description ought not to be weakened by a further and unnecessary description which is false," and this has been approved in *Shaffer v. Hahn,* 111 N. C., 1, and in *Peebles v. Graham,* 128 N. C., 227.

Applying this principle, we are of opinion there was evidence which entitled the plaintiffs to have their cause submitted to the jury, upon the question of the ownership by them of the crops raised on other land than the 12 acres set apart to the defendant Ray, and that they are the owners if the jury shall find that the crops were grown on land adjoining Baldwin and Bennett, and that it was the intention of the parties to convey these to the plaintiffs.

The crop in controversy is that of 1911. The defendant Ray entered into possession of the land under a parol agreement with the owner to sell him 12 acres of a larger tract, not designated or described, and to be selected thereafter, and the evidence of the plaintiffs tends to prove that he cultivated more than 12 acres in one lot of land, adjoin-
(381) ing the lands of Hamp Baldwin and Jim Bennett, and that the 12 acres were not set apart until after the crops were seized in this action. As the contract with the owner was in parol, Ray did not own any land, nor had he bought any from the owner, as none had been set apart or selected, and his house and premises were on all the land cultivated by him, as well as on the 12 acres afterwards allotted.

It follows, therefore, that there was error, and a new trial is ordered.

New trial.

MATILDA OWEN v. ELIJAH NEEDHAM ET AL.

(Filed 13 November, 1912.)

1. Partition—Parties—Title.

A party to proceedings to partition lands cannot claim title to the land allowed to another party under a grant from the State taken out after the proceedings, and the principles announced in *Carter v. White*, 134 N. C., 466, have no application to this case.

2. Partition—Parties—Estoppel—State's Lands—Grants—Vacant and Unappropriated—Titles.

J. and his wife were parties to proceedings to partition certain lands, and it appeared by the petition that A. died in 1847, seized and possessed of the lands, and that the wife of J., and others, were his children and heirs at law, and as such were tenants in common thereof. Partition was made and finally adjudicated in 1849: *Held*, that J. and those claiming under him were estopped to deny that A. was the owner of the lands in 1847, and that as the lands were not vacant or unappropriated in 1850, any grant that J. may have obtained at that time from the State to the lands were invalid to pass title to any one claiming thereunder.

OWEN *v.* NEEDHAM.

APPEAL by plaintiff from *O. H. Allen, J.*, at April Term, 1912, of MONTGOMERY.

This is an action to recover possession of land. (382)

The plaintiff claims under a deed from Alexander Jordan, who procured grants from the State for the land in controversy in 1850, 1851, and 1854.

The defendant claims as the heir of Sarah Jordon, who was the first wife of Alexander Jordon, and specially pleads that the plaintiff is estopped to claim title to said land.

The plaintiff introduced evidence tending to establish her title, and relied on said grants to Alexander Jordon as a necessary part of her title.

The defendant then introduced a partition proceeding, of date 1849, in which the land in controversy was allotted to Sarah Jordon, and it was admitted that the defendant was her heir.

Alexander Jordon and Sarah Jordon were parties to said partition proceeding, and they alleged in their petition that George Allen died in 1847, seized and possessed of certain lands, and that Sarah Jordon and others named were his children and heirs, and, as such, tenants in common of said land, and partition was made in accordance with the petition.

His Honor then intimated that he would instruct the jury that the plaintiff was estopped if it was found as a fact that Alexander Jordon was a party to the partition proceeding and that the land in controversy was therein allotted ot Sarah Jordon, and in deference thereto the plaintiff submitted to judgment of nonsuit and appealed.

Howell Hurley and John T. Brittain for plaintiff.
J. A. Spence and Jerome & Price for defendant.

ALLEN, J. *Carter v. White,* 134 N. C., 466, is not decisive of this controversy, because no land was allotted in the partition proceeding to Alexander Jordon, under whom the plaintiff claims, and she does not derive her title through that proceeding, but there is another principle which is conclusive against the plaintiff.

Alexander Jordon was a party and joined in the partition, which alleged that George Allen died in 1847, seized and possessed of the land described, and that the petitioners were tenants in common of the same as his heirs, which was equivalent to an allegation of an estate of inheritance in George Allen in 1847, and following the petition (383) there was an adjudication of title accordingly in 1849.

This, according to all authorities, estops all parties to the proceeding, including the grantor of the plaintiff, to deny that in 1847 George Allen

was the owner of the land described (*Armfield v. Moore,* 44 N. C., 161; *Coltraine v. Laughlin,* 157 N. C., 287), and if so, it was not vacant and unappropriated land, which alone is the subject of entry and grant, and the adjudication of necessity passed on this precise point, and the plaintiff is now seeking to establish that the land was vacant and unappropriated land in 1849, and that the State did not part with title until 1850, 1851, and 1854.

The two positions are irreconcilable, and if we give any effect to the adjudication, we must hold that Alexander Jordon is estopped to allege that the title to the land in controversy was in the State at the time his grants were issued, and that the plaintiff, being a privy in estate, is bound by the estoppel. *Green v. Bennett,* 120 N. C., 394.

In the *Armfield case, Pearson, C. J.,* discusses the effect of an adjudication upon the parties and the important part it plays in the administration of justice. He says: "According to my Lord Coke, an estoppel is that which concludes and 'shuts a man's mouth from speaking the truth.' With this forbidding introduction, a principle is announced which lies at the foundation of all fair dealing between man and man, and without which it would be impossible to administer law as a system. The harsh words which the very learned commentator upon Littleton uses in giving a definition to this principle are to be attributed to the fact that before his day 'the scholastic learning and subtle disquisition of the Norman lawyers' (in the language of Blackstone) had tortured this principle so as to make it the means of great injustice, and the object of my Lord Coke was to denounce the abuse, which, he says, had got to be 'a very cunning and curious learning,' and was 'odious,' and thereby restore the principle and make it subserve its true purpose as a plain, practical, fair, and necessary rule of law. The meaning of which is, that when a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in
(384) question and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed, and when parties, by deed or solemn act, *in pais,* agree on a state of facts, and act on it, neither shall ever afterwards be allowed to gainsay a fact so agreed on, or be heard to dispute it; in other words, his mouth is shut, and he shall not say that is not true which he had before in a solemn manner asserted to be truth. For instance, one is acquitted upon the trial of an indictment, and is afterwards indicted for the same offense; he pleads *autrefois acquit,* to wit, the fact has been decided of record. Not even the sovereign can be heard to gainsay it, although there be an allegation of proof subsequently discovered. So, in a civil suit, if a fact be agreed on by the parties, or be found by a verdict, and the court acts thereon

and pronounces a judgment or decree, neither party can be afterwards heard to gainsay that fact, so long as the judgment or decree stands unreversed. An allegation of the discovery of important evidence, after the admission on trial, or a suggestion that the party made the admission of record under a mistake as to his rights, cannot be listened to without upsetting the whole administration of the law as a system, and reducing it to a mere arbitrary and despotic proceeding, by which the court, in each case, according to its views of the circumstances, may see fit to decide, in the one way or the other."

And in the *Coltraine case Justice Hoke* declares the same principle, as follows: "It is well recognized here and elsewhere that when a court having jurisdiction of the cause and the parties renders judgment therein, it estops the parties and their privies as to all issuable matter contained in the pleadings, and though not issuable in the technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant, and were in fact investigated and determined on the hearing. *Gillam v. Edmonson,* 154 N. C., 127; *Tyler v. Capeheart,* 125 N. C., 64; *Tuttle v. Harrell,* 85 N. C., 456; *Fayerweather v. Ritch,* 195 U. S., 277; *Aurora City v. West,* 74 U. S., 82, 103; *Chamberlain v. Gaillard,* 26 Ala., 504; 23 Cyc., 1502-4-6."

If the doctrine is ever to be applied, it should be in a case like this, where the husband, while living with the wife, takes out a (385) grant for her land.

We are therefore of opinion, upon reason and authority, that the plaintiff is estopped as a privy in estate to Alexander Jordon to maintain that Alexander Jordon acquired title to the lands in controversy under the grants issued to him, and so hold.

Affirmed.

Cited: Weston v. Lumber Co., 162 N. C., 202; *Ferebee v. Sawyer,* 167 N. C., 203; *Pinnell v. Burroughs,* 168 N. C., 318; *s. c.* 172 N. C., 187.

COHARIE LUMBER COMPANY v. W. C. BUHMANN ET AL.

(Filed 9 October, 1912.)

1. Appeal and Error—Order Vacating Attachment—Findings of Facts.

The Superior Court judge is not required to set out the facts upon which he has vacated an attachment levied on defendant's property, unless the party appealing, and complaining of the ruling of law, requests him to find the facts necessary to give him the benefit of his exceptions.

2. Same—Presumptions.

On appeal, it will be presumed that the Superior Court judge found facts sufficient to support his order vacating an attachment on the debtor's property, when they do not appear of record; and any facts, so appearing, found by him, are not reviewable.

3. Appeal and Error—Order Vacating Attachment—Debtor's Possession—Undertaking—Interpretation of Statutes.

When an attachment on the debtor's property has been vacated by the Superior Court judge, the defendant should not be required to give the undertaking under Revisal, secs. 774 and 775, to regain possession of the property.

APPEAL by plaintiff from *O. H. Allen, J.*, at May Term, 1912, of NEW HANOVER.

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

Joseph W. Little and John D. Bellamy for plaintiff.
Davis & Davis for defendant.

WALKER, J. This is an action to recover $3,000, the penalty (386) of a bond given by W. C. Buhmann as principal and F. G. Buhmann as surety, for the faithful performance, by W. C. Buhmann, of a certain contract between him and plaintiff, and for the further recovery of the amount of a note for $2,500, made by W. C. Buhmann and indorsed by F. G. Buhmann, and deposited with plaintiff as collateral to secure the payment of three promissory notes, each for $500, given by W. C. Buhmann to plaintiff, and of an open account for money advanced and supplies furnished by plaintiff to the said W. C. Buhmann. Warrants of attachment were issued and levied on property of defendants in this State. They were based upon affidavits which alleged that W. C. Buhmann is not a resident of the State and that F. G. Buhmann, though alleged to be a nonresident, had secreted himself in the State with the purpose of avoiding the service of process, and had assigned, disposed of, and secreted, or was about to assign, dispose of, or

secrete his property in this State, for the purpose of defrauding his creditors. The case was heard in the court below, after special appearance by defendants, upon a motion to vacate the warrants of attachment and the affidavits filed by the parties. The court ordered that the attachments be vacated, but without setting out the facts upon which the order was based.

The judge was not required to state his findings of fact in the order or otherwise, unless requested by the plaintiff to do so. This has been thoroughly settled by the authorities, and notably in *Millhiser v. Balsley,* 106 N. C., 433. As there seems to be some misapprehension upon this subject, we reproduce what is said by *Chief Justice Merrimon* in that case: "It was not necessary, in this case, that the court should set forth in the judgment vacating the warrant of attachment its findings of facts on which the same was founded. The statute does not so require, and to do so would more or less encumber the record without serving any necessary or useful purpose, unless a party should desire to assign error. In this and like cases it is the province of the judge in the court below to hear the evidence, usually produced before him in the form of affidavits, find the facts, and apply the law arising thereupon. *Pasour v. Lineberger,* 90 N. C., 159, and the cases there cited. If (387) a party should complain that the court erred in so applying the law, then he should assign error and ask the court to state its findings of the material facts in the record, so that he might have the benefit of his exceptions, on appeal to this Court. In that case, it would be error if the court should fail or refuse to so state its findings of fact, and the law arising upon the same. Such practice affords the complaining party reasonable opportunity to have errors of law, arising in the disposition of incidental and ancillary matters in the action, corrected by this Court, while in very many cases it lessens the labor of the court below, expedites proceedings in the action, and saves costs."

So we said in *Pharr v. R. R.,* 132 N. C., 418:

"This Court cannot pass upon the affidavits, but in order to entitle the moving party to a review here of the ruling below, the facts must be found and spread upon the record, and the court must always find the facts when requested to do so," citing *Smith v. Whitten,* 117 N. C., 389; *Albertson v. Terry,* 108 N. C., 75.

Where the facts are not set out in the record, we will presume that the judge found such facts as would support the order, or judgment, as the case may be. We do not presume that error was committed by the court. It must be shown by the party alleging it. *Pharr v. R. R., supra; S. v. Taylor,* 118 N. C., 1262; *Albertson v. Terry, supra.* Likewise, the findings of fact upon such a motion are not reviewable here, but are

conclusive upon us. *Hale v. Richardson,* 89 N. C., 62; *Taylor v. Pope,* 106 N. C., 267; *Burke v. Turner,* 85 N. C., 500; *Harris v. Sneeden,* 101 N. C., 273; *Love v. Moody,* 68 N. C., 200; *Travers v. Deaton,* 107 N. C., 502. This rule, of course, is subject to the qualification that a party may except to the findings of fact upon the ground that there is no evidence to support them, but the exception must be made in apt time and in the proper way. *Travers v. Deaton, supra.* Assuming that the judge found such facts as warranted the order, and being concluded by them, as much so as if they had been fully set out in the order, the necessary conclusion is that there was no error in vacating the attachment,
(388) as there is no foundation for it to rest upon.

The learned counsel for plaintiff suggested in argument, and this is one of his assignments of error, that the defendants should have been required by the court to give an undertaking, under Revisal, secs. 774, 775; but we do not think those sections will bear such a construction. They were intended to apply where the defendant comes in and moves to discharge the property from the attachment, upon giving the required security and without regard to the validity of the attachment. They are rather predicated upon the idea that the attachment was properly issued for one or more of the causes prescribed in the statute, and the defendant appears, submits himself to the jurisdiction of the court, and agrees to file an undertaking, with sufficient surety, in lieu of the attached property, and conditioned to pay the debt if the plaintiff succeeds in the action. A cursory reading of those sections will disclose this as the purpose of their enactment. It was not supposed that plaintiff should be entitled to security from the defendant if the attachment is invalid or was not properly sued out. The attachment then fails and the right to security is extinguished. It is said in 3 Enc. Pl. & Pr., 77, citing cases in the notes: "Attachments may be dissolved by traversing in the motion for dissolution the facts alleged in the affidavit as grounds for the attachment, by pleading some irregularity of a fatal character in the proceedings, or by giving bond to the sheriff to pay the debt, thereby releasing the property"; and at page 84: "It is generally provided by statute that the attached property may be discharged from the attachment lien by executing in favor of the plaintiff, or, in some States, the officer who executes the attachment, a bond, with sufficient security, conditioned upon the faithful performance of whatever judgment shall be rendered in the action." But the point is determined in *Bear v. Cohen,* 65 N. C., 511, where it is said: "An attachment or other provisional remedy will be vacated without any undertaking by the defendant, by a judge, if on its face it appears to have been issued irregu-

larly, or for a cause insufficient in law, or false in fact." *Rowles* (389) *v. Hoare,* 61 Barbour (N. Y.), 266.

The rule is well stated in *Bates v. Killian,* 17 S. C., 553: "Attachments may be dissolved or defeated upon two grounds: (1st) Where some irregularity of a fatal character appears on the face of the proceedings, and (2d) because of the fact that the allegations upon which it may issue are untrue. The dissolution in either case may be had upon motion, the first being made upon the papers, and the second upon affidavits as to matters *dehors* the record. These causes go to the root of the attachment, especially in the last class of cases, and when they exist the effect of their interposition is not simply to release the property, but to entirely vacate and set aside the attachment proceedings. Besides this remedy, in cases where the attachment has been irregularly issued, or issued without warrant of law, section 265 of the Code, *supra,* provides for the release of the property attached, where the attachment has been legally issued and there is no objection as to its regularity or want of observance of proper form, the effect of which provision, when adopted by the defendant, is to convert the action from one *in rem* to one *in personam,* with security by the defendant for the payment of the debt. This is done by permitting the defendant to give bond for the payment of the debt in the event that the plaintiff's action succeeds, the purpose of an attachment being to obtain security for the debt by securing a lien on property. The bond provided for is substituted in the place of this lien and the property is released." When there is any fatal defect in the attachment proceedings, parties would doubtless avail themselves of the chance offered to attack the process and vacate the same, thereby releasing the property from the lien, without any further liability. The relief provided by Revisal, secs. 774, 775, was without doubt intended primarily to provide for those cases where the attachments are regular and valid, and yet where it would be a hardship to the debtor if he is deprived of the use and enjoyment of his property during the pendency of the action. This remedy respects the interests of both creditor and debtor, as it gives the creditor a security in the form of an undertaking, which is, by the law, considered as reliable (390) as the lien displaced by it, and an adequate protection, while the debtor is restored to the possession of his property. *Bates v. Killian, supra.*

It appears that an undertaking was given to the sheriff for the release of the property, but what effect it will ultimately have in securing the plaintiff's claim, if established, is not now before us for decision.

No error.

Cited: Wright v. Harris, post, 545; *In re Smith's Will,* 163 N. C., 466.

GEORGE C. THOMPSON v. PURCELL CONSTRUCTION COMPANY AND WINSTON-SALEM SOUTHBOUND RAILROAD COMPANY.

(Filed 13 November, 1912.)

Railroads—Contributory Negligence—Evidence—Nonsuit.

In an action to recover damages for a personal injury, it appeared from the plaintiff's evidence that the defendant construction company was engaged in constructing for its codefendant, a railroad company, a cut under the track of another railroad company for the purpose of crossing beneath it, at right angles, which was deep in the center where it passed, extending in each direction a considerable distance; that with full knowledge and appreciation of the danger, the plaintiff, on a dark night, attempted to walk the exposed sills over the cut, when it was too dark for him to see them, when he could safely have used a roadway about a quarter of a mile distant, and fell through a space left open between the sills, to his injury: *Held*, upon his own evidence, the contributory negligence of the plaintiff barred his recovery, and a motion to nonsuit upon the evidence should have been allowed.

APPEAL by defendants from *O. H. Allen, J.*, at April Term, 1912, of DAVIDSON.

At the close of the testimony of plaintiff, who was the only witness examined, the defendants moved to nonsuit. Motion overruled. The defendants, the construction company and the railroad company, appealed.

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

Emery E. Raper, McCrary & McCrary for plaintiff.

Phillips & Bower, F. C. Robbins, Watson, Buxton & Watson for defendants.

(391) BROWN, J. The plaintiff was the only witness examined, and from his testimony it appears that the construction company was engaged in constructing for its codefendant, the Southbound Railroad, a cut under the tracks of the Southern Railway near Lexington. This cut was three-quarters of a mile in length, and deep in the center where it passed under the Southern's tracks, and extended about half a mile south of the Southern Railway, and about a quarter of a mile north, and crossed under the Southern at right angles.

The plaintiff testified that he attempted to cross in the night on the Southern Railway track lying north of the center track by walking on the cross-ties, the earth having all been taken out below the two north tracks; that he knew the condition; that he knew it was a dangerous place; that his little boy was just in front of him, and that he called

to his boy to be careful in crossing; that it was so dark he could not see. Plaintiff said also, "I could not see the cross-ties when walking. I could not see the space between the cross-ties. I had gone 12 or 15 feet safely between the rails on the right-hand track. I undertook to cross from that track to the middle track. I knew there was an opening between the two tracks, and I stepped through it." "I had crossed this same trestle three times that day. I had crossed it before. I knew very well the conditions there, and knew it was a dangerous place."

In view of the admitted facts that plaintiff was not in the employment of either of these defendants, and was not injured on their roadway, and that he could have gone safely home by walking a quarter of a mile to the north of the Southern Railway trestle, it is difficult to see what duty these defendants owed plaintiff that they failed to perform.

But it is manifest from his own testimony that plaintiff was guilty of such inexcusable heedlessness as bars recovery under the accepted doctrine of contributory negligence.

Instead of taking the path of safety, although only a quarter of a mile longer, he voluntarily and unnecessarily undertook to cross a railway trestle, over a deep excavation, knowing all the conditions and that it was a dangerous place to cross, especially on a dark night.

He says he knew there was an opening between the two tracks (392) before he attempted to cross from one track to the other, and that he stepped in the dark into this open space and fell through.

No prudent man would have attempted such an act, and at the time of his injury, if he was doing what no prudent man would have done, he is guilty of contributory negligence, and his own careless act was the proximate cause of his injury. *Neal v. Town of Marion,* 126 N. C., 412; *Hinshaw v. R. R.,* 118 N. C., 1047.

It is settled that the defendants may avail themselves of their plea of contributory negligence on the motion to nonsuit, as the facts are undisputed and arise upon plaintiff's evidence. *Wright v. R. R.,* 155 N. C., 325.

The judgment of the Superior Court is reversed, and the motion to nonsuit allowed.

Reversed.

Cited: Horne v. R. R., 170 N. C., 660.

CAUSEY ALLRED v. J. WESLEY KIRKMAN.

(Filed 7 November, 1912.)

1. Appeal and Error—Unanswered Questions—Objections and Exceptions—Assignments of Error—New Matter.

An unanswered question asked on the trial of a cause is not objectionable; and cannot be properly introduced for the first time in an assignment of error for the purpose of excepting to it.

2. Evidence Corroborative—Declarations of Parties.

A party to an action may prove his own declarations, which are consistent with his own evidence, and made before the trial, as corroborative evidence.

3. Issues—Answer Conclusive—Second Issue—Evidence—Harmless Error.

When the jury by their answer to the first issue have determined the action, evidence on the second issue, erroneously excluded, is harmless error.

APPEAL by plaintiff from *O. H. Allen, J.*, at March Term, 1912, of RANDOLPH.

The facts are sufficiently stated in the opinion of the Court by (393) MR. JUSTICE WALKER.

Morehead & Morehead, Elijah Moffitt, and John T. Brittain for plaintiff.

Hammer & Kelly and J. A. Spence for defendant.

WALKER, J. Action by the husband for criminal conversation and alienation of his wife's affections. The jury returned this verdict:

1. Did the defendant carnally know the wife of the plaintiff, as alleged in the complaint? Answer: No.

2. What damages is plaintiff entitled to recover? No answer.

Judgment for defendant, and plaintiff appealed.

1. Defendant proposed to prove by one Mary Nixon "that the plaintiff and his wife did not get along well together," but the question was not answered, as the record discloses. An assignment of error must be based upon matter appearing in the case or record to which exception was previously taken. It has been said that, in an action by the husband for this wrong, his neglect of his wife, lack of affection for her, his indifference or cruelty toward her, and the unhappiness of their domestic relations before the alleged enticement or seduction may be shown in mitigation of damages. 21 Cyc., 1625 and 1632, citing numerous cases in support of the proposition. But we need not decide the

question, as we do not think it was properly raised. New matter cannot be properly introduced for the first time in an assignment of error for the purpose of excepting to it, especially when, as in this case, the assignment does not appear to have received the sanction of the judge, but is inserted after his signature to the case on appeal. We must be governed by the record in such case, and as it appears from it that the question was not answered, there is no ground for the exception, an unanswered question not being objectionable. *Morse v. Freeman,* 157 N. C., 385. In *Worley v. Logging Co.,* 157 N. C., 490, *Justice Allen,* after stating that an assignment of error must be based upon an exception properly taken, says, at page 499: "The preparation of the assignment of error is the work of the attorney for the appellant, and is not a part of the case on appeal, and its office is to group the exceptions noted in the case on appeal, and if there is an assignment (394) of error not supported by an exception, it will be disregarded."

2. The defendant having been examined as a witness, in his own behalf, was impeached by the plaintiff's testimony. It was competent for him to prove his own declarations, which were consistent with his own evidence, and made before the trial, in corroboration of himself. *S. v. Whitfield,* 92 N. C., 831; *Hooks v. Houston,* 109 N. C., 623. The rule is thus stated by the present *Chief Justice* in *Burnett v. R. R.,* 120 N. C., 517: "It is competent to corroborate a witness by showing that previously he had made the same statement as to the transaction as that given by him on the trial," citing many cases in its support.

3. Defendant offered certain evidence in mitigation of damages, but as the second issue was not reached in the investigation by the jury, the first having been answered in the negative, no harm was done, even if the admission of this testimony was erroneous.

No error.

Cited: Bowman v. Blankenship, 165 N. C., 521.

J. A. CREED ET AL. V. S. E. MARSHALL ET AL.

(Filed 30 November, 1912.)

1. Judgments Nunc Pro Tunc—Motions—Procedure.

The Superior Court judge, at a subsequent term to an affirmance on appeal of a judgment theretofore rendered in the cause, entered an order imposing conditions upon which the execution should not issue thereunder, therein providing that his order may be revoked at any time, after

notice. At a subsequent term, after notice, he revoked the order, and on a second appeal it is *Held*, that the proceeding should be treated as a motion in the cause to amend the judgment first rendered and affirmed.

2. Judgments Nunc Pro Tunc—Corrections—Inadvertence—Clerical Errors.

A judgment *nunc pro tunc* cannot be entered for the purpose of correcting errors or omissions of the court in a former judgment rendered in the cause, except where the former judgment fails, through inadvertence, or in consequence of clerical errors, to be what at the time it was intended to be.

3. Same—Evidence—Findings Conclusive—Appeal and Error.

The judge of the Superior Court is the sole judge of the weight and credibility of the evidence, in rendering a judgment *nunc pro tunc* correcting, or refusing to correct, errors or omissions in a former judgment; and his findings thereon are conclusive, and not reviewable on appeal, when the record does not disclose that he failed to find any material fact or any fact which he ought to have found from the evidence adduced.

4. Same—Questions for Jury—Issues of Fact—Questions of Fact.

In this case it is *Held*, that the judge of the Superior Court did not commit error in refusing to submit to the jury the evidence upon which he refused to correct a former order of the court. Upon the distinction between issues of fact and questions of fact, *Heilig v. Stokes*, 63 N. C., 612; *Keener v. Finger*, 70 N. C., 42, cited and approved.

(395) APPEAL by defendant Marshall from *Lyon, J.*, at the August Term of SURRY, from judgment rendered in Winston, 11 September, 1911.

This cause was originally tried at August Term, 1909, of SURRY, before *Jones, J.*, upon issues submitted to and answered by a jury. Judgment was rendered, and an appeal taken to the Supreme Court. The judgment was affirmed in an opinion delivered by *Mr. Justice Hoke*, 155 N. C., 169.

At August Term, 1911, of Surry Court, upon motion, *Lyon, J.*, made the following order:

NORTH CAROLINA—SURRY COUNTY.

August Term, 1911.

In this cause, the defendant having presented in open court the notes set out in the award for surrender unto plaintiffs, and the sum of $350, as set forth in the said award to be paid:

It is thereupon ordered by the court, that upon deposit of the said notes and a certified check for the $350 in the office of clerk of Superior Court, no execution shall issue against said S. E. Marshall or his sureties on arbitration bond in said action, nor shall said notes and money be turned over to plaintiffs until the surrender of the big mill into the

possession of S. E. Marshall; that this order may be revoked after (396) notice at any time.

It is further ordered that notice issue to plaintiffs, returnable to the November Term of 1911, why they should not turn over and surrender to defendant the big mill.

That the clerk issue a copy of this order to the Sheriff of Surry County, to be served upon plaintiffs.

Lyon, J., then, upon motion of plaintiffs, after notice, set aside the above order, and rendered the following judgment:

NORTH CAROLINA—SURRY COUNTY.

In the Superior Court, August Term, 1911.

(Title of Cause.)

This cause coming on to be heard upon the motion of the plaintiffs to set aside and vacate an order heretofore made by me at Surry Superior Court, restraining the plaintiffs from issuing execution in the above entitled cause until the plaintiffs should deliver the sawmill involved in this controversy, and known as the "Big Mill," after examining the affidavits offered both by the plaintiffs and defendants and hearing the arguments of counsel for plaintiffs and defendants, I find that the judgment heretofore rendered in this cause by E. B. Jones, judge presiding, at the Superior Court of Surry County, from which there was an appeal to the Supreme Court, and being heard upon said appeal by the Supreme Court was affirmed, was not an irregular judgment, and if said judgment was erroneous in form, that there was no exception to the form thereof, nor was there any appeal from the form of judgment.

I further find as a fact that since the said mill was turned over by plaintiffs to the defendant, that the defendant has exercised acts of ownership over the said "Big Mill," and if he has not at this time possession of the said mill, it is his own fault, and he has no one to blame but himself.

It is therefore decreed that the order made by me just at the close of Surry Superior Court, restraining the plaintiffs from issuing execution on the judgment heretofore rendered in this cause, is set aside and vacated, and it is ordered that the order made in said cause by me relating to the "Big Mill" is hereby set aside. It is further or- (397) dered that the defendant pay the cost of this proceeding.

The defendant Marshall excepted to this last order of *Lyon, J.,* and appealed.

Watson, Buxton & Watson for plaintiffs.
S. P. Graves, J. H. Folger, W. F. Carter for defendants.

BROWN, J. We must treat this proceeding as a motion in the cause to amend the judgment rendered by *Judge Jones* and affirmed by this Court so as to include in it an adjudication as to the surrender of the "Big Mill," etc., as contended by the defendant. Treating it as such, upon the record before us, we must affirm the order of *Judge Lyon,* from which the defendants appeal.

There is no finding of facts set out in this record that *Judge Jones* ever rendered any such judgment and inadvertently failed to incorporate it in the written judgment signed by him. The case was brought to this Court on appeal, and no such error was assigned by the appellant. In fact, the form of the judgment as founded upon the issues was not contested.

It is well settled that in any case where a judgment has been actually rendered, or decree signed, but not entered on the record, in consquence of accident or mistake or the neglect of the clerk, the court has power to order that the judgment be entered up *nunc pro tunc,* provided the fact of its rendition is satisfactorily established and no intervening rights are prejudiced.

If the written judgment fails to incorporate the true sentence or judgment of the court, through inadvertence and in consequence of clerical errors or omissions, it may be completed by an order *nunc pro tunc,* or may be set aside and the true and correct judgment entered *nunc pro tunc.* But the power to amend the judgment as entered cannot be used for the purpose of correcting errors or omissions of the court.

No amendment can be allowed simply for the purpose of entering judgment which the court failed to render at the proper time, or to change the judgment actually rendered to one which was not
(398) rendered. Such procedure cannot be allowed so as to enable the court to review and reverse its action in respect to what it formerly either refused or failed to do. 23 Cyc., 843.

According to many authorities, the evidence to justify the entry of a judgment *nunc pro tunc* must be record evidence, or some entry, note, or memorandum from the records which shows in itself, without the aid of parol evidence, that the alleged judgment was rendered, and what were its character and terms; but other authorities hold that such entries *nunc pro tunc* may be ordered on any evidence that is satisfactory, whether it be parol or otherwise.

The record does not disclose that the judge below failed to find any material fact or any fact which ought to have been found from the

evidence adduced. He is the sole judge of the weight and credibility of the evidence, and his findings thereon are conclusive and are not reviewable by this Court. This has been settled by innumerable decisions. *Stockton v. Mining Co.,* 144 N. C., 595; *Norton v. McLaurin,* 125 N. C., 185; *Winburn v. Johnson,* 95 N. C., 46; *Sikes v. Weatherly,* 110 N. C., 131; *Lumber Co. v. Buhmann,* 75 S. E., 1008.

It has been held uniformly since the case of *Heilig v. Stokes,* 63 N. C., 612, that the Supreme Court has no power to pass upon issues of fact, and that, generally speaking, those questions of fact which are passed upon by the Superior Court judges are conclusive and binding upon this Court.

It is further contended that his Honor should have submitted the issues of fact to the jury. We cannot concur with the learned counsel for the defendant. The issues of fact arise upon the pleadings, and the issues arising upon the pleadings in this case were submitted to a jury and no exception taken to their form. All the rulings of the court below in submitting those issues to the jury were reviewed by this Court on appeal, and the judgment affirmed.

A distinction between *issues* of fact and *questions* of fact has been pointed out by *Judge Rodman* in the *Heilig case* and approved in the opinion of *Chief Justice Pearson* in *Keener v. Finger,* 70 N. C., 42.

Many questions of fact must necessarily arise which cannot be passed upon by a jury, such as amendments to the record, motions for injunction, vacating attachments, granting writs of assistance, (399) and the like. This proceeding before *Judge Lyon* comes within this category, and his Honor found the facts without the aid of a jury, and his findings are binding upon us.

We fail to see how the defendant is greatly prejudiced if the facts be as found by his Honor, that the "Big Mill" was surrendered to the defendant, and that the defendant has exercised acts of ownership over it.

The plaintiffs, upon the admissions and findings now set out in this record, cannot now gainsay the defendants' right to such possession.

The costs of this appeal will be paid by the defendants.

The judgment of the Superior Court is

Affirmed.

AARON T. PENN v. STANDARD LIFE INSURANCE COMPANY.

(Filed 7 November, 1912.)

1. Contracts—Courts—Interpretation.

The courts can only interpret a contract lawfully entered into between parties legally and mentally competent to make it.

2. Insurance — Policy Contract — Interpretation — Accident — Independent Cause.

A policy of accident insurance creating a liability on the part of the insurer for injuries sustained by the insured "directly and independently of all other causes, through external, accidental, and violent means," is lawful and enforcible by the insurer in accordance with its terms.

3. Same—Instructions.

In an action to recover under an accident insurance policy for the loss of eyesight whereunder the insurer was liable for injuries sustained by the insured "directly and independently of all other causes, through external, accidental, and violent means," there was evidence tending to show that the plaintiff's eyesight was lost by reason of an old cataract existing before the accident, as well as that the accident had caused the loss of vision. The court charged the jury that if they found by the greater weight of the evidence that the plaintiff's loss of his eyesight was caused directly and independently of all other causes, through external, accidental, and violent means, to answer for the plaintiff; but otherwise if the accident operated in connection with another cause: *Held*, the charge was correct and not objectionable on the ground that it would deny a recovery in a case where there was a former malady and an accident, and the latter directly produced the injury as the efficient cause thereof, though the malady itself would have resulted in the same injury, at a later time.

4. Insurance — Policy Contracts — Interpretation — Accidents—Independent Cause—Definitions—Liability.

In construing a policy of accident insurance against injuries sustained by the insured "directly and independently of all other causes, through external, accidental, and violent means," it is *Held*, (1) When an accident causes a diseased condition which, together with the accident, resulted in the injury or death complained of, the accident alone is to be considered the cause of the injury or death; (2) When at the time of the accident the insured was suffering from some disease, but the disease had no causal connection with the injury or death resulting from the accident, the accident is to be considered as the sole cause; (3) When at the time of the accident there is an existing disease which, coöperating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause, or as the cause independent of all other causes.

5. Insurance — Policy Contracts — Interpretation — Accidents—Independent Cause—Proximate Cause—Casual Connection.

When the loss under a policy of accident insurance is made, by its terms, to depend upon injury or death "resulting from accident, independent of all other causes," the rule of proximate and remote causes cannot be applied, the question being, upon an issue of fact presented, whether the disease with which the insured was suffering at the time of the accident had causal connection with the injury inflicted by the accident.

6. Instructions—Alternate Theories—Appeal and Error—Special Requests for Instructions—Procedure.

The failure of the trial judge to charge the jury upon alternate theory correctly stated and arising upon the evidence in the case, does not necessarily render the charge incorrect, and no reversible error will be held on appeal for the mere failure of the judge to charge the alternate theory in the absence of a special instruction asked and refused.

7. Instructions—Construed as a Whole—Appeal and Error.

The charge of the trial judge to the jury should be construed as one connected whole, and not in detached portions, and it will not be held for error when, thus considered, the meaning of the charge clearly appears, and the jury could not have been misled.

APPEAL by plaintiff from *Adams, J.*, at August Term, 1912, (401) of ROCKINGHAM.

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

Morehead & Morehead, Sapp & Williams, and Justice & Broadhurst for plaintiff.

G. S. Bradshaw and T. H. Calvert for defendant.

WALKER, J. This is a petition to rehear this case, which was decided by us at Fall Term, 1911, and is reported in 158 N. C., at p. 29, where the facts are stated. There is no new question in the case, as now presented, but the learned counsel for the plaintiff think that we have misapprehended the true nature and meaning of the charge of *Judge Adams,* who presided at the trial, and that, if properly construed, it would deny a recovery in a case where there was a former malady and an accident and the latter directly produced the injury as the efficient cause thereof, provided the malady itself would have resulted in the same injury, though at a later time. It is also said that certain expressions of the Court in the opinion indicate that it was clearly not the intention so to decide. As to the latter suggestion, we agree with counsel, but we do not as to the former.

What the Court intended to decide, and did decide, was that there must have been a union of the two causes, so that they coöperated in producing the injury, and if the accident was the sole cause, or produced the result independent of all other causes, recovery could be had in such a case, and we are of the opinion now, as we were at the former hearing, that the judge so charged the jury. The instruction will not bear any other construction, as will appear from the following extract:

"If you find from the evidence, and by the greater weight of it, that the plaintiff has suffered the entire loss of the sight of his eye; that the loss of his sight is irrecoverable; that the loss was caused directly and independently of all other causes, through external, accidental, (402) and violent means, your answer to the second issue will be 'Yes.' If you do not so find, your answer will be 'No.'" The other part of the instruction merely informed the jury that if the accident did not cause the injury directly and independently of all other causes, but operated in connection with another cause, the case would be different, and the jury must have so understood it.

It must be remembered that we are construing a contract not of our making, and the terms of which we cannot alter, and not discussing the law of negligence and the doctrine of proximate cause. The plaintiff and defendant had the legal right to make any contract with each other, not unlawful in itself, both being at arm's-length and in the full possession and enjoyment of their mental faculties. We must decide the case, therefore, not by what we may think would have been a wiser and more discreet contract on the part of the plaintiff if he could have procured such a one, but by what is written in the contract actually made by them. Courts are not at liberty to rewrite contracts for the parties. We are not their guardians, but the interpreters of their words. We must, therefore, determine what they meant by what they have said—what their contract is, and not what it should have been. We said as much in our former opinion: "As long as parties who are capable of doing so shall be permitted to make their own contracts, it is the plain duty of the Court to enforce them as they are written, unless fraud or public policy shall intervene. *Binder v. Accident Association,* 127 Iowa, 25 (35). While the rule is thoroughly settled that policies of this and like character are to be construed liberally, and that ambiguous provisions, or those capable of two constructions, should be construed favorably to the insured and most strongly against the insurer, plain, explicit language cannot be disregarded, nor an interpretation given the policy at variance with the clearly disclosed intent of the parties. Taking the policy in the case at bar by its four corners, it will admit of but one construction. *White v. Ins. Co.,* 95 Minn., 77. In *Carr v. Ins. Co.,*

100 Mo. App., 602, the Court said that the question of proximate and immediate cause is not raised under the conditions of a policy which in terms excludes disease or bodily infirmity, and which could have no more force than the general provision, 'independent of all (403) other causes.' See, also, *Association v. Fulton,* 79 Fed., 423. If the jury had found that the injury was caused by the sum of two causes, that is, that the accident and the preëxisting cataract and diseased condition of the eye were together responsible for the subsequent blindness, the plaintiff could not have recovered, as the injury must have resulted from the accident, 'independent of all other causes.' "

We did not before fail to consider, in its full scope, the language of the learned judge in charging the jury, and, after a more careful examination of his instructions, we do not think that, in word or phrase, he so narrowed the terms of the insurance contract as to prejudice the plaintiff's rights, but that he correctly stated the law which is applicable to the case.

There was a disputed question of fact presented by the testimony, whether the plaintiff was suffering from a cataract on his eye at the time of the alleged fall, or whether the fall produced a cataract. In addition to the testimony recited in the brief for the petitioner, testimony by Dr. McGee was given as follows: "He complained of pain in his left eye and in the lower third thigh, right side. On examination of his eye, I found that he had an old cataract, and so told him. He had particles of dust around his eye. I put a little antiseptic solution on that. I found no evidence of traumatism or blow on the head, nor any inflammation. I found an old cataract and told him it was from an old injury; that it was produced by some injury in the past. It is possible to have a blow on the eye or on the head that will cause a rupture of the lens, and cataract follows. I found no sign of an injury resulting from a fall from the train. It takes a cataract some time to form and develop from a traumatic injury. The cataract I saw had been forming for months." The petitioner, as we understand, concedes, both in the petition and in the brief filed in support of the petition, that the decision is right in holding that if the jury had found that the injury was caused by the sum of two causes—that is, that the accident and preëxisting cataract and diseased condition of the eye were together responsible for the subsequent blindness and united sensibly and effi- (404) ciently in producing it—the plaintiff could not have recovered, as the injury must have resulted from the accident, "independent of all other causes."

Reasoning from the authorities cited in the briefs filed by both parties in the appeal, and in the former opinion of the Court, and the admitted-

ly correct proposition above stated, it appears that under policy contracts such as the one under consideration, three rules may be stated:

1. When an accident caused a diseased condition, which together with the accident resulted in the injury or death complained of, the accident alone is to be considered the cause of the injury or death.

2. When at the time of the accident the insured was suffering from some disease, but the disease had no causal connection with the injury or death resulting from the accident, the accident is to be considered as the sole cause.

3. When at the time of the accident there was an existing disease, which, coöperating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause or as the cause independent of all other causes.

The petitioners rely on *Fetter v. Casualty Co.*, 174 Mo., 256. That was an action on a policy which insured the life of the plaintiff's father against bodily injuries sustained through accidental means, and the company promised to pay a certain sum if death should result from such injuries, independent of all other causes. It appeared that the deceased suffered a fall, producing a rupture of a kidney, from which rupture followed a hemorrhage, which caused his death. He submitted to an operation and died just less than thirty days from the day of his fall. An autopsy showed that one of the kidneys had been ruptured and that the lower end of the kidney was cancerous. There was a judgment for the plaintiff, and the appellate court affirmed the judgment. Several doctors had been examined as experts, differing in their opinion on the question of fact whether a cancerous condition of the kidney existed before the fall, and with the fall had produced the rupture, or whether the fall itself had produced the rupture and this had brought (405) about, in that short time, the cancerous condition. The Court held that, on this conflict of testimony, the jury had the right to find that the ruptured kidney caused the cancerous growth, and that the rupture of the kidney was caused by the fall "independent of all other causes," and said: "Under those facts and in the light of the scientific evidence, who can say with certainty that the blow which ruptured the kidney did not also cause the cancerous growth? On the question of whether or not the blow caused the cancer, if the jury had found either way, the verdict would have had honest, intelligent, scientific testimony to support it." This part of the opinion in that case was sufficient to dispose of the appeal, and the further discussion of the ordinary rule of proximate cause was unnecessary to the decision of the case, and, we respectfully think, was erroneous as applied to a policy which permits recovery only when the injury or death results from the accident solely or independent of all other causes.

The rules of proximate and remote causes, as understood in the law of negligence, cannot be justly or safely applied under a contractual stipulation that the injury or death must have "resulted from the accident, independently of all other causes," and when an issue of fact is presented whether the person was suffering from a disease which had causal connection with the injury or death.

As further evidence of the fact that a discussion of the doctrine of remote and proximate causation was not essentially involved in *Fetter v. Casualty Co., supra,* and that what was decided in that case does not necessarily conflict with the charge of the court in this case, we may well refer to two or three expressions of the Court, which seem to place its decision upon the ground that the accidental fall against the table, while attempting to raise the upper window sash, was the real, efficient cause of the death, and all sufficient. *Judge Valliant* said: "There is no question but that the fall of the insured against the table, striking his side heavily against its edge, was accidental, and that it produced the rupture of the kidney which caused the hemorrhage which caused his death. All the witnesses concur in that. . . . The undisputed evidence and conceded facts make out a *prima facie* case (406) for the plaintiffs, and the defense that there was a remote predisposing cause of the death was given as full and fair consideration as the defendant was entitled to, and there is not sufficient in the evidence bearing on it to justify any impeachment of the verdict. The theory of the instructions given at the request of the plaintiffs is that if the death of the insured resulted from the accidental rupture of his kidney, the plaintiffs were entitled to recover. These were supplemented by the modified instruction for defendant that the plaintiffs could not recover unless the 'accident was the sole and direct cause of death.' Those instructions taken together put the case on the correct theory, and they include whatever there legitimately was in the defendant's theory of any other cause. There was really so little in the remote-predisposing-cause theory that the court would have been justified in ignoring it altogether."

A discussion of proximate and remote causes can be pertinent only when it appears that there have been two or more causes and when a judicial selection must be made as between the different causes, and a choice made of one as the proximate cause. In such a case, two causes have operated together, and we are looking for the one which was the efficient, and therefore the legal, cause of the injury. This is entirely different from a case in which we are dealing with the condition of a policy, that the injury or death must have resulted from the accident "independently of all other causes."

Though the Court, in *Freeman v. Accident Association,* 156 Mass., 350, recognized the application of some sort of a rule of proximate cause, it stated it in a qualified or limited manner, as follows: "When different forces and conditions concur in producing a result, it is often difficult to determine which is properly to be considered the cause, and, in dealing with such cases, the maxim, *causa proxima non remota spectatur,* is applied. But this does not mean that the cause or condition which is nearest in time or space to the result is necessarily to be deemed the proximate." And then the Court proceeded to affirm an instruction substantially like the one excepted to in this case, as is hereafter pointed out.

(407) In *White v. Ins. Co.,* 95 Minn., 77, the Court said that the rule of proximate cause, as applied to actions of negligence, cannot be applied in its full scope to contracts of this nature. The Court, in that case, so clearly stated the accepted rule, that we give its own language: "Similar policies have been before both the State and Federal courts, and the consensus of judicial opinion is that, subject to the exceptions contained in the policy, if the injury be the proximate cause of death, the company is liable, but if an injury and an existing bodily disease or infirmity concur and coöperate to that end, no liability exists. If, however, the injury be the cause of the infirmity or disease —if the disease results and springs from the injury—the company is liable, though both coöperate in causing death. The distinction made in this particular is found in that class of cases where the infirmity or disease existed in the insured at the time of the injury, and, on the other hand, that class of cases where the disease was caused and brought about by the injury. And even in cases where the insured is afflicted at the time of the accident with some bodily disease, if the accidental injury be of such a nature as to cause death solely and independently of the disease, liability exists."

Coming, then, to a particular examination of the instruction objected to, it seems to fall naturally within the terms of the third rule above stated, "that when, at the time of the accident, there was an existing disease which, together with the accident, resulted in (that is, had causal connection with) the injury or death, the accident cannot be considered as the sole cause or as the cause independent of all other causes." It should be understood that in the case of an accident resulting in injury or death, if there was an existing disease having also a causal connection therewith, it is not necessary that the disease should itself have been one which would ultimately have proved fatal, or that it should be, of itself, sufficient to have caused the injury or death. Under the rule that, where the injury or death has been caused by the

sum of two causes, it is sufficient to prevent a recovery on the policy, if any ordinary disease, not itself necessarily fatal, should contribute with the accident to cause the death, that is, if without the presence of the disease the accident itself would not have been sufficient to have caused the injury or the death. And so in this case, it would (408) have been sufficient to have shown a diseased condition of the eye which, together with the alleged accident, resulted in blindness. It is not necessary in such a case to show that the disease of the eye was such that it would ultimately have resulted in blindness. In this view of the case, the plaintiff certainly has nothing to complain of in the instruction given. If the verdict and judgment had been for the plaintiff, the defendant might have had ground of complaint, in that the instruction virtually told the jury that the plaintiff could recover unless they should find that the blindness was caused by the combined effect of the alleged accident and such a disease of the eye as would ultimately have resulted in blindness, because both causes might have produced the blindness, without either being completely sufficient to that end. The instruction of the court must be read in view of the facts in the case, and with the alternative proposition stated: "But if you find from the evidence and by the greater weight of it that the plaintiff has suffered the entire loss of sight of his eye; that the loss of his sight is irrecoverable; that the loss was caused directly and independently of all other causes, through external, accidental, and violent means, your answer to the second issue will be 'Yes.'" Not only is the instruction within the third rule above stated, upon reason, but there is authority (*Freeman v. Accident Association,* 156 Mass., 351) clearly sustaining, against attack by the beneficiary under such a policy, an instruction substantially the same as the one objected to in the case at bar, and given upon facts practically similar to those appearing in this record. In the *Freeman case* it was proved that the insured died of peritonitis localized in the region of the liver. There was evidence indicating that he had previously had peritonitis in the same part, and that the previous disease had produced effects which rendered him liable to a recurrence of it. The Court approved the charge under review, which instructed the jury: "The question as to whether or not peritonitis, if that caused his death, is to be deemed a disease, within the meaning of this policy, so far as to prevent a recovery, depends upon the question whether or not, before the time of the fall and at the time of the fall, he had then the disease—was then suffering with the disease. If he was, (409) then in the sense of the policy, although aggravated and made fatal by the fall, he cannot recover." In the brief filed in support of the petition to rehear, counsel say: "Even if he had a cataract which ex-

isted prior to the fall, and, notwithstanding the cataract, the fall did cause the loss of his sight, and would have caused it if he had not a cataract, he would be entitled to recover." For the purpose of the argument, it may be admitted that this states a correct proposition, and yet if it does, it is merely an alternative theory that might have been submitted to the jury, and it does not follow that the instruction excepted to was erroneous. It is too late now to urge that the court should have instructed the jury on that theory of the case, because if a correct one, a special instruction should have been asked. *Simmons v. Davenport,* 140 N. C. (Anno. Ed.), 407, and cases cited.

The decision of this Court, that injury or death caused by the sum of two causes, namely, accident and disease, is not covered by the policy, is sound, as we think. The instruction excepted to, when properly considered, is but one way of stating the rule, and is well within the rule, and on the facts testified to, the jury had the right to find that the blindness was caused by the alleged accident combined with a disease which affected the eye at the time of the accident.

It would be idle and useless to repeat what was said in our former opinion about this case and the rule which controls its decision. We then discussed the matter at great length, because of the importance of the principle involved, and cited numerous authorities, which we think sustain our view. Before taking final leave of the case, we will refer to *Fishblate v. Ins. Co.,* 140 N. C., 593, cited by the petitioner (plaintiff) on this rehearing, in which an instruction substantially similar to the one under examination was given to the jury and was upheld by this Court, *Justice Hoke* saying: "This charge might be held on the first issue." What was the first issue to which this reference was made? It was this: "Was the plaintiff's eye lost as a result directly or independently of all other causes, from bodily injuries sustained through
(410) external, violent, and accidental means?" The same inquiry we have in the case at bar? It is true, the learned judge added, "and is perhaps more favorable to the defendant on that issue than he could require"; still this does not neutralize or destroy what had previously been stated, and, besides, he cites with approval *Freeman v. Accident Asso.,* 156 Mass., 357, which we also cited in our former opinion, and which, it seems to us, is a direct authority in support of the instruction of *Judge Adams.* The latter did not intend to say that the mere existence of a previous malady at the time of the accident would defeat recovery, if, by itself, it would ultimately have produced the injury, although it did not coöperate with the accident in causing it, but that if the two, accident and disease, acting together, were the producing causes of it, the plaintiff could not recover, as in that case the

accident was not, within the terms of the policy, the direct and independent cause, but the injury was produced "by the sum of these two causes." *Ward v. Ins. Co.*, 85 Neb., 471; *Casualty Co. v. Shields*, 155 Fed., 54; *Cary v. Ins. Co.*, 127 Wis., 67; *Accident Asso. v. Shyrock*, 73 Fed., 423; *Accident Asso. v. Fulton*, 79 Fed., 423; *White v. Ins. Co.*, 95 Minn., 77; *Binder v. Accident Asso.*, 127 Iowa, 25 (35), and 1 Cyc., 262, and note 64, where the doctrine is tersely stated and the cases bearing upon it are collected.

The judge's charge should be construed as one connected whole, and not in detached or isolated portions (*Kornegay v. R. R.*, 154 N. C., 392), and when thus considered, the meaning of the court clearly appears, and we think the jury could not have been misled by the instruction.

Petition dismissed.

Cited: Wheeler v. Cole, 164 N. C., 380; *Leggett v. R. R.*, 168 N. C., 368; *McMillan v. R. R.*, 172 N. C., 855.

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(411)

HENRIETTA GOODWIN, ADMINISTRATRIX, v. THE TOWN OF REIDSVILLE.

(Filed 13 November, 1912.)

1. Cities and Towns—Governmental Functions—Ordinances—Liability.

A corporation is not liable for a personal injury, resulting in death or otherwise, caused by either its failure to enact or enforce an ordinance solely relating to the exercise of a purely governmental function.

2. Same—Baseball—Unsafe Customs—Streets—Nonsuit.

The plaintiff's intestate died from an injury inflicted by being struck by a baseball while driving along a public street in the defendant town, and the basis of the action to recover damages against the defendant was its negligence in allowing its public streets to become unsafe for travel; and the evidence tended to show that, with the knowledge of the police officers of the town, it had been the custom of the boys for two years to collect on the street and play ball in the evenings, and the injury complained of resulted therefrom: *Held*, the negligence alleged was in the exercise of a governmental function, for which the city could not be held liable, and a judgment of nonsuit was properly allowed.

APPEAL by plaintiff from *Daniels, J.*, at June Term, 1912, of ROCKINGHAM.

At the conclusion of the evidence a motion of nonsuit was sustained. The plaintiff appealed. When the pleadings were read plaintiff's coun-

sel stated that they abandoned the allegations, charging the existence and nonenforcement of a town ordinance as set out in the complaint.

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

George D. Bennett for plaintiff.

Johnson, Ivie & Dalton and Manly, Hendren & Womble for defendant.

BROWN, J. This action is brought to recover damages for the alleged wrongful death of T. C. Goodwin. The basis of the cause of action is the allegation that the defendant negligently allowed its public (412) streets to become unsafe for travel, in that certain boys were permitted without molestation to play baseball thereon.

The evidence tends to prove that the said Goodwin while driving along the public street of the defendant town in June, 1910, was struck by a baseball, his collar-bone broken, and other injuries inflicted, which are charged to have caused his death.

The evidence tends to prove that certain boys had a custom of collecting on the street and playing ball in the evenings, frequently during the spring and summer months, which custom had been going on for over two years, and was known to the police officers of the town, and no effort had been made to stop it.

Upon these facts the judge below held that the defendant was not liable, and in his opinion we concur.

A municipal corporation has a dual character, the one public and the other private. It exercises functions that are twofold; one being governmental and legislative and the other private and ministerial.

When the corporation is acting for the preservation of peace, engaged in the maintenance of good order and the enforcement of the laws for the safety of the public, it is exercising governmental functions, and enjoys immunity from suit.

When the corporation exercises the powers and privileges conferred on it by its franchise for its private advantage, for local and purely corporate purposes, it is subject to suit by those whom it may have injured.

The distinction between the two classes of powers is set forth very clearly in many adjudicated cases, as well as by text-writers, and the exemption of the municipality from liability in the one case and its liability in the other for an injury resulting from negligence firmly established. Second Dillon Mun. Corp., secs. 752, 949-966; *Hill v. Charlotte,* 72 N. C., 56; *McIlheny v. Wilmington,* 127 N. C., 146; *Hull v. Roxboro,* 142 N. C., 453; *Harrington v. Greenville,* 159 N. C., 632; *Jones v. Williamsburg,* 97 Va., 722; 15 A. & E., 459; 28 Cyc., 1356.

The reason for this distinction is pointed out in a note found in 1 A. & E. Ann. Cases, 961, in the following language:

"The obvious reason for this distinction is, that the prevention of the improper use of streets by objects in motion and subject to (413) human control involves the direct control of persons and the regulation by the municipality of the conduct of its citizens, and this requires an exercise of the public and governmental powers of the municipality, in respect to which no liability can arise. It is a well-settled rule that a municipality is not liable for tortious injuries to persons or property when engaged in the performance of governmental functions, while in the exercise of private or corporate powers it is liable."

This doctrine of the exemption of a municipal corporation from liability for injuries occasioned by unlawful or improper use of its streets, and not from any defect in their condition, has been applied in various kinds of cases, such as coasting, bicycle riding, animals running at large, the use of fireworks, and fast driving .

In *Addington v. Littleton,* 50 Col., 623, the corporation was held not liable to one injured through the failure of its officers to enforce an ordinance making it unlawful for dogs to run at large upon the streets.

The same conclusion was arrived at by the Oklahoma Court in *Marth v. Kingfisher,* 18 L. R. A. (N. S.), 1238, where the injury was received from a horse racing upon the streets of the city; likewise by the Court of Kentucky, where the plaintiff was injured by a sled in coasting upon the street. *Dudley v. Flemingsburg,* cited with other cases to the same effect on p. 639 of the note in 23 L. R. A., N. S.

In *Jones v. Williamsburg,* 97 Va., 722, the plaintiff was injured in a collision with a bicycle improperly ridden upon the sidewalk. In holding the town not liable, that Court said:

"The condition of the street or walk, however, is one thing, and the manner of its use by the public is quite a different thing. For its safe condition the city is responsible, but for its unlawful and improper use it is not. . . . The Government does not guarantee its citizens against all casualties incident to humanity, and cannot be called upon to compensate, by way of damages, its inability to protect against such accidents and misfortune."

In dealing with a situation far more dangerous than that of (414) playing baseball, the Supreme Court of Pennsylvania in *Norristown v. Fitzpatrick,* 94 Pa., 121, where it appeared that a crowd of citizens were engaged in firing a cannon in the streets of the city without authority, whereby great damage was inflicted, held that it was

one of those injuries for which the municipality was not liable, but that it was within the exercise of governmental agency, and that the city was not liable for the negligence of its officers.

This question has been so fully discussed by this Court in the cases that we have cited that further discussion is useless.

It is immaterial whether the plaintiff founds her claim upon the failure to enact an ordinance prohibiting baseball on the streets, or upon the failure to enforce an ordinance.

The municipality would not be liable for the negligence of its officers, because the act is governmental in its nature, and the corporation is as much exempt from suit in such cases as the State itself.

The judgment of the Superior Court is

Affirmed.

BANK OF GLADE SPRING v. S. M. McEWEN ET AL.

(Filed 13 November, 1912.)

1. Deeds and Conveyances—Husband and Wife—Entireties—Jus Accrescendi.

Under a conveyance of land in fee to husband and wife, they take by entireties, with the right of survivorship, and during their lives the lands are not subject to the debts of either, except with the consent of both properly given.

2. Attorney and Client—Principal and Agent—Consent Judgment—Scope of Authority.

The consent of an attorney to a "consent judgment" which materially affects the rights of his client in the subject-matter of the controversy, given without the consent, expressed or implied of his client, is not within the scope of the employment of the attorney, and is not binding upon the client. The principles relating to the scope of an attorney's agency in representing the interests of his client discussed by WALKER, J.

3. Consent Judgments—Agreement—Void in Toto—Equity.

When it is made to appear that a judgment purporting to be a consent judgment had been entered in a cause, but was not, in fact, consented to by one of the parties, it is error for the court to set so much of it aside as is injurious to the one whose consent had not been obtained, and proceed to adjust the matter by decree which attempts to observe the equities between the parties.

4. Same—Attorney and Client.

A judgment entered by the court as a consent judgment is the agreement made by the parties, and when it appears that a party thereto did not consent, but that the judgment had been entered upon the consent of

his attorney, without his authority, expressed or implied, of which the other parties to the agreement had actual notice given them at the time, and that the agreements were reciprocal, each a consideration for the other, the party not having consented may by proper proceedings have the consent judgment set aside *in toto*.

5. Same.

In an action by a judgment creditor to set aside certain deeds in trust for the payment of a debt executed by husband and wife on lands held by them in entireties, a judgment purporting to be a consent judgment was entered, decreeing that the lands be sold, and the proceeds applied first to the cost of the action, and the balance to the payment of the mortgage debt, then to the payment of judgment creditors, and any surplus to the wife. In proceedings to set aside this judgment on the ground that the attorneys for the husband and wife had consented to the judgment without their knowledge or consent, it appeared that the attorneys had not obtained their client's consent and had given notice thereof at the time the judgment was entered: *Held*, (1) the principles of principal and agent apply to the relationship of attorney and client, and that an attorney has no authority to consent to the relinquishment of his client's property rights in the subject-matter of the controversy without the client's consent; (2) the matters of agreement of the parties, as appeared in the consent judgment, were reciprocal, and each was a consideration for the other, and while the court should have set aside the decree, as a whole, it could not modify it by eliminating the part which had not been consented to and adjust the matter under what appeared to be equitable for all parties.

6. Consent Judgments—Fraud—Absence of Consent—Power of Court.

A court has the power to open or vacate a judgment which appears to have been entered by consent or agreement of the parties, on adequate grounds, *e. g.*, fraud or mistake, or the real absence of consent, if so found.

7. Appeal and Error—Lost Appeal—Equity—Judgment Set Aside—Procedure.

In this case, it appearing that in proceedings to set aside a "consent judgment" one of the parties had not in fact consented, and the trial judge, instead of setting aside the "consent judgment," erroneously attempted to adjust the rights of the parties upon equitable principles, and in consequence of the abortive agreement the party appealing has lost his right to prosecute an appeal to the Supreme Court from the verdict, having moved for a new trial in time for that purpose, and the judge having left the district: *Held*, in equity, the judgment and verdict appealed from should be set aside, permitting the parties to come to another agreement, if they are so advised, or start anew from the beginning, and try out the issue of the fraud alleged, to a final decree.

8. Appeal and Error—Objections and Exceptions—Fraud—Motions—Independent Actions.

In this case, it appearing that the parties have elected to place the matters involved upon their real merits, without regard to mere form, the

Supreme Court has decided the case accordingly; and whether it should have been upon motion or an independent action, no exception or point having been made, *quære.*

(416) APPEAL by plaintiff from *Daniels, J.,* at Spring Term, 1912, of ASHE.

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

T. C. Bowie for plaintiff.
R. L. Ballou for defendant.

WALKER, J. This case was brought here by the appeal of the plaintiff from an order upon a motion of the defendants to set aside a consent judgment, and presents the following facts:

Plaintiff, as a judgment creditor of S. M. McEwen, brought an action by the above title to impeach and set aside two deeds of trust, one executed on 16 October, 1909, by S. M. McEwen and his wife, Nannie B. McEwen, to G. L. Park, as trustee, to secure a debt due to W. J. McEwen for $2,500, which amount had been advanced to the plaintiff by said W. J. McEwen at the request and for the benefit of the defendant, S. M. McEwen, and the other executed on 18 October, 1909, by the said S. M. McEwen to T. E. Parker as trustee for the benefit of Nannie B. McEwen, to secure the payment to her of $2,500, which she had
(417) loaned to her husband, S. M. McEwen. Issues were submitted to the jury and answered as follows:

1. Was the deed of trust from S. M. McEwen and wife to G. L. Park, trustee, on 16 October, 1909, made with the intent to hinder, delay, defeat, and defraud the plaintiff? Answer: Yes.

2. If so, did W. J. McEwen have knowledge of said fraudulent intent and participate therein? Answer: Yes.

3. Was the deed of trust from S. M. McEwen and wife to Eugene Parker, trustee, on 18 October, 1909, made with intent to hinder, defeat, delay, and defraud the plaintiff? Answer Yes.

4. If so, did Nannie B. McEwen have knowledge of the fraudulent intent of her husband, S. M. McEwen, and participate therein? Answer: Yes.

Judgment was entered upon the verdict, to the effect that the deeds of trust should be canceled, and defendant W. J. McEwen having moved in apt time to set aside the verdict to the extent that it affected his interests adversely, and the judge having intimated that he would grant the motion, the plaintiff's and defendant's attorneys agreed, at the suggestion of the court, that the equities of the parties should be adjusted and

settled upon the following basis: The issue of fraud as to W. J. McEwen to be set aside and the land described in the deed of trust to G. L. Park to be sold and the proceeds of sale to be applied, first, to the costs of the action, and the balance to the payment of the debt of $2,500 due to W. J. McEwen, and then to the payment of the judgment creditors, and any surplus to be paid to Nannie B. McEwen. This agreement was inserted in the consent judgment, which was signed by *Judge Lyon* and the attorneys of the respective parties at Fall Term, 1911. This judgment was entered without the knowledge or consent of Mrs. Nannie B. McEwen or her husband, and without any authority given by them, or either of them, to their attorneys to consent to the judgment, and really against their consent. These defendants, after having successfully applied for an injunction to *Judge W. J. Adams,* moved before *Judge F. A. Daniels,* at Spring Term, 1912, to set aside the con- (418) sent decree because they had not, in fact, agreed thereto, and had given no authority to their attorneys to do so. *Judge Daniels* found and stated the facts in his judgment upon the motion, and among others, that the attorneys acted without authority; but instead of setting aside the judgment *in toto,* he modified it by striking out so much of it as directed that a part of the proceeds of the sale of the second tract of land be applied to the payment of the judgment creditors of S. M. McEwen, and then proceeded to order a sale of the land first described in the deeds of trust, for the purpose of paying the costs and the debt of $2,500 due to W. J. McEwen, and if the proceeds of that sale should prove insufficient for the designated purpose, then that the tract last described should be sold to pay any balance due, with a direction that the surplus, if any, should be paid to S. M. McEwen and wife, Nannie B. McEwen. Plaintiff excepted to this judgment, and appealed.

The learned judge was manifestly right in holding that so much of the alleged consent judgment, signed by *Judge Lyon,* as did not receive the consent of the defendants S. M. McEwen and wife, Nannie B. McEwen, and which prejudiced their rights, was not binding upon them; but instead of amending or reforming the judgment, he should have set it aside altogether. It appears that the defendants McEwen and wife held the land by entireties, and it is insisted by their counsel that it could not be sold to pay the judgment creditors of the husband, unless with the consent of both, and only to the extent that they had encumbered it, and the court could not sell it without their consent, which was no given. They rely on *Bruce v. Nicholson,* 109 N. C., 202, where it was held by this Court: "Under a conveyance of land in fee to husband and wife, they take, not as tenants in common or joint tenants, but by entireties with the right of survivorship, each being seized *per tout*

et non per my; neither can convey or encumber the estate without the assent of the other, nor can the interest of either become subject to the lien, or any proceeding to sell for the satisfaction of any judgment during their joint lives. . . . The nature of this estate forbids and prevents the sale or disposal of it, or any part of it, by the hus- (419) band or wife without the assent of both; the whole must remain to the survivor. The husband cannot convey, encumber, or at all prejudice such estate to any greater extent than if it rested in the wife exclusively in her own right; he has no such estate as he can dispose of to the prejudice of the wife's estate. The unity of the husband and wife as one person, and the ownership of the estate by that person, prevents the disposition of it otherwise than jointly. As a consequence, neither the interest of the husband nor that of the wife can be sold under execution so as to pass away title during their joint lives, or as against the survivor after the death of one of them. It is said in Rorer on Judicial Sales, that 'No proceeding against one of them during their joint lives will, by sale, affect the title to the property as against the other one as survivor, or as against the two during their joint lives. Neither party to such tenancy can sell or convey his or her interest, for it is incapable of being separated.' He cites many authorities to support what he thus says. Indeed, it seems that the estate is not that of the husband or the wife; it belongs to that third person recognized by the law, the husband *and* the wife. It requires the coöperation of both to dispose of it effectually. Rorer Judicial Sales, sec. 549; Freeman Cotenancy, secs. 73, 74; 4 Kent Com., 362; *Simonton v. Cornelius,* 98 N. C., 433." The law, as thus stated, may be subject to some qualification not applicable to the facts of this case, and, therefore, not considered. The principle of law as to an estate by entireties is merely noticed to show that, in this case, the Court could not sell the land held in entireties, except under the deeds of trust, without the consent of defendants, as that matter was not involved in the suit. It amounted to illegal sequestration.

It is found by *Judge Daniels* that defendants McEwen and wife never consented to the judgment, and that counsel had no authority to consent for them. This was known to plaintiffs at the time the consent judgment was entered, for it was stated in open court by defendants' counsel that they had not consulted with their clients in regard to the proposed consent judgment, as they lived at a great distance, in Tennessee, and there was no chance of doing so. Where the relation of attorney (420) and client exists, the law of principal and agent is generally applicable, and the client is bound, according to the ordinary rules of agency, by the acts of his attorney within the scope of his authority. 4 Cyc., 932.

The power of an attorney with reference to the release of his client's interests is fully considered in *Hall v. Presnell,* 157 N. C., 290, and we therein said: "As said in *Bank v. Hay,* 143 N. C., 326: 'There is a general rule that, when one deals with an agent, it behooves him to ascertain correctly the scope and extent of his authority to contract for and in behalf of his alleged principal, for under any other rule, it is said, every principal would be at the mercy of his agent, however carefully he might limit his authority. The power of an agent is not unlimited unless in some way it either expressly or impliedly appears to be so, and the person who proposes to contract with him as agent for his principal should first inform himself where his authority stops or how far his commission goes, before he closes the bargain with him. *Biggs v. Ins. Co.,* 88 N. C., 141; *Ferguson v. Mfg. Co.,* 118 N. C., 946.' No one could reasonably suppose that it was within the scope of an attorney's authority to release a debt or any party to a note, or to do anything which would have that effect, when his commission extended only to the collection of the debt. It is stated in the books that an attorney has no implied authority to work any discharge of a debtor but upon actual payment of the full amount of the debt, and that in money. He cannot release sureties or indorsers nor enter a *retraxit,* when it is a final bar (*Lambert v. Sanford,* 3 Blackford, 137), nor release a witness (*Ward v. Hopkins,* 2 Pen. (N. J.), 689; *Campbell v. Kincaird,* 3 Mon., 566), nor a party in interest (*Succession of Wright,* 18 La. Ann., 49). It is a general rule that an attorney, who in many respects is considered as a mere agent, cannot waive any of the substantial rights of his client without the latter's consent, and in such a case he is not barred thereby, without ratification, or something which amounts to an estoppel, to deny his attorney's authority. These principles will be found to be sustained by the following authorities: Weeks on Attorneys, sec. 219, and cases cited in the notes; *Savings Inst. v. Chinn,* 70 Ky. (7 Bush.), 539; *Ireland v. Todd,* 36 Me., 149; *Givens v. Briscoe,* 3 J. J. Marsh (421) (Ky.), 529; *Union Bank v. Goran,* 10 Sm. & M. (Miss.), 333, and cases cited; *Tankersley v. Caruth,* 2 S. C. (4 Des. Eq.), 44; *Terhune v. Cotton,* 10 N. J. Eq. (2 Stock. Ch.), 21."

In *Savory v. Chapman,* 39 E. C. L., 242 (11 Ad. & Ell., 829), *Justice Patteson* lays down the law upon this subject very clearly and succinctly, and what is stated in the same case by *Justice Coleridge* is so appropriate to the facts in our record that we quote it as he said it: "A party is bound to know the legal qualifications of persons filling certain employments. The question, therefore, turns on the authority of the attorney; and there is nothing here to show that he had any, either in his general character or with reference to the circumstances of the suit. He could,

as it appears here, be only an agent *de facto;* and there is nothing shown to make him one for the present purpose." It seems, therefore, to be the generally accepted doctrine that an attorney charged with the collection of a debt, has no power, in virtue of his general authority, to do any act which will either release his client's debtor or his surety, nor can he materially jeopardize his client's interest in any way. An attorney at law is an officer in a court of justice, who is employed by a party in a cause to manage the same for him (4 Cyc., 897), and his client is concluded by his acts done within the range of his authority. "An attorney's authority is not limited to the mere prosecution of the suit, but extends to everything necessary to the protection and promotion of the interests committed to his care, so far as they are affected by proceedings in the court where he represents his client." 4 Cyc., 934, and cases cited. An attorney cannot compromise his client's case without special authority to do so, nor can he, without such authority, receive in payment of a debt due his client anything except the legal currency of the country or bills which pass as money at their par value by the common consent of the community. A subsequent ratification of the acts of the attorney is equivalent to a special authority previously granted to do those acts, but it must be the ratification of the
(422) client himself and not of his agent. *Moye v. Cogdell,* 69 N. C., 93, headnote.

In *Alspaugh v. Jones,* 64 N. C., 32, where the question of authority from client to attorney, and the extent of that authority, was before the Court, *Justice Settle,* in writing the opinion of this Court, said: "His Honor should have left it to the jury to say whether or not he was the attorney of the plaintiff; and if he was, it was for them to find how far his authority extended."

An attorney may submit his client's cause to arbitration without his knowledge or consent, as this is one of the modes of trial, and the client's assent to it is implied, and if it is wrongfully done, the client's remedy is an action against the attorney for damages (*Thomas v. Hews,* 2 C. & M., 327); but he cannot compromise his client's case without his authority. *Halker v. Parker,* 7 Cranch, 436. These principles were approved and applied in the leading case of *Morris v. Grier,* 76 N. C., 410, which cites in support of them, *Jenkins v. Gillespie,* 10 Smedes & Marsh (Miss.), 31; *Rex v. Hill,* 7 Price, 630; *Moye v. Cogdell, supra; Thomas v. Hews, supra; Buckland v. Conway,* 16 Mass., 396; *Halker v. Parker, supra.* "Although counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, calling no witnesses, and other matters which properly belong to the suit, and the management

and conduct of the trial, he has not, by virtue of his retainer in the suit, any power over matters which are collateral to it." *Pollock, Ch. Baron,* in *Swinfen v. Chelmsford,* 2 L. T., (N. S.), 406.

Mr. Weeks says an attorney, in the management of a suit, has a very extensive authority, which springs from his general retainer. He has the free and full control of a case, in its ordinary incidents, and to this extent he is not bound or required to consult his client (section 220), and that an agreement to refer the cause, or to arbitrate, comes within the scope of the attorney's general authority, the weight of authority being to the effect that he cannot compromise his client's interests, citing *Halker v. Parker, supra,* in which *Chief Justice Marshall,* delivering the opinion, said that the client is not bound by a compromise made by his attorney without his consent, and the compromise and judgment entered therein in that case was of no effect, as the attorney (423) had exceeded his authority. Weeks on Attorneys, sec. 228, p. 398. But he is clear that the general authority of an attorney, under his retainer, does not include the power to sell or release his client's property. He must have special authority or instructions for that purpose. Weeks, sec. 219.

Having settled this question as to the scope of an attorney's authority, and remarking that in this case plaintiff had notice that they did not profess to act with special authority to agree to a sale of the land held by entireties, we proceed to a consideration of the next and last question.

The court had the power to set aside the decree, as a whole, but not to eliminate from it that part only which affected the defendants McEwen and wife, prejudicially. The agreements of the parties were reciprocal, and each was the consideration for the other. If you take out what hurts the said defendants, what is left is not what was agreed to. The plaintiff might well say, "I made no such contract" (*non hœc in fedeva veni*). Besides, the supposed voluntary relinquishment by defendants of their land to sale formed the consideration for plaintiff's release of certain of its rights. Equity and common fairness, therefore, demand that the entire decree be vacated. We said in *Massey v. Barbee,* 138 N. C., 84: "He must abide by that judgment, as it was written with his consent. The court cannot change it, but can only construe its provisions. We find no expression in the judgment indicative of such an understanding, and there is no rule of law by which we are authorized to read it into the contract of the parties, or by construction to give the latter a meaning which its words will not warrant. We have no more right to construe the agreement of the parties contrary to its spirit and intent than we have to vary or modify its terms without the consent of the parties. The rights of the parties must be determined solely by the judgment to

which they have assented. The law will not even inquire into the reason for making the decree, it being considered in truth the decree of the parties, though it be also the decree of the court, and their will stands as a sufficient reason for it. *Wilcox v. Wilcox,* 36 N. C., 36. It (424) must therefore be interpreted as they have written it, and not otherwise." In that case we relied on what is so clearly stated by *Justice Dillard,* one of the best of our chancellors and judicial writers, in *Edney v. Edney,* 81 N. C., 1, to this effect: "A decree by consent, as such, must stand and operate as an entirety or be vacated altogether, unless the parties by a like consent shall agree upon and incorporate into it an alteration or modification. If a clause be stricken out against the will of a party, then it is no longer a consent decree, nor is it a decree of the court, for the court never made it." The same was substantially said in *Vaughan v. Gooch,* 92 N. C., 524, also cited in *Massey v. Barbee:* "The judgment, or, as it is termed, the decree, is by consent the act of the parties rather than (the act) of the court, and it can only be modified or changed by the same concurring agencies that first gave it form, and whatever has been legitimately, and in good faith, done in carrying out its provisions must remain undisturbed." "If a judgment has been irregularly entered, or fails to contain all that is essential to it, or to express the true sentence of the court, in consequence of clerical errors or omissions, it may be completed by an order *nunc pro tunc,* or may be set aside and the true and correct judgment entered *nunc pro tunc.* The power to order the entry of judgment *nunc pro tunc* cannot be used for the purpose of correcting errors or omissions of the court. This procedure cannot be employed to enter a judgment where the court wholly failed to render any judgment at the proper time, or to change the judgment actually rendered to one which it neither rendered nor intended to render, or where the fault in the original judgment is that it is wrong as a matter of law, or to allow the court to review and reverse its action in respect to what it formerly refused to do or assent to." 23 Cyc., 843, 844.

The correct procedure is stated in *Aronson v. Sire,* 85 N. Y. App. Div. (1903), page 607: "An interlocutory judgment, in strict accordance with a stipulation entered into between the parties, cannot be amended on a motion made by one of the parties and opposed by the other; the remedy of the party objecting to the form of the judgment is to make a motion to be relieved from the stipulation and to have the judg- (425) ment vacated." A court has the power to open or vacate a judgment which appears to have been entered by consent or agreement of the parties, on adequate grounds, *e. g.,* fraud or mistake or the real absence of consent, if so found, but it cannot alter or correct it

except with the consent of all the parties affected by the judgment. 23 Cyc., 733. In *Foley v. Gatliff,* 19 Ky. L., 1103, a special judgment was vacated because entered with the consent of an unauthorized attorney, but it was entirely set aside, and not only in part and to the detriment of one of the parties. He who asks equity must do equity. The court will not award relief for the defendants to the prejudice of their adversary, who has, at least, an equal equity.

The authorities cited by plaintiff's counsel, to the effect that a consent order cannot be vacated except by consent of all the parties, are not in point, as in them the attorneys were only exercising their ordinary functions in the prosecution or defense of the suits, and were not giving away their clients' rights, which were not involved therein, being entirely collateral. The very nature of the transaction here was notice to the plaintiff of a lack of authority in the attorney, and, moreover, the plaintiff had actual notice of it, as the judge finds. Besides, in the cases cited by counsel for plaintiff, it was assumed, or was the case, that consent had actually been given, and the attempt was to amend the agreement, or, ignoring or repudiating the consent, to vacate it. Such was the fact in *Stump v. Long,* 84 N. C., 616; *McEachern v. Kerchner,* 90 N. C., 177. In *Henry v. Hilliard,* 120 N. C., 479, the consent to the order was the exercise of one of the inherent rights of the attorney and within the general scope of his authority under his retainer. It related to the proceedings in the cause. *Ladd v. Teague,* 126 N. C., 544, which has been called to our attention, stands upon the same footing. It was there a waiver of a jury trial and a consent "that the judge might find the facts and adjudge upon them according to the law." It rests upon the same principle as the attorney's power to consent to a reference, and relates to a question of practice or procedure. The attorney is intrusted with the management of the case, and his authority, in this respect, is, as a general rule, plenary. As to all matters coming (426) legitimately within its scope, he represents his client fully, and the latter is bound by his acts simply because he has clothed him with this general authority. In *University v. Lassiter,* 83 N. C., 38, the attorney appeared officiously, and his ostensible client could not take advantage of his opponent in the suit or of persons who acquired rights upon the faith of his act, if he was solvent and responsible. But in our case, plaintiff, as we have said, was forewarned, and can raise no such question.

Defendant contends that the judgment can be modified in part, and reasons substantially in this wise: "If it is found as a fact that an error has been committed, along with an act of right, then are we required to undo the righteous act in order to correct the evil? The idea

that a court cannot correct its mistakes is too antiquated to admit of argument. This question was ably fought out during the reign of James I. of England, when equity first began to exercise the power to set aside and modify judgments at law. In that great controversy Lord Coke defended the time-honored practices of the courts of law, while Lord Ellesmere defended the advanced idea of giving to the courts of equity the right to set aside or to modify judgments of law. In that well-fought legal battle, equity won (and we add, as all good causes should win), and its protecting arm has ever since been thrown around unfortunate litigants. 1 Story Eq., sec. 51; Spence Chanc. Jur., p. 674." But the authorities, *supra* and others cited, refer to ordinary judgments *in invitum,* and not to those rendered by consent. If the Court should withdraw an essential part of the judgment, which was entered by consent, it would surely destroy the agreement, and this it has no power to do. As *Judge Gaston* said in *Wilcox v. Wilcox,* 36 N. C., at p. 41, we can very well understand the propriety of the Court refusing to rehear a decree rendered by consent, because it is, in truth, a decree of the parties, and in such a case their will is a sufficient reason for it (*stat pro ratione voluntas*). The court takes no part in the formation of the consent, but merely enters its decree in conformity therewith. But before there can be such a decree, it is absolutely necessary that there should have been a previous consent of the parties to be affected thereby. This constitutes the authority of the court to enter its decree, and is the essential basis of its action. *Chief Justice Smith,* in the case of *Vaughan v. Gooch,* 92 N. C., 524, recognizes the principles herein stated, and discusses them at length, as does the Court in *McEachern v.* (427) *Kerchner,* 90 N. C., 177.

What judgment to render here, represents a more serious and difficult problem, but we have concluded that as by the abortive agreement the defendants have lost their right to prosecute an appeal to this Court from the verdict, having moved for a new trial in due time for that purpose, and the judge having left the district, the only equitable thing left for us to do is to set aside the verdict and judgment, in analogy to those cases where some accident *e. g.,* loss of papers, has thwarted the appeal. The parties can give a fresh consent, or can start anew from the beginning and try out the issue of fraud to a final decree. It is, therefore, ordered that the judgments of *Judge Daniels* and of *Judge Lyon* be set aside, and also the verdict, and that the case stand for trial upon the issues joined between the parties.

We have not adverted to the form of the proceeding, as being a motion and not an independent action, as no point was made in respect to it, and we are not, therefore, called upon to express any opinion in regard to it. We consider that the parties have elected to place the decision

upon the real merits of the controversy, without regard to mere form, so that their rights may the more speedily be determined. It is not intended to intimate that a motion is not the proper remedy.

We are indebted to counsel for their excellent briefs, filed in the cause, which exhibit unusual ability and research, and have been of great utility to us in the investigation of the important questions involved.

We must declare that there was error in the proceedings and judgment of the court below.

Error.

Cited: Cox v. Boyden, 167 N. C., 321; *Moody v. Wike,* 170 N. C., 544; *Gardiner v. May,* 172 N. C., 200.

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(428)

ORINOCO SUPPLY COMPANY v. SHAW BROTHERS LUMBER COMPANY, J. T. B. SHAW, VESTRY OF ST. PAUL'S CHURCH, AND ILLINOIS SURETY COMPANY.

(Filed 20 November, 1912.)

1. Contracts—Indemnity—Sureties—Beneficiaries.

The beneficiaries of an indemnity contract ordinarily can recover, though not named therein, when it appears by express stipulation or by reasonable intendment that their rights and interests were contemplated and being provided for.

2. Same—Material Men.

A contract and bond signed by the contractor and his surety expressly agreeing, among other things, to pay the owner of the building "for all labor and material supplied for the erection of the building and to save the owner harmless from any and all claims or liens" which might arise out of contracts made by him (the contractor) with material furnishers and laborers, etc., the bond further stipulating "that the said contractor shall faithfully perform and carry out said contract according to the true intent and meaning thereof," clearly contemplates that the contractor shall pay the material men and laborers, and constitute such claimants the beneficiaries of the contract and bond.

3. Same—Pleadings—Demurrer.

An action brought for materials furnished in the erection of a building, which were to be paid for by the contractor and which were bought by him therefor and therein used, which sets out a contract and bond signed with a surety, which clearly contemplates that the contractor shall pay the material men and laborers and constitute them the beneficiaries under the contract and bond, states a good cause of action against the surety, and a demurrer thereto is bad.

4. Same—Loss or Damage.

When a contract and bond of indemnity given by a contractor to the owner of a building to be erected, which was signed by the surety, provides, in addition to saving the owner harmless, for some definite thing, which has not been complied with, as in this instance, to pay for the material used in the building, it is not necessary to allege, in order to maintain an action against the surety, that the owner has suffered pecuniary loss by reason of the contractor's default therein.

APPEAL by defendant surety company from *Daniels, J.,* at March Term, 1912, of FORSYTH.

(429) Action heard on demurrer to complaint. In the complaint, recovery is sought against defendant the Illinois Surety Company for $346.56 on account of material furnished by plaintiff for building a rectory for St. Pauls Church in the city of Winston, N. C. The parties defendant are the contractor, J. T. B. Shaw, who was to "furnish all the material and perform all the work for the erection and completion of said rectory"; the Illinois Surety Company, who, with said Shaw, signed the bond sued on; and the vestry of St Pauls Church also appear formally as defendants. The defendant the Illinois Surety Company demurred to the complaint in terms as follows: "That the complaint does not state facts sufficient to constitute a cause of action, for that it appears upon the face of said complaint that there is no privity of contract between the plaintiff and the defendant the Illinois Surety Company; that it appears on the face of said complaint that there was no surety, indemnity, nor guarantee by the Illinois Surety Company to the plaintiff in this action; that it appears on the face of said complaint that any cause of action that would arise on account of the surety, indemnity, or guarantee of the defendant Illinois Surety Company would accrue to the vestry of St. Pauls Church, and not to the plaintiff in this action; that it further appears on the face of said complaint that the plaintiff in this action furnished material which went into the erection of the building erected by Shaw Brothers Lumber Company for the vestry of St. Pauls Church, and any cause of action which the plaintiff has on the account of the failure of the said Shaw Brothers Lumber Company to pay it for said material would be against the said Shaw Brothers Lumber Company, and in no event would plaintiff have a cause of action against the Illinois Surety Company.

There was judgment overruling the demurrer, and the surety company excepted and appealed.

Manly, Hendren & Womble for plaintiff.
Wilson & Ferguson for defendant.

HOKE, J. In respect to the liability of the Illinois Surety Company, the complaint, after stating the contract on the part of J. T. B. Shaw

to provide all the material and perform all the work for the (430) erection and completion of the rectory, continues:

"3. That amongst other provisions contained in said contract the said Shaw contracted and agreed to pay for all such labor and material, and to have the said J. C. Buxton and others, committee as aforesaid, harmless from any and all claims and liens which might arise out of contracts made by said Shaw with material furnishers and laborers," and expressly provided "Should there prove to be any such claims (for material or labor) after all payments are made, the contractors shall refund to the owner all moneys that the latter may be compelled to pay in discharging any lien on said premises obligated in consequence of the contractor's fault.

"4. That on 25 January, 1911, in pursuance of the contract as aforesaid the said Illinois Surety Company executed, as surety, together with the said Shaw as principal, a bond in the sum of $2,500 in favor of the said vestry of St. Pauls Church of Winston-Salem, N. C., as aforesaid, conditioned that the said Shaw should and would 'faithfully perform and carry out said contract according to the true intent and meaning thereof, and according to plans and specifications prepared by the said W. L. Brewer, architect, as aforesaid, and shall faithfully build and construct said rectory according to said plans and specifications and according to the terms of said contract.'

"5. That the plaintiff, at the request of the said J. T. B. Shaw and Shaw Brothers Lumber Company, furnished certain material, which was used by the said J. T. B. Shaw in carrying out his contracts, as aforesaid, for the construction and completion of the rectory, as aforesaid, and that there is now due to the said plaintiff and unpaid, on account of the furnishing of the material as aforesaid, the sum of $346.56, with interest thereon from 1 July, 1911."

And by an amendment, makes further averment as follows: "That the plaintiff, prior to the bringing of this action, had filed a lien in the office of the Clerk of the Superior Court of Forsyth County against J. C. Buxton and others, forming a committee for the vestry of St. Pauls Church, and had instituted a suit, which is now pending, and in which suit the Illinois Surety Company is a party defendant for (431) the purpose of foreclosing said lien.

"2. That prior to the institution of the action against this defendant, the plaintiff has instituted a suit against the contractor, J. T. B. Shaw, and since the filing of the complaint therein has obtained judgment against said Shaw, issued execution, which has been returned *nulla bona.*"

There have been several later decisions of the Court applying the principle that under certain circumstances the beneficiaries of a contract

could recover thereon, though not named as parties, a principle that usually prevails when it appears by express stipulation or by reasonable intendment that the rights and interests of such beneficiaries were contemplated and being provided for, as in *Gastonia v. Engineering Co.*, 131 N. C., 363; *Gorrell v. Water Supply Co.*, 124 N. C., 328. In the case before us it appears that the contractor had agreed to pay "for all labor and material supplied for the erection of the building, and to save the trustees of the church harmless from any and all claims and liens which might arise out of contracts made by him" with material furnishers and laborers, etc., and the bond sued on, signed by the surety company, contains express stipulation "that said contractor shall faithfully perform and carry out said contract according to the true intent and meaning thereof." These provisions, in our opinion, clearly contemplate that the contractor shall pay the material men and laborers and constitute such claimants the beneficiaries of the contract and bond within the principles of the authorities cited.

The cases of *Clark v. Bonsal*, 157 N. C., 270, and *Pecaock v. Williams*, 98 N. C., 324, and others of like purport, were on contracts which were in strictness contracts of indemnity, providing and intending to provide protection for the contracting party alone, and giving no indication that the interests of third persons were contemplated or that they were intended to be in any way directly benefited.

On the position that a cause of action does not arise on this instrument unless and until it is shown that the obligee principal, that is, the church, had suffered pecuniary injury by reason of the contractor's default, it was held in *Hilliard v. Newberry*, 153 N. C., pp. 104-106, that (432) this restriction on liability does not obtain where, in addition to saving the principal harmless there is also an agreement to do some definite thing which has not been complied with—in this instance, to pay for the labor and material, citing *Burroughs v. McNiel*, 22 N. C., 297; 16 A. & E., p. 179; Pingrey on Suretyship and Guaranty, sec. 182.

Under these authorities, therefore, and on the facts as they now appear, we are of opinion that a good cause of action has been stated against the appellant and that the judgment overruling the demurrer must be Affirmed.

Cited: Mfg. Co. v. Andrews, 165 N. C., 290; *Withers v. Poe*, 167 N. C., 374; *McCausland v. Construction Co.*, 172 N. C., 711.

ALICE BROADNAX v. ALICE BROADNAX, ADMINISTRATOR, ET AL.

(Filed 7 November, 1912.)

1. Negligence—Wrongful Death—Common Law—Interpretation of Statutes.

The right of recovery for the wrongful death of another did not exist at common law, and rests entirely on statute.

2. Widow's Year's Support—Common Law—Interpretation of Statutes.

The widow's right to a year's support from the effects of her deceased husband is purely statutory.

3. Negligence—Wrongful Death—Widow's Year's Support—Interpretation of Statutes.

Under our statute (Revisal, sec. 3095), the widow's year's support is assignable from the personal effects of her deceased husband "in possession at the time of his death" in a certain prescribed manner, and the right of recovery for his wrongful death, being conferred by statute after his death, the damages have never belonged to the deceased, and the widow is not entitled to have her year's support assigned to her therefrom.

4. Same.

The amount of damages recovered for a wrongful death, by express provision of our statute, not being "liable to be applied as assets, in the payment of debts and legacies," but to "be disposed of as provided in this act for the distribution of personal property in case of intestacy," Laws of 1868-9, ch. 113, which was brought forward in The Code of 1883 and Revisal, secs. 59 and 60, with the change that the recovery in such instances "shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy": *Held*, that there being no provision in that chapter for the widow's year's support, she is not entitled to have it set apart from a recovery of this character .

APPEAL by plaintiff from *O. H. Allen, J.*, at September Term, (433) 1912, of FORSYTH.

This is a controversy submitted without action, and the material facts are, that William Broadnax, the husband of Alice Broadnax, the plaintiff herein, was an employee at the plant of the Reynolds Tobacco Company, and while so employed, was killed. He left several children, both minors and adults, but no property, either real or personal. Alice Broadnax qualified as his administratrix and settled any claim which she, as administratrix, had by reason of the death of her intestate, receiving as the result of said settlement the sum of $900, and the only question involved in this appeal, is whether Alice Broadnax, as the widow of William Broadnax, is entitled to her year's allowance out of the said fund of $900.

His Honor held against the claim for a year's allowance, and the widow excepted and appealed.

John M. Robinson for plaintiff.
W. Reade Johnson for administratrix.
Louis M. Swink for defendants.

ALLEN, J. At common law, there was no right of action to recover damages for wrongful death, and the right of action conferred by statute is one that did not exist before. *Killian v. R. R.,* 128 N. C., 261; *Bolick v. R. R.,* 138 N. C., 371.

The right of the widow to a year's support is also purely statutory. *Williams v. Jones,* 95 N. C., 506.

It follows, therefore, that the determination of this controversy depends upon a construction of the two statutes.

The first was enacted in 1854 (Laws 1854-5, ch. 39), and was reënacted in the Revised Code, ch. 1, secs. 8, 9, 10, and 11; in the Laws of
(434) 1868-9, ch. 113, secs. 70, 71, and 72; in The Code of 1883, secs. 1498, 1499, and 1500, and in the Revisal of 1905, secs. 59 and 60.

In the original act and in the Revised Code, it was provided that any recovery of damages should be disposed of according to the statute for the distribution of personal property in case of intestacy, and in the Acts of 1868-9, in The Code of 1883 and in the Revisal of 1905, the statute became a part of the chapter for the settlement of the estates of deceased persons, it being provided in the first (Laws '68-9) that, "The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, but shall be disposed of as provided in this act for the distribution of personal property in case of intestacy," and in the others (Code 1883 and Revisal 1905): "The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy."

Note that the language since The Code of 1883 is that the amount recovered shall be disposed of as provided "in this chapter" for the distribution of personal property in case of intestacy, and when we turn to the chapter we find the Statute of Distribution a part of it, but no provision therein for the widow's year's support.

It would seem, therefore, that the language of the statute conferring the right of action in the event of death is directly opposed to the contention of the widow, and if we examine the provisions relating to a year's allowance, this conclusion is supported and strengthened.

Revisal, 3095: "Such allowance shall be assigned from the crop, stock, and provisions of the deceased in his possession at the time of his death, if there be a sufficiency thereof in value; and if there be a deficiency, it shall be made up by the personal representative from the personal estate of the deceased."

The allowance can only be set apart from the personal estate of the deceased, and the right of action for wrongful death, being conferred by statute at death, never belonged to the deceased, and the recovery is not assets in the usual acceptation of the term. *Baker v. R. R.*, 91 N. C., 310; *Hartness v. Pharr*, 133 N. C., 566; *Vance v. R. R.*, (435) 138 N. C., 463.

In the *Baker case* the Court says: "The administrator thus occupies the place of trustee, for a special purpose, of such fund as he may obtain by the suit, holding it when recovered solely for the use of those who are entitled under the statute of distributions, free from the claims of creditors and legatees, and subject only to such charges and expenses, inclusive of counsel fees and his own commissions, as may have been reasonably incurred in prosecuting and securing the claim. Diminished by these deductions, the remaining duty is to pay over to the distributees"; and in the *Hartness case:* "It must be borne in mind that, whatever the varying forms of the statutes may be, the cause of action given by them, and also by the original English statute, was in no sense one which belonged to the deceased person, or in which he ever had any interest, and the beneficiaries under the law do not claim by, through, or under him; and this is so although the personal representative may be designated as the person to bring the action. The latter does not derive any right, title, or authority from his intestate, but sustains more the relation of a trustee in respect to the fund he may recover for the benefit of those entitled eventually to receive it, and he will hold it when recovered actually in that capacity, though in his name as executor or administrator, and though in his capacity as personal representative he may perhaps be liable on his bond for its proper administration."

It is true, the recovery is spoken of as a part of the estate of the deceased, in *Neill v. Wilson*, 146 N. C., 244, but only for the purpose of distribution. There is

No error.

Cited: Hood v. Telegraph Co., 162 N. C., 94; *Hartis v. Electric R. R., ib.*, 242; *Edwards v. Chemical Co.*, 170 N. C., 557.

(436)

G. W. RAKESTRAW ET ALS. v. JAMES PRATT AND WIFE, EMMA, ET AL.

(Filed 20 November, 1912.)

1. Deeds and Conveyances—Wills—Mental Capacity — Evidence — Fraud — Undue Influence—Transaction with Deceased—Interpretation of Statutes.

In an action to set aside a deed or will on the ground of mental incapacity of the maker or testator at the time of its execution, it is competent for a witness, after testifying as to his opinion that the maker or testator was mentally incompetent at the time of the execution of the deed or will, to further testify as to such communications or conversations he had had with him upon which his opinion was founded; and as to such the provisions of Revisal, sec. 1631, prohibiting evidence of transactions with a deceased person, do not apply.

2. Deeds and Conveyances—Wills—Mental Capacity—Undue Influence—Evidence—Questions for Jury—Appeal and Error.

The testatrix made her will devising all of her property to one of her daughters and twenty days thereafter executed her deed for the same purpose. At the time of making the will and the deed the testatrix was nearly 84 years of age. A witness, one of her daughters, testified that in her opinion the testatrix was mentally incompetent at the time, and further testified that she was with her mother the day after the will was made, and her mind was very weak and she did not recognize her; told her she had not made a will and the devisee remarked that it was "all a story about the will," which the testatrix did not contradict: *Held*, (1) the execution of the deed being twenty days after the execution of the will, if the fact is accepted by the jury that the testatrix could not remember a day after she made the will that she had done so, it would, under the evidence of this case, be a relevant circumstance as to the intelligent execution of the deed; (2) and if it were established that the testatrix had sufficient mental capacity to make both these instruments, then the assertion of the devisee, in her presence, that the making of the will was "all a story," which was not denied by her, is some evidence on the issue of undue influence; (3) the exclusion of this evidence, in this case, is reversible error.

APPEAL by plaintiff from *Daniels, J,* at June Term, 1912, of ROCKINGHAM.

(437) Action, involving the validity of a deed purporting to have been executed by Nellie Rakestraw to Emma Pratt, one of her daughters, and also involving the validity of the will of said Nellie Rakestraw now deceased, in which she devised her estate to Emma Pratt, to the exclusion of her other children.

On issues submitted, the jury rendered the following verdict:

1. Is the paper-writing offered in evidence the last will and testament of Nellie Rakestraw? Answer: "Yes."

2. Was Nellie Rakestraw of such unsound mind at the time of the execution of the deed as to render her incapable of executing a deed? Answer: "No."

3. Did James Pratt and his wife, Emma, procure the execution of the said deed by exerting an undue influence over Nellie Rakestraw? Answer: "No."

Judgment on the verdict for defendants, and plaintiffs excepted and appealed.

C. O. McMichael, P. W. Glidewell, and Watson, Buxton & Watson for plaintiff.

A. L. Brooks and H. R. Scott for defendant.

HOKE, J. From the facts in evidence it appeared that on 7 July, 1908, Nellie Rakestraw, owning two tracts of land and other property, aggregating in value four or five thousand dollars, made her last will and testament, in which she devised and bequeathed her estate to her daughter, Emma, with whom she was then living on the land, and twenty days thereafter, on 27 July, 1908, she executed a deed for this land to her daughter, Emma. In August, 1909, said Nellie Rakestraw died, and her other children and heirs at law, having duly entered a caveat to the will and instituted a suit to set aside the deed, on the ground of mental incapacity and undue influence, the two proceedings were consolidated without objection and the issues tried and determined as heretofore stated.

On the trial there was evidence on the part of plaintiffs tending to show that, at the time of making the will and the deed, Nellie Rakestraw was 84 or 85 years of age, well-nigh physically helpless, and mentally incompetent to make either a will or deed. In support of this position, Mrs. Lou Gann, one of the daughters examined as a witness, gave it as her opinion that the mother was mentally incompetent (438) at the time of execution of the will and deed, and testified further that the witness was at the home with the mother the day after the will was made, and that her mother's mind was very weak; did not recognize the witness, and that the mother then said to her she had made no will and also that Emma, in the presence of the mother and another sister, said it was "all a story about the will," and the mother made no reply, etc.

Plaintiffs proposed to prove same or substantially similar facts by Mrs. Martin, another sister, and the evidence was excluded, the court being of opinion that testimony was incompetent under section 1631, Revisal, excluding, in certain cases, testimony of interested persons as to a transaction with deceased persons. The proposed evidence was in support of the opinion just given by these witnesses as to the mental

incapacity of the mother, and is not regarded as a "transaction" by our decisions construing the section referred to. In *McLeary v. Norment*, 84 N. C., 235, the Court held: "Where a witness testifies to the want of mental capacity in a grantor to make a deed, and that his opinion was formed from conversations and communications between the witness and grantor, it was held competent to prove the facts upon which such opinion was founded. Section 343 of The Code does not apply to the facts of this case." Section 343 of The Code of that time corresponds to section 1631 of present Revisal. It was urged for the defendant that the evidence had relation only to the issue on the validity of the will, and, even if the ruling was erroneous, it should not be allowed to affect the verdict as to the deed, but we cannot so consider the evidence. The deed was executed twenty days after the execution of the will, and, under the circumstances presented, if the fact is accepted by the jury that, within twenty days of the execution of the deed, the alleged testatrix could not remember for twenty-four hours that she had made a will, this of itself would be a relevant circumstance as to the intelligent execution of the deed. Apart from this, if, as defendant contends, Nellie Rakestraw, the mother, had mental capacity sufficient to execute these instruments, the fact that she allowed the devisee, in her presence (439) and without protest, to assert that the making of the will was "all a story," when she had just made such a will, this in one aspect might be considered a relevant circumstance on the third issue as to undue influence exercised by such devisee. On a careful perusal of the record, the Court is of opinion that the exclusion of the evidence referred to constitutes reversible error, and the cause must be tried before another jury.

New trial.

G. OBER & SONS COMPANY v. ALEX. KATZENSTEIN.

(Filed 20 November, 1912.)

1. Foreign Corporations—Domesticating Act—Failure to File Charter—Contracts—Consideration.

Failure of a foreign corporation to become domesticated by filing a copy of its charter with the Secretary of State does not invalidate an express or implied contract made with it.

2. Foreign Corporations—Domesticating Act—Failure to File Charter—Action by Attorney-General—Forfeiture of Penalty.

An action for the forfeiture provided in section 1194, Revisal, for the failure of a foreign corporation, doing business here, to file its charter with the Secretary of State, must be brought by the Attorney-General for the forfeiture.

3. Contracts, Written—Parol Evidence — Vendor and Vendee — Delivery—Implication—Harmless Error.

When a contract for the sale of goods is put in writing which does not express the entire agreement, the oral part may be proved by parol, when not a variance or contradiction of the writing; and the writing being silent as to the time of delivery, the law implies that it shall be in reasonable and apt time. In this case it is immaterial whether there was an additional parol contract to pay a larger commission on sales amounting to a specified quantity, as it was not contended that this quantity had been sold by the defendant.

4. Contracts—Vendor and Vendee—Fertilizer—Option of Cancellation—Measure of Damages.

In an action to recover the balance of the purchase price of tobacco fertilizer sold under a contract making it optional with the plaintiff to cancel the order, it is held, on defendant's counterclaim for damages for the failure of plaintiff to deliver the goods, that recovery could only be had for damages accrued up to the time of the plaintiff's notice that he would exercise his option—in this case, the cost of preparing the plant-bed and for the higher priced labor employed and held by the defendant in readiness, and the profits on fertilizer actually sold by him, as contemplated by the parties, caused by his inability to substitute others, owing to the late date of cancellation; and not for the loss of crop incident to the option exercised under the contract by the plaintiff.

APPEAL by plaintiff from *Cline, J.*, at February Term, 1911, (440) of WARREN.

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

Tasker Polk and A. C. Zollicoffer for plaintiff.
J. H. Kerr and Charles J. Katzenstein for defendant.

DEFENDANT'S APPEAL.

CLARK, C. J. This action was brought to recover a balance due for the purchase of fertilizers. Revisal, 1149, requires every foreign corporation (excepting railroad, banking, insurance, express, and telegraph companies), before being permitted to do business in this State, to domesticate by filing in the office of the Secretary of State a copy of its charter and complying with certain regulations, and imposes a penalty of $500 for failure to observe the terms of that section. The plaintiff demurred to section 12 of defendant's answer in which he pleaded that the plaintiff could not recover because it had not complied with the requirements of Revisal, 1194, and was doing business in this State illegally. The demurrer was properly sustained. For its failure to comply with the provisions of the statute the plaintiff company is liable to an

action by the Attorney-General for the forfeiture provided by this section. But the statute does not invalidate either the express contract
(441) made between the plaintiff and the defendant nor, indeed, the implied contract raised by the receipt of the goods of the former by the defendant. This point has been recently adjudicated. *Tobacco Co. v. Tobacco Co.,* 144 N. C., 352. If the State, in addition to the penalty, had desired to render invalid the contract and to deny a recovery thereon, it would have so enacted, as it has done in regard to gambling and other illegal contracts. Revisal, 1687, 1689.

It is true that though a contemporaneous parol agreement cannot be admitted to vary, alter, or contradict a written agreement, yet that when the contract is not entirely in writing the oral part can be proven by parol, subject to the above rule. In this case, the controversy whether there was a parol agreement with the agent that the goods should be shipped promptly is immaterial, for there was of course an implied understanding that they were to be shipped in reasonable and apt time. Nor is it material whether there was a parol contract to pay a larger commission if as much as 500 tons were sold by the defendant, for in fact that number of tons was not sold by him, and there is no claim in this action for the higher commission.

The court properly held that the defendant was not entitled to recover by way of counterclaim any damages that he might have sustained by reason of his inability to get fertilizers to plant his 11 acres of tobacco land. It is true that where a farmer contracts for the purchase of fertilizers and the vendor, though knowing that it is for the purchaser's crop, fails to deliver, and the vendee, because of the lateness of the season, is unable to procure it elsewhere in time, so that thereby the yield of his crop is lessened, he is entitled to recover damages thus sustained. *Herring v. Armwood,* 130 N. C., 177; *Spencer v. Hamilton,* 113 N. C., 49; Sutherland Damages, secs. 664, 667. On this point the plaintiff relies upon *Carson v. Bunting,* 154 N. C., 532, and *Fertilizer Works v. McLawhorn,* 158 N. C., 274; but in the first case the Court held that the purchaser could not recover damages for failure to receive the fertilizers because the purchaser "did not allege that he could not have bought other fertilizers to have made good the deficiency, but admitted in his evidence that he could have done so." In the latter case, the action was to recover, not for a shortage in the quantity, but
(442) for defect in the quality, and the Court held that the best evidence of such defective quality could be found in the analysis which had been made for the purchaser at the time by the Agricultural Department, and not by comparison of the soils and crops of the adjacent lands; and that the purchaser having notice by such analysis then made, should have bought the deficient material, which he had time to do.

Notwithstanding the above principles of law, the defendant is not entitled to recover, because in his contract with the plaintiff he agreed that the plaintiff could at its option cancel the order if it saw fit. Therefore the defendant was entitled to recover only the damages he had sustained up to the time he had notice that the plaintiff declined to fill his order, to wit, for the cost of preparing the plant-bed and for the higher priced labor employed and held in readiness, and for these two items the defendant was awarded damages as will appear in the "plaintiff's appeal" in this case. Besides, it is reasonably clear that the defendant had time to have purchased fertilizers, though not of this brand, in time to proceed with his crop.

No error.

PLAINTIFF'S APPEAL.

CLARK, C. J. The plaintiff appealed because the defendant was allowed to show in evidence that under his contract with the plaintiff he had sold to his customers 88 tons of fertilizers at a profit of $2.25 per ton, which the plaintiff had failed to ship; and also to show that he had prepared two plant-beds at a cost of $60, and was unable to use them for that purpose because of failure to receive the guano; and, thirdly, because the defendant was permitted to show that the higher priced labor which he had retained for use on the tobacco farm up to the time he had to discharge them on account of failure to receive his fertilizers had entailed the loss of $117.

As we have already stated in the defendant's appeal, the defendant was entitled to recover the last two items because this loss had already accrued at the time he received notice that the fertilizers would not be shipped. But the defendant could not recover for the loss of the increased crop he would have made, because under the contract (443) the plaintiff had the right to cancel any order. Had the plaintiff given notice sooner, the defendant's loss would have been less. The plaintiff was liable for the loss up to the time of the notice that he would exercise the option not to ship.

For the same reason, on the first item the defendant having already contracted to sell this particular brand of fertilizer as agent, at the profit named, when the plaintiff after having booked the order exercised the option not to ship, the defendant could not get that brand of fertilizer elsewhere, and there is no evidence that the parties to whom the defendant had contracted to sell would have taken any other brand. Besides, the presumption is that the other fertilizer companies already had agents to sell their fertilizers. If it were otherwise, the plaintiff could have shown these facts in mitigation of damages, but did not offer to do so.

No error.

Cited: Stehli v. Express Co., post, 506; *Pfeifer v. Israel,* 161 N. C., 428; *Blount v. Fraternal Assn.,* 163 N. C., 171; *Tomlinson v. Morgan,* 166 N. C., 562; *Carter v. McGill,* 168 N. C., 511.

CHARLOTTE SUPPLY COMPANY v. BURRISS METAL ROOFING COMPANY.

(Filed 20 November, 1912.)

1. Contracts—Consideration — Concurrent Duties — Breach—Readiness and Ability of Performance.

When a contract has concurrent stipulations to be performed by the parties as the consideration to support it, it is necessary, in order for one of the parties to recover damages arising from the breach thereof by the other, to prove his readiness and ability to fulfill his part thereof .

2. Same—Principal and Agent—Sales Agent.

In an action by a sales agent against this principal for damages arising from the latter's failure to supply the goods contracted by him to be furnished, it appeared that the plaintiff had agreed to sell a certain quantity of goods per annum, and in consideration thereof the defendant was to manufacture and furnish that amount; that neither the plaintiff sold, nor could the defendant have furnished the amount contracted for. The defendant having set up a counterclaim for damages arising from the plaintiff's default under the contract sued on, it is *Held*, that a nonsuit as to the plaintiff was properly granted, and that the defendant could not recover on his counterclaim, as neither could show readiness and ability to comply with the stipulations that had been agreed upon by each to perform.

(444) APPEAL by plaintiff from *Justice, J.,* at September Term, 1912, of MECKLENBURG.

Action to recover damages for breach of contract. Defendant having denied liability, set up counterclaim for damages by reason of breach of same contract by plaintiff.

On facts stated in the pleadings, with certain admissions formally made by the parties, the court below sustained a demurrer *ore tenus* to plaintiff's cause of action and to defendant's counterclaim, and both plaintiff and defendant excepted and appealed.

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

Hugh W. Harris for plaintiff.

R. S. Hutchison and Burwell & Cansler for defendant.

PLAINTIFF'S APPEAL.

HOKE, J. Plaintiff alleged that on the first of October, 1909, plaintiff and defendant entered into a contract whereby plaintiff was constituted, for two years, sole agent for the sale of "Burriss patent metal shingle," which defendant was to manufacture and supply on orders from plaintiff at a specified price per square. That defendant had failed to supply shingles, as stipulated, to plaintiff's great damage, and on 31 October, 1910, present suit was instituted to recover for said breach of contract.

Defendant having duly denied liability, set up a counterclaim for breach of the same contract, and alleged that defendant had made the contract as stated and had entered on the manufacture of said shingles in North Carolina under a license from John T. Burriss, the patentee. That having small capital, they were dependent on amount of shingles sold for means of carrying on the enterprise. That the contract, made an exhibit of the complaint, required that plaintiff should make proper effort to put the product on the market and to furnish orders to (445) "an amount not less than 5,000 squares per annum." That plaintiff the first year had only obtained orders for 2,080 squares of said shingles, and by reason of such failure and refusal on the part of the plaintiff to comply with the terms of the contract to give orders for the number and amount of shingles called for in the contract and to take such number, defendant suffered great financial loss, its business was broken up, etc., and defendant was thereby compelled to suspend business and relinquish its rights under its contract with Burriss, etc.

When the cause was called for trial there was formal admission made by defendant, treated as an additional averment in the complaint, "that as a matter of fact plaintiff had only succeeded in procuring orders for 2,080 squares of shingles for defendant for the first year, to wit, on or before 10 October, 1910," and on such admission, in connection with the other facts shown in the pleadings, and on perusal of the contract, we think his Honor correctly ruled that no recovery by plaintiff was permissible. The case presented an action for breach of a contract having concurrent stipulations, and where, in order to a recovery, there must be allegation and proof of a readiness and ability to perform by the party seeking relief.

In *Ducker v. Cochran,* 92 N. C., pp. 597-600, *Chief Justice Smith,* delivering the opinion, said: "The proposition is too plain to need any reference to authority in its support, that a party to a contract cannot maintain an action against another for its breach, without averring and proving performance of his own antecedent obligations or some legal excuse for nonperformance, or, if the stipulations are concurrent, his readiness and ability to perform." This statement has been quoted

with approval in *Corinthian Lodge v. Smith,* 147 N. C., 246; *Tussey v. Owen,* 139 N. C., pp. 457-461, and the principle is one very generally recognized in our decisions. *Wildes v. Nelson,* 154 N. C., 590; *Hughes v. Knott,* 140 N. C., 550.

There is no error, and the judgment of his Honor sustaining the demurrer must be

Affirmed.

DEFENDANT'S APPEAL.

(446) HOKE, J. On trial of the cause there was admission formally made by defendant and treated as an additional averment on its counterclaim, that on 10 October, 1910, and for some time prior thereto, it had on hand ready for delivery only 800 squares of shingles referred to in the contract, and it would have taken thirty days from that date within which to have filled the order for the balance of the 5,000 squares of shingles which plaintiff contracted to give orders for during the first year of the contract. There is also the further admission in the answer that defendant is utterly unable to further comply with the contract. As we have just held in disposing of plaintiff's appeal, this is a counterclaim for breach of a contract having concurrent stipulations, and where, in order to a valid recovery, there must be allegation and proof of a readiness and ability to perform. We think the additional facts referred to could be very properly considered as an admission by defendant that it was not ready or able to perform within the time specified, and that recovery on the counterclaim was properly denied.

In *Hughes v. Knott, supra,* affirming the same case, in 138 N. C., 410, on a contract presenting practically the same question, the Court held:

"1. Where the defendants agreed to deliver a certain quantity of tobacco f. o. b. cars in Raleigh on 1 July, to the plaintiffs, who agreed to receive and pay for it at that time, and neither party was ready to comply on that day, but both were able to comply on 4 July, when the plaintiffs made a demand, which was refused, and there was no extension of time, plaintiffs are not entitled to recover the tobacco.

"2. Neither party to a contract can demand performance by the other without alleging and proving his own readiness to perform his part of the contract at the specified time and place."

The authority, in our opinion, is decisive, and the judgment sustaining the demurrer to defendant's counterclaim is

Affirmed.

H. M. CROUCH v. T. P. CROUCH.

(Filed 20 November, 1912.)

1. Debtor and Creditor—Judgments—Liens—Different County—Homesteads —Registration—Appraisers' Returns—Judgment Rolls.

A creditor obtained judgment and had it sent to another county and laid off the debtor's homestead, and the appraisers' report was found in the latter county in the clerk's office, in a metallic filing case, labeled "Homesteads." Thereafter the homesteader conveyed a part of the homestead lands: *Held*, (1) his vendee acquired title subject to the lien of the judgment; (2) the judgment having originally been obtained in another county, the appraisers' returns could not have been found in the judgment rolls, and were properly filed in the county wherein the homestead was laid off; (3) the registration of the homestead is unnecessary unless the exemption is made on the debtor's petition.

2. Limitation of Actions—Judgments—Liens—Homesteader in Possession— Adverse Possession—Deeds and Conveyances—Color.

In order to plead the statute of limitations against a judgment lien, the vendee of lands embraced in a homestead may show that the allotment was invalid; but, in this case, the vendee having bought subject to the judgment and been in possession for twenty years, any irregularity in the allotment could only be taken advantage of by the judgment creditor.

3. Homestead—Conveyance—Interpretation of Statutes—Limitation of Actions—Adverse Possession.

The act of 1905, now Revisal, sec. 686, providing that a homestead exemption cease upon its being conveyed by the homesteader, by express terms is not retroactive, and the vendee cannot acquire title under color until seven years adverse possession since 1905. It is further *Held*, that the ten-years statute in this case had not run against the lien of the judgment.

4. Judgments—Liens—Homestead—Procedure—Trusts and Trustees — Execution.

In this action, the homestead conveyed being subject to a lien of a judgment creditor, it is *Held*, that in accordance with the relief demanded, the vendee be declared a trustee to convey to the purchaser at the execution sale under the judgment, and that the administrator of the deceased homesteader be authorized to sell the lands and apply the proceeds to the satisfaction of the judgment; though a simpler remedy for the judgment creditor would be to sell under his execution.

APPEAL by plaintiff from *Adams, J.*, at May Term, 1912, of (448) CALDWELL.

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

Edmund Jones, M. N. Harshaw, and I. W. Whisnant for plaintiff.
W. C. Newland and Mark Squires for defendants.

CLARK, C. J. The plaintiff obtained judgment against Laban E. Hoke, the intestate of defendant, in Alexander County, 3 July, 1888, which was docketed in Caldwell, 18 November, 1888. Execution issued 22 March, 1889, from Alexander County to the sheriff of Caldwell, who summoned three appraisers on 25 April, 1889, whose allotment to said Hoke of his homestead included a tract which is described in their return as "First tract, valued at $36, known as the Fisher land." This is the tract which the plaintiff is seeking to subject to satisfaction of his judgment. The appraisers' report was returned to the clerk of Caldwell Superior Court, in whose office it was found 16 August, 1909, in a metallic filing case, labeled "Homesteads." The sheriff sold all the lands of said Hoke not embraced in the appraisers' return on 5 August, 1889, the plaintiff being the purchaser thereof.

On 21 September, 1889, said Hoke executed a deed to the defendant Felix Abernathey for the "Fisher land," which had been allotted to him as a part of his homestead. Hoke died 16 July, 1909, leaving him surviving his widow and two children, both of whom are of age. This action was begun 4 October, 1910, to subject the "Fisher tract" to payment of plaintiff's judgment, and plaintiff asked that the court decree the deed from Hoke to Abernathey void as against the lien of the plaintiff's docketed judgment; that Abernathey be directed as trustee to convey to the purchaser at execution sale and that defendant administrator be authorized to sell the land and apply the proceeds to the satisfaction of the plaintiff's judgment. The court held that Abernathey had no actual notice of the allotment of the land in question as a part of Hoke's homestead exemption, and that the constructive notice is insufficient because the description was not definite and the return of
(449) the appraisers was not filed in the judgment roll of the action, citing *Bevan v. Ellis,* 121 N. C., 225. We think the description is sufficient. *Ray v. Thornton,* 95 N. C., 575. The judgment roll in the action was not in Caldwell County, but in Alexander, and hence the appraisers' return could not be filed in the judgment roll in Caldwell. Besides, *Bevan v. Ellis, supra,* holds that registration of the homestead is not necessary except when the exemption is made on the petition of the homesteader.

Abernathey bought with notice of the docketed judgment against Hoke, and, of course, of the fact that all his land was subject to the lien of the judgment. If at the time Abernathey received his deed the lien of the judgment had expired by the lapse of ten years, then it would be admissible for him to claim that the statute of limitations had not been sus-

pended as to the judgment because the property was not embraced in a valid allotment of the homestead. But he bought subject to the lien of the judgment and has been protected for twenty years from execution issuable thereon by virtue of such exemption. Had there been any informality as to the allotment of the homestead, it was for the plaintiff, not the defendant, to claim benefit from its invalidity.

It is true that under the act of 1905, ch. 111, now Revisal, 686, the homestead exemption ceased as to this tract of land when the homesteader conveyed it to Abernathey. But the act specifically provides that it shall not have any retroactive effect; therefore, the land did not become subject to plaintiff's execution till 1905, and the defendant has neither held the land seven years under color of title nor is the lien of the judgment barred by the ten years statute of limitations, and, indeed, the plaintiff has not pleaded either statute.

The plaintiff was entitled to have the land subjected to the payment of his debt. He might have proceeded more simply by selling under his execution.

Reversed.

Cited: Brown v. Harding, 170 N. C., 264.

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(450)

LOUISA PRICE AND HUSBAND, R. S. PRICE, v. CHARLOTTE ELECTRIC RAILWAY COMPANY.

(Filed 20 November, 1912.)

Husband and Wife—Negligence—Loss of Wife's Services—Recovery by Wife—Judgments—Estoppel of Husband.

When a husband has joined in an action with his wife to recover damages for a personal injury to them both, arising from the same negligent act, and his counsel withdraws all claim for damages for him, and the action is successfully prosecuted to recover damages for the wife's injuries inflicted on her, including damages arising for a loss or material impairment of her capacity for labor, particularly of a permanent nature, he, by thus prosecuting and acquiescing in the action of his wife, will be deemed to renounce in her favor his right to recover for the loss of her services, and the judgment will estop him from any further demand thereof.

CLARK, C. J., concurring in result; BROWN, J., concurring in the concurring opinion.

APPEAL by defendant from *Daniels, J.,* at July Term, 1912, of MECKLENBURG.

Action to recover damages for personal injuries, instituted by Louisa Price, *feme* plaintiff, and her husband, R. S. Price.

The record shows that, at the opening of the trial, plaintiff's counsel stated in open court that it was not their intention to claim damages for plaintiff's husband, R. S. Price. The jury rendered a verdict that Louisa Price was injured by the negligence of defendant company and suffered damages and to the amount of $5,000. There was no issue as to contributory negligence, same not having been pleaded as against either plaintiff. Judgment on verdict, and defendant excepted and appealed.

T. L. Kirkpatrick, E. R. Preston, and Neill R. Graham for plaintiff.
Osborne & Cocke for defendant.

HOKE, J. The complaint alleged, and there was evidence on the part of plaintiffs tending to show, that in the early evening, 27 September, 1911, 8:30 o'clock, plaintiffs, R. S. Price and wife, were driving a (451) horse and buggy out from the city of Charlotte, and when near defendant's track, on account of a rough place in road, the track being laid in the street or highway, they were run into by a car of the defendant company, which approached from behind plaintiffs, without signal or warning of any kind and at a much greater rate of speed than allowed by law; that as a result of the collision, both plaintiffs were thrown to the ground; the wife was dragged some distance and seriously injured, necessitating the amputation of her foot at the ankle; one arm was broken, leaving it crooked and stiff; she received also a deep cut and bruises on the head, which had to be sewed up with many stitches and which still cause her severe and continued pain; that plaintiff, Robert Price, was also thrown to the ground and received bruises, and his horse was killed. There was general denial on the part of defendant company and evidence offered in support of its position, but, on the issue as to defendant's negligence, and under a charge which gives defendant certainly no just ground for complaint, the facts stated have been accepted by the jury, and no good reason has been shown for disturbing the verdict on that issue.

It was chiefly urged for error that his Honor, in charging the jury on the issue as to damages, allowed the *feme* plaintiff, in addition to compensation for her pain and suffering, to recover by reason of her diminished capacity to labor and make a living. There are decisions to the effect that, in actions for personal injuries by the wife, when there has been loss or material impairment of her capacity for labor, and particularly of a permanent nature, this may be properly considered as an element of the damages to be recovered. *R. R. v. Nichols,* 41 Col.,

272; *R. R. v. Jacobs,* 88 Ga., 647; *Powell v. R. R.,* 77 Ga., 192; 13 Cyc., p. 143. There is also high authority for the position that, in jurisdictions where the Constitution or statutes or both have conferred on married women the right to own, control, and dispose of property as if they were *femes sole,* a recovery of the kind in question should be allowed. *R. R. v. Humble,* 181 U. S., 56; *Harmon v. R. R.,* 165 Mass., 100.

Our own Court has thus far taken a different view as to the (452) effect of these constitutional and stautory provisions, as in *Syme v. Riddle,* 88 N. C., 463, and other cases. In many of the States, however, in which this same view prevails, it is very generally held that such recovery should be allowed by the wife when it is shown that she is pursuing an independent employment; is engaged in making her own support and receiving her wages for her own benefit. *Fleming v. Shenandoah,* 67 Iowa, 105; *Bailey v. Centerville,* 108 Iowa, 20; *Hadley v. Balantine,* 66 N. J. L., 339.

The North Carolina decisions were rendered prior to the Martin Act, Laws of 1911, chapter 109, which practically constitutes married women free traders as to all their ordinary dealings, and we are not called on to determine the effect of this legislation on the question presented, as all the authorities here and elsewhere hold that a husband may confer this right to earn and acquire property upon the wife, in any event when the rights of creditors do not intervene. *Syme v. Riddle, supra; Cunningham v. Cunningham,* 121 N. C., 414; *Peterson v. Mulford,* 36 N. J., 481; *Mason v. Dunbar,* 43 Mich., 407.

It may be that, under our decisions as they now stand, it would not of itself be sufficient to support the verdict that the wife, living at the time with her husband, was earning her own support, working out for hire and receiving the wage; but it appears, further, that the husband, made a party plaintiff, pursuant to the statute, and charged to some extent with the duty of looking after his wife's interests (*Vick v. Pope,* 81 N. C., 22), has permitted his wife to insist on this loss of capacity as an element of recovery and has acquiesced in the result. This, in our opinion, should be held to validate such a recovery even if it could be otherwise questioned. True, there are decisions to the effect that, in a suit of this kind by the wife, a verdict and judgment for defendant was not allowed to estop the husband in a suit to recover for his own injury, a position that seems to have been stated with approval in one case where the husband was a nominal party (*Walker v. Philadelphia,* 195 Pa. St., 168), but none of these authorities, so far as examined, would sustain the principle that when a husband, party of record, has thus formally given his sanction to a recovery of this character, that (453) the same could be afterwards questioned either by him or by the company.

Our decision is in no way affected by the entry on the record that plaintiffs' counsel stated in open court that "it was not their intention to claim damage for plaintiff husband." Such an entry by correct interpretation was intended to refer to the cause of action also set forth in the complaint for the physical injuries to the husband and the wrongful killing of his horse. If allowed any effect on the wife's cause of action, it permits and in our opinion should receive the construction that the husband made no claim to the damages in any way incident to the wife's cause of action, but formally renounced the same in her favor. In this view it only gives emphasis to the position that on the record the husband has formally passed to the wife the right to recover for the loss or impairment of her capacity to earn a living. The other portions of his Honor's charge in this connection, to which objection is also made, was only in illustration of the proper method of arriving at the present value of the loss to the wife, and does not afford ground for substantial criticism.

After careful examination, we are of opinion that no reversible error has been shown, and the judgment in plaintiff's favor should be affirmed.

No error.

CLARK, C. J., concurring in the result: Louisa Price sustained serious injuries caused by the negligence of the defendant, as the jury find. Her right foot was amputated, her right arm was broken and permanently rendered stiff, and her head severely gashed. For these injuries and for her physical and mental suffering, and for her diminished power to earn wages by reason of her injuries, the jury assessed her compensation at $5,000. The able counsel for the railroad company strenuously argued that being a married woman this compensation was the property of her husband, and could be recovered only by him, and not by her. Fortunately for her, the husband had been made a co-plaintiff, and the Court does not pass upon the point.

(454) But the contention that the wife's earnings, and damages for injuries sustained by her person and for her sufferings, physical and mental, belong to her husband, cannot be maintained except upon the principle that the earnings of a slave and damages for injuries to the slave's person are the property of the master. This was the origin of these decisions centuries ago, when "in the eyes of the judges" the wife was merely the chattel, the property of her husband, for no English-speaking legislative body has ever so enacted. The doctrine was entirely the creation of the courts; that is, it was the "common law," which is simply another name for "judge-made law." It has not even the excuse that it was the custom among the Saxon tribes, for, barbarians though they were, no such system prevailed among them. The doctrine was

created by the courts after the Conquest, and is based solely upon the ideas of the judges of that date as to what was the proper status of women.

Under the Constitution, Art. X, sec. 5, a married woman owns her property "acquired before marriage or to which after marriage she may become in any manner entitled" as absolutely as if single, or as her husband owns his, and it should follow, most certainly since the act of 1911, giving a married woman the right to contract as if single, that her earnings in occupations elsewhere than in her household duties belong to her, and that she has the same right to recover them as the husband has to sue for his own earnings. For a stronger reason, damages for injuries to her person and for her physical and mental suffering must belong to her. Such damages are compensation intended to put her in *statu quo,* so far as she can be compensated by money for the loss, which is peculiarly her own.

Many courts of the highest reputation have held that the statutes conferring upon married women the right of property and the right to contract carry with them the right to recover earnings and damages for injuries causing loss of capacity to earn, and for physical and mental suffering. *R. R. v. Humble,* 181 U. S., 57; *Harmon v. R. R.,* 165 Mass., 100; *Duffee v. R. R.,* 191 Mass., 563; *Hatton v R. R,* 3 Penniwell (Del.), 159; *Athens v. Smith,* 111 Ga., 870; *R. R. v. Krempell,* 116 Ill. App., 253; *Logan v. Logan,* 77 Ind., 558; *Harkness v. R. R.,* 110 La., 823; *Rockwell v. Traction Co.,* 187 Pa. St., 568; *Normile v. Traction Co.,* 57 W. Va., 132, and there are many others. These decisions (455) are in accordance with the spirit of the age and of the Constitution.

It is true that under the decisions of the courts made in a ruder age, not based upon any statute, but evolved by the judges out of their own consciousness, and termed by euphemism "the common law," a married woman could not recover her earnings, nor for damages to her person, nor for her sufferings, physical or mental, and that compensation for all these things belonged to her husband, upon Petruchio's theory that the wife is the chattel or property of her husband. Upon this common law it was held in North Carolina, by *Pearson, C. J.,* in *S. v. Black,* 60 N. C., 263, that it was the "husband's duty to make the wife behave herself" and to thrash her, if necessary to that end, and in *S. v. Rhodes,* 61 N. C., 453 (1868), this Court sustained the charge of the judge below that a man "had the right to whip his wife with a switch no larger than his thumb," and this was cited and approved in *S. v. Mabry,* 64 N. C., 593. But in *S. v. Oliver,* 70 N. C., 61 (in 1874), this Court overruled the numerous decisions to that effect, *Settle, J.,* saying: "The courts have advanced from that barbarism." Thus passed away the vested

right of the husband to thrash his wife "with a whip no larger than his thumb," without any statute to change the law.

As late as 1886, in *S. v. Edens,* 95 N. C., 693, the Court again held, upon the same "judge-made" law of former times, that a man could "wantonly and maliciously slander" the good name of his wife with impunity, or "assault and beat her" if he inflicted no permanent injury upon her; but a majority of this Court reversed that holding in 1908 without any statute, in *S. v. Fulton,* 149 N. C., 485, since which time no man has had legal authority to slander or assault and beat his wife in North Carolina. And thus passed away another vested right, or rather another vested wrong.

In view of the Constitution and statute conferring upon a married woman the absolute right to her own property and unlimited power to contract, it should not now require any statute to abolish the claim (which was never based upon any statute, but was purely the creation of the judges in a ruder age) that a married woman could not
(456) recover her earnings nor damages for injuries to her own person causing her loss of earning capacity and great mental and physical suffering.

Even statutes have been held obsolete and unenforcible because of changed conditions and the long lapse of time. Certainly this ought to be true of decisions which rest upon no statute and which are now contrary to every sense of right and opposed to the spirit of our Constitution and of the age in which we live.

The "common law" has been praised because of the very fact that, being "judge-made," it was flexible and could be molded from time to time to fit the changing conditions of society. But it loses this sole excellence when it is used to thwart beneficial statutes, expressing the demand of the age for more just and benign laws, by construing them according to the darkened and narrow views of the judges of the Fourteenth century and not according to the intendment of legislators imbued with the enlightened ideas of the twentieth century. The fiction that the judges *declared* the "common law," and did not make it, is a mere decency. But if the statement were true, this would only carry back its origin to more ignorant and barbarous ages. That the "common law" is the "perfection of reason" when traced to such origin is impossible, and it can be fairly judged by its rulings as to married women which, long since abolished root and branch in England, both by the courts and by statutes, are still fondly clung to by some American courts as a clog upon progressive legislation. This is true as to other common-law rulings in every department of law. In truth, every betterment in the law has necessarily come from legislation, or by decisions of the courts denying the barbarous or worn-out rulings that are unsuited to the improved con-

dition of society and obnoxious to the juster ideas of a more enlightened age. There are of course principles of the common law which are eternally just and which will survive throughout the ages. But this is not because they are found in a mass of error or were enunciated by judges in an ignorant age, but because they are right in themselves and are approved, not disapproved as much of the common law must be, by the intelligence of today.

As, however, common-law views as to the status of women (457) still survive among a few and are still urged as law, it would not be amiss should the General Assembly make such enactment in this regard as that body may deem just and proper. Every age should have laws based upon its own intelligence and expressing its own ideas of right and wrong. Progress and betterment should not be denied us by the dead hand of the Past. The decisions of the courts should always be in accord with the spirit of the legislation of to-day, which should not be misconstrued to conform to the views of dead and forgotten judges of centuries long overpast who were not always learned and able, and who, if wise, were rarely wise beyond the narrow vision of their own age. Nations, like men,

> "May rise on stepping-stones
> Of their dead selves to higher things."

BROWN, J., concurs in this opinion.

Cited: *Floyd v. R. R.*, 167 N. C., 61, 62; *Patterson v. Franklin,* 168 N. C., 77, 79; *McCurry v. Purgason,* 170 N. C., 465.

NOTE.—The General Assembly of 1913 enacted, as one of its first acts, ch. 13, that a married woman can recover her earnings and damages for personal injuries for her own use, and without joinder of her husband in the action.

H. G. KIME v. SOUTHERN RAILWAY COMPANY.

(Filed 20 November, 1912.)

1. Carriers of Goods—Live-stock Bill of Lading—Owner's Acceptance—Delivering Carrier—Negligence.

A common carrier may not make a valid contract which will have the effect of relieving it from liability; and irrespective of the ownership of the car, it cannot relieve itself from liability for damages to a car-load of live stock it has received from its connecting line, in good condition, but in an unsuitable car, and delivers them in bad condition, by reason of a requirement in the original bill of lading that the shipper must inspect the car and reject it if unsuitable.

2. Carriers of Goods—Live-stock Bill of Lading—Written Notice—Actual Notice.

That the requirement that the written notice provided for in a carrier's live-stock bill of lading is not necessary under the circumstances of this case, see *s. c.*, 156 N. C., 451.

(458) APPEAL by defendant from *Carter, J.*, at May Term, 1912, of ALAMANCE.

The plaintiff brought this action to recover damages for negligent injuries alleged to have been done to certain horses and mules belonging to plaintiff while in transit from Richmond, Va., to Burlington, N. C., and states in his complaint two grounds of actionable negligence on the part of the defendant company: First, for receiving from its connecting carrier a car loaded with live stock which was unfit and unsuitable for the shipment of such stock, without proper inspection; and, second and principally, for its careless and negligent transportation of said live stock after so receiving it, while in transit over its line from Richmond to Burlington, N. C., without giving said car and the stock contained therein reasonable and proper attention while in transit; and he further alleges that, on account of such negligence and want of care, three valuable horses loaded on said car died soon after their arrival at the point of destination, and plaintiff was put to great cost and unnecessary expense on account of said negligence in treating, caring for, and curing the other horses and mules before they could be put in a condition to be placed upon the market. The particular facts were these: On 20 January, 1909, the defendant company received from the Richmond, Fredericksburg and Potomac Railroad Company a car, as described in the complaint, loaded with 21 horses and 3 mules for shipment to Burlington, N. C., as the property of the plaintiff. All of said horses were in good condition when they were loaded at Richmond, Va., and the plaintiff paid to the defendant company at Burlington, N. C., the full freight charges required of him for the shipment, from the very place of making the purchase of the horses and mules to Burlington, N. C. The defendant company received said shipment in an old stock car that had been worked over so as to be suitable for the shipment of shelled corn. The sides and ends, and all ventilating windows and doors, were closed up tightly with slats and made practically air-tight, absolutely unfit, even in the coldest season of the year, for the shipment of live stock. The defendant company knew live stock was on this car, and without inspecting the car, and without attending to it while in transit, by

(459) removing a few of the slats so as to give proper ventilation, it undertook to convey, and did cnovey, said horses and mules in this car from Richmond, Va., to Burlington, N. C., and while said car

was in transit between these two points the defendant company failed and neglected to give said live stock any attention at all, the car being in its sole possession and control. That by reason of said negligence and want of care while in transit, the stock arrived at Burlington, N. C., in a suffocated and smothered condition. That this proceeded from the want of care in not giving said horses and mules proper ventilation or sufficient breathing conditions. That with the slightest care, and with little expense, a few slats might have been removed and the stock could have been safely delivered. As the proximate result of defendant's alleged negligence, plaintiff lost three of the horses, for which he had just paid $175 each, and sustained other damages, as above set forth. The jury returned the following verdict:

1. Was plaintiff's stock injured by the negligence of the defendant company, as alleged in the complaint? Answer: Yes.

2. If so, what amount of damages did plaintiff sustain on account of said negligence and injury? Answer: $475.

3. Did the defendant at the time of the delivery of the stock have actual notice of the damaged condition of said stock? Answer: Yes.

Judgment was entered on the verdict, and defendant appealed.

W. H. Carroll for plaintiff.
Parker & Parker for defendant.

WALKER, J., after stating the case: This cause was before us at a former term, *Kime v. R. R.*, 156 N. C., 451. The case as now presented to us is not substantially different from the one which was here on the first appeal, though the facts have been more fully developed. The defendant argues, because the car, in the same condition as when it arrived at Burlington, was received by it from a connecting carrier at Richmond, Va., in the course of transit from the initial point to its destination at Burlington, N. C., that it was relieved of any duty of care, and exempted from any liability for failure to exercise proper supervision of the car and care for the horses and mules contained therein, and was (460) not required to make inspection of the car to see if it was in proper condition for the reasonable comfort and well-being of the animals, because, as it alleges, the original shipper was under obligation, by special agreement, to examine the car and pass upon its suitability for the transportation, and to accept it as sufficient or reject it as insufficient for that purpose, and that defendant was not to be liable for any damages sustained by injuries to the stock due "to the insufficiency or defective condition of the body of said car." It also defends upon the ground that plaintiff was required by the contract of shipment, as shown in the bill of lading, to give notice of his claim or damage within five days

after the stock was removed from the car. There is also a stipulation exempting the carrier from damages caused by injuries to the stock from suffocation or from almost any other imaginable cause.

We do not think these special clauses of exemption from liability for its own negligence, however gross or inexcusable it may be, can have the effect, in law, of relieving the carrier fromt the exercise of due and proper care while the animals were being transported over its line, for while a common carrier may, under certain well-defined circumstances, relieve itself by contract from its common-law liability, it cannot so relieve itself from responsibility for its own negligence, which has proximately caused an injury or loss to the shipper. It is said in 6 Cyc., 441: "A general stipulation that the shipper has examined the car in which the stock is shipped, and accepts it as suitable and sufficient, will not estop him from recovering for injuries due to a defective car, inasmuch as the carrier cannot limit his common-law liability so as to exempt himself from the consequences of his own negligence." *R. R. v. Dies,* 91 Tenn., 177, is cited in support of the text, and that case decided that "A common carrier is not protected against liability for loss of goods resulting from defects in car, the existence of which affords evidence of negligence, by a stipulation in the bill of lading, accepted by the shipper, to the effect that he had examined the car for himself, and found it in good order, and accepted it as 'suitable and sufficient,' for the purpose of his (461) shipment." The Court went further in that case, and held that a common carrier is liable for loss of goods resulting from defects in a car used for transportation, the existence of which imply negligence, although the car belonged to another, and was procured by the carrier for the particular shipment at the special request of the shipper, upon his paying the additional expense, and the shipment was made in its then condition—the car being of a kind acceptable to the carrier, and commonly used in making like shipments. The carrier cannot escape liability by carrying the freight in a car furnished or owned by another company. With respect to the shipment and the special car, it is still a common carrier, and it is a matter of no importance who owned or furnished or paid for the particular car into which the stock had been loaded. *R. R. v. Dies, supra; R. R. v. Ray,* 102 U. S., 452; *R. R. v. Katzenborger,* 16 Lea, 380. In *R. R. v. Silegman,* 23 S. W. Rep., 298 (Tex. Civ. App.), it was held that a stipulation in a bill of lading that a shipper accepts the cars furnished, cannot prevent his showing that they were not suitable, as this would be an attempt to limit the carrier's duty. As to the duty of the carrier in the shipment of stock, see 6 Cyc., 437 *et seq.* It would be unjust and unreasonable for a carrier thus to be relieved of liability, when he has charge and control of the train of which the particular car is a part, and when the animals have been intrusted

to his care for safe transportation and delivery to the consignee. If, during the journey, the stock require special care and attention, especially where the contingency has arisen from a defective car, the carrier should put himself in the place of the owner and bestow that degree of care upon them which the situation would reasonably suggest as proper under the circumstances. 2 Hutchison on Carriers (1906), sec. 646 (324), and page 712. We held in *Hinkle v. R. R.*, 126 N. C., 932, approving the rule as stated in Greenleaf on Evidence (14 Ed.), sec. 219, that "if the acceptance was special, the burden of proof is still on the carrier to show, not only that the cause of loss was within the terms of the exception, but also that there was on his part no negligence or want of due care." *Smith v. R. R.*, 64 N. C., 235; *Parker v. R. R.*, 133 N. C., 336; *Gardner v. R. R.*, 127 N. C., 293; *Stringfield v.* (462) *R. R.*, 152 N. C., 125. We have held that there is a duty resting upon the carrier to reasonably inspect cars received from connecting carriers to be operated over its road. *Leak v. R. R*, 124 N. C., 455.

We now hold, therefore, that the clauses of the contract by which it is attempted to relieve the carrier of liability for negligence are unreasonable and cannot be upheld, so far as this particular shipment is concerned. The horses and mules were in good condition when delivered to defendant for transportation over its line, and when they were unloaded at Burlington it appears that they had been "smothered and suffocated" in the close car for the want of any ventilation; that they were drenched with perspiration and so greatly weakened and debilitated that they had to be steadied while being removed from the car, in order to prevent their falling from sheer lack of sufficient strength to stand on their feet. Some were "out of breath." The description of the condition of these animals when they were taken from the car is so shocking that we wonder why the ordinary dictates of humanity did not induce a different course on the part of the carrier, without regard to the question of legal duty. It is a plain case of negligence, for which the defendant is liable to plaintiff in damages.

The law in regard to the duties and liabilities of a carrier in the receipt, transportation, and delivery of goods is so fully and clearly discussed by *Justice Ashe* in *Capehart v. R. R.*, 81 N. C., 438, and the decision applies so peculiarly and closely to the facts of this case, that we may well rest our conclusion upon what is therein said by him, and unanimously approved by the Court of which he was such a learned and distinguished member, noted for his singularly clear and forceful statement of legal principles, in their application to the case at hand. After observing that special agreements or clauses in bills of lading exempting carriers from losses by fire and for loss or damage to the shipper's employees, or those imposing the risks of transportation upon the ship-

per, though general and broad in their terms and literally sufficient to embrace every description of risk incident to the journey, must have a fair and reasonable construction and be restricted within just and
(463) proper limits, so that they may not be regarded as stipulating for exemption for willfull misconduct, gross negligence, or even a want of ordinary care, approving what is decided in *Navigation Co. v. Bank,* 6 How. (U. S.), 344, from which is taken the following statement: "Although he (the carrier) was allowed to exempt himself from losses arising out of events and accidents, against which he was a sort of insurer, yet as he had undertaken to carry the goods from one place to another, he was deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and was, therefore, bound to use ordinary care in the custody of the goods and their delivery." After commenting upon the stipulation as to exemption from loss by fire, the requirement as to thirty days notice by the shipper of his claim for damages, and other special exceptions and exculpatory clauses in bills of lading, *Justice Ashe* refers to *Smith v. R. R.,* 64 N. C., 235, and expressly approves the principle as thus stated in that case: "Although a common carrier cannot, by a general notice to such effect, free itself from all liability for property by it transported, yet by notice brought to the knowledge of the owner it may reasonably qualify its liability as common carrier, and in such case it will remain liable for want of ordinary care, *i. e.,* negligence," citing *Glenn v. R. R.,* 63 N. C., 510; *Wyld v. Pinkford,* 8 Mees. and Welsby, 443; *Bodenham v. Bennett,* 4 Price, 31; *Birkett v. Willan,* 2 Barn & Ald., 356; *Bank v. Express Co.,* 93 U. S., 174; *R. R. v. Bauldauff,* 16 Penn. St., 67, and numerous other cases. The case of *Capehart v. R. R* sums up the law as follows:

"1. That a common carrier, being an insurer against all losses and damages except those occurring from the act of God or the public enemy, may by special notice brought to the knowledge of the owner of goods delivered for transportation, or by contract, restrict his liability as an insurer, where there is no negligence on his part.

"2. That he cannot by contract even limit his responsibility for loss or damage resulting from his want of the due exercise of ordinary care."

"And now that railways have become so numerous, and as carriers have absorbed so much of that class of business which is so im-
(464) portant to our increasing commerce and the more frequent intercourse of our people, to hold a different doctrine would lead to the abolition of those safeguards of life and property which public policy demands shall be preserved and protected." *Selby v. R. R.,* 113 N. C., 588; *Whitehead v. R. R.,* 87 N. C., 255.

In the cases above mentioned, the courts were not considering the question of limiting the amount of recovery by fixing in advance, not arbitrarily, but by reasonable agreement, the value of stock per head, or the value of other kinds of property, and were merely referring to the liability of the carrier for any loss resulting from negligence on his part. *Everett v. R. R.*, 138 N. C., 68.

The question as to the validity of the clause restricting the recovery to the agreed value, per head, of the stock, which was $100 each, does not arise in this case, as the jury were instructed to allow only that amount, and plaintiff did not appeal. The point as to the five days notice of the plaintiff's claim is eliminated by the finding of the jury, under proper instructions from the court, that defendant, by its duly authorized freight agent, had actual notice of the condition of the horses and mules and of the plaintiff's claim. This finding was made under a charge from the court in exact accordance with our decision upon that question when the case was here before. There was not only evidence, but strong evidence, to warrant the finding, as the agent of the defendant was standing by, and within 8 or 10 feet, when the stock was being unloaded, and viewing, if not superintending, the work of discharging the freight. *Kime v. R. R.*, 156 N. C., 451, and 153 N. C., 398. The validity of the clause as to five days notice of the shipper's claim for loss is not, therefore, involved in this appeal.

There are other exceptions, but they are substantially covered by what we have said in regard to those discussed by us and selected as the principal ones in the case. None of the exceptions have impressed us as being meritorious.

No error.

Cited: Mule Co. v. R. R., ante, 238, 248; *Baldwin v. R. R.*, 170 N. C., 13; *Horse Exchange v. R. R.*, 171 N. C., 70; *Schloss v. R. R., ib.*, 352.

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(465)

WHITLOCK AND ROBINSON, RECEIVERS, v. C. L. ALEXANDER.

(Filed 4 December, 1912.)

1. Corporations—Stockholders — Unpaid Capital — Directors — Trusts and Trustees—Insolvency—Debtor and Creditor.

The capital stock of a corporation, including unpaid indebtedness for stock issued and held by the stockholders, shall, if required, be considered a trust fund for the creditors; and, under ordinary conditions, persons having business dealings with the companies have a right to

suppose that this capital stock has been paid in, in money or money's worth; and in case of insolvency, any unpaid balance, by proper proceedings, may be made available to the extent required for the settlement of outstanding claims.

2. Corporations—Purchase of Property—Directors—Valuation—Good Faith—Fraud—Stockholder's Liability.

By express provision of our statute, Revisal, secs. 1160 and 1161, the holders of certificates of stock issued by a corporation for the legitimate purchase of property with which to conduct its business are not liable for any further call or payment for the shares by reason of the purchase, in the absence of actual fraud in the valuation, the judgment of the directors being conclusive as to the value of the property thus purchased.

3. Same—Evidence—Receivers.

In an action by the receivers of an insolvent corporation to compel the payment of a subscription to stock issued for property acquired by the corporation for the conduct of the business, evidence tending to show a grossly excessive valuation of the property by the directors, knowingly made, is strong evidence of fraud, and may be conclusive thereof.

4. Same—Patent Rights—Questions for Jury.

For the purpose of acquiring certain patent rights for use in its business, a corporation, by resolution of the board of directors, valued the patents at a certain amount and issued common stock therefor, with a certain amount of preferred stock for financing the business. After the insolvency of the corporation had been adjudicated, the receivers brought suit against a holder of said stock, who defended the action upon the ground that it was fully paid and no assessment was due thereon. There was conflicting evidence as to whether the patent right was a valuable asset sufficient to justify the price, and as to whether the insolvency of the corporation resulted from bad management or other causes, and it is *Held*, the patents should be considered as property, and the evidence raised a question for the jury upon the issue as to fraud on the part of the directors in fixing the value of the patents thus acquired.

5. Corporations—Insolvency — Receivers — Shareholders' Valuation — Directors—Minute-book—Resolutions—Omissions—Evidence.

In an action by the receivers of an insolvent corporation to require the holder of stock issued for certain patent rights, which the corporation had acquired for the conduct of its business, to pay in the value of his stock, the defendant claimed that the directors of the corporation had, in good faith, fixed the value of the patents and that no assessment was due on the stock issued therefor: *Held*, while a transaction of this character should be pursuant to corporate action, it would not be rendered invalid because it was, by inadvertence, omitted from the minutes of the proceedings.

6. Corporations—Receivers—Principal and Agent—Dual Agency.

When certain patent rights have been acquired by a corporation, used in its business, and are still held and dealt with as part of its assets, the

acquisition and purchase may not be assailed by receivers in insolvency proceedings on the ground that the agent of the patentee acted without his authority in making the sale, or that he was acting as agent of both parties, the patentee having made no claim thereto.

7. Corporations—Solvency—Stock Dividends—Earnings.

Stock dividends may be declared by a solvent corporation from its profits, where the total amount of the stock is kept within the charter limits and the profits have really been earned.

8. Same—Debtor and Creditor—Notice.

The issuance of paid-up stock as a dividend cannot be attacked by an existent creditor, nor by one who has notice of the facts, since it withdraws nothing from the corporation or in any way depletes its assets.

9. Same—Insolvency—Stockholders' Liability.

Such issuances in other respects, however, is regarded as an increase of the capital stock, and as to subsequent creditors the holder may be held accountable very much on the principle which obtains in reference to stock of original issue.

10. Same—Stockholders—Overvaluation—Fraud — Evidence — Questions for Jury.

The rule requiring that stock dividends shall be issued by the directors of a corporation in "good faith" does not refer the matter absolutely to the action of the directorate or other managing agents of the company, for they are required to act with good sense and reasonable business judgment; and if this character of stock has been issued upon an excessive overvaluation of the corporation's property, or by an excessive and entirely unwarranted estimate of the profits or the unearned increment, and at the time the corporation was embarrassed with debt, and the stockholders have taken the stock dividends with notice or knowledge of all the circumstances, this would be actual fraud, and, upon conflicting evidence, the issue should be determined by the jury, in an action brought by the receivers to hold the stockholders liable for the unpaid debts of the concern.

11. Corporations—Insolvency—Receivers—Stockholder—Debtor and Creditor —Counterclaim.

A stockholder in an insolvent corporation who is sued by its receiver for payment of assessment upon his stock may not set up by way of counterclaim a debt alleged to be due him by the corporation, as the receiver and the stockholder do not claim in the same right, the receiver claiming for the creditors of the corporation; and the defendant is only entitled to offset against the company such dividends as he may be entitled to in the distribution of the assets among the shareholders.

APPEAL by defendant from *Daniels, J.*, at July Term, 1912, (467) of MECKLENBURG.

Action by the receivers of the Carolina Ice Company, insolvent, to recover of defendant, as holder and owner of 62½ shares of stock, $100

each, in said corporation, 31¼ shares being on original subscription, issued July, 1908, and 31¼ by reason of a stock dividend, issued 11 February, 1909, the claim being that nothing of value had been paid on either issue. The defendant having denied liability, issues were submitted and responded to by jury as follows:

1. Are the 31¼ shares of stock of the Carolina Ice Machine Company mentioned in the third paragraph of complaint, held by the defendant, unpaid, as alleged in the complaint? A. Yes.

2. Are the 31¼ shares of stock of the Carolina Ice Machine Company mentioned in the fourth paragraph of the complaint, held by the defendant, unpaid, as alleged in the complaint? A. Yes.

3. In what amount is the defendant indebted to the plaintiffs on account of said unpaid stock? A. $6,250, with interest from 11 February, 1911.

(468) At close of testimony, the court charged the jury that if they believed the evidence they would answer the issues for plaintiff. Verdict was rendered as stated. There was judgment on verdict, and defendant excepted and appealed, assigning for error certain rulings of the court on questions of evidence, the charge of the court as given, and the judgment rendered.

Burwell & Cansler and Tillett & Guthrie for plaintiff.

F. I. Osborne, Pharr & Bell, and Maxwell & Keerans for defendant.

HOKE, J., after stating the case: The decisions of this State are to the effect, and the position is in accord with doctrine prevailing in other jurisdictions, that the capital stock of a corporation, including unpaid indebtedness for stock issued and held by the stockholders, shall, if required, be considered a trust fund for the creditors; that, under ordinary conditions, persons having business dealings with the companies have a right to suppose that this capital stock has been paid in, in money or in money's worth, and in case of insolvency any unpaid balance may, by proper proceedings, be made available to the extent required for the settlement of outstanding claims. *Pender v. Speight,* 159 N. C., 612; *McIver v. Hardware Co.,* 144 N. C., 478; *Hobgood v. Ehlen,* 141 N. C., 344; *Bank v. Cotton Mills,* 115 N. C., 507; *Hill v. Lumber Co.,* 113 N. C., 174; *Clayton v. Ore Knob Co.,* 109 N. C., 385; *Foundry Co. v. Killian,* 99 N. C., 501; *Fogg v. Blair,* 139 U. S., 118; *Handley v. Stultz,* 139 U. S., 417; *Sawyer v. Hoag,* 84 U. S., 610.

In applying the doctrine, where payment in property is permissible and has been attempted, the question frequently occurs as to the principle upon which the liability of the stockholder may be made to rest. Some of the courts administer what is not inaptly termed the "true

value" doctrine, and hold the stockholder to the difference between the par value of the stock and the true value of the property in money, and this regardless of the question of fraud (10 Cyc., 473), while others have maintained the "good faith doctrine," referring the question primarily and very largely to the decision of the corporate authorities having charge of the matter when they have exercised their honest judgment in making the valuation. Whatever may have been the leanings of our former decisions, this view must now prevail with (469) us, our statute making provision on the subject as follows:

"Nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this chapter, except as herein provided in case of the purchase of property or labor performed, and no loan of money shall be made to a stockholder or officer thereof; and if any such loan be made, the officers who make it, or assent thereto, shall be jointly and severally liable, to the extent of such loan and interest, for all the debts of the corporation until the repayment of the sum so loaned.

"1161. Any corporation formed under this chapter may purchase mines, manufactories, or other property necessary for its business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full-paid stock, and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of actual fraud the judgment of the directors as to the value of the property shall be conclusive; and in all statements and reports of the corporation to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the facts."

While some of the courts, sustaining the position that actual fraud is required to charge a stockholder who has paid for his stock in property, have held that a "gross and obvious overvaluation of property" is strong evidence of fraud (*Coit v. Amalgamating Co.*, 119 U. S., 343), and our own Court, going further, has held that a valuation grossly excessive and knowingly made may be conclusive on this subject. (*Hobgood v. Ehlen, supra,* a decision made since the enactment of the statute and well supported by authority, 2 Clark & Marshall on Corporations, p. 1215; *Coleman v. Howe,* 154 Ill., 458; *Land Co. v. Birmingham,* 92 Ala., 407), we think that the principles embodied in the statute, by correct interpretation, are against the rulings of the lower court as presented in the record. On the hearing it was made to appear (470) that Casper W. Miles was the patentee and owner of two letters patent for improvements in "compressors for ice machines," and that, on or about 30 June, 1908, the Carolina Ice Machine Company was formed

by defendant, C. L. Alexander, J. Reed Curry, and S. S. Miles, brother of the patentee, for the purpose of manufacturing and selling ice and refrigerating machines, with a capital stock of $25,000, $12,500 of which was preferred and $12,500 of which was common stock at par value of $100 per share; that 62½ shares of common stock was issued to S. S. Miles, 34¼ to J. Reed Curry, and 31¼ to defendant C. L. Alexander; that shortly thereafter S. S. Miles, acting under a power of attorney from Casper W. Miles, assigned said patents to the corporation, and the manufacturing and sale of the machines in the States of North and South Carolina were entered upon and conducted until 28 September, 1910, when, on proceedings instituted, the corporation was placed in the hands of receivers, the plaintiffs in the present suit; that on or about 11 February, 1909, pursuant to a resolution of the company, reciting adequate profits, a stock dividend was declared, and under the same there was issued to the defendant C. L. Alexander 31¼ additional shares of stock, etc.

These facts having been shown, the defendant offered evidence tending to prove that the original stock held by him should be properly considered and dealt with as paid-up stock, the same having been issued and applied in the purchase of the patents, assigned by Miles to the company and under which the business had been carried on.

The evidence in question, by parol and by entries in the corporation journals, was to the effect that the common stock to the full amount of $12,500 was issued and applied, as stated, for the patents in question, and that 31¼ shares had been issued to defendant Alexander, under an arrangement for value with the owner, and that this had been done by corporate action in which the patents had been formally valued and resolutions passed directing that the patents be purchased for the full amount of the common stock, and that if such action and resolution were
(471) not on the books of the company, it should have been; a witness stating his recollection of the resolution as follows: *Resolved,* That the Carolina Ice Machine Company purchase patent rights for North and South Carolina from S. S Miles and give him therefor $12,500 of common stock for the patent." There was also evidence tending to show that, at the time of this purchase, the patent was fully worth the amount paid for it, $12,500, and was now a right of considerable value.

The plaintiff having offered the minute-book of the company, purporting to give the minutes of the first meeting of the stockholders and board of directors and which failed to disclose or make any reference to the transaction, as claimed by plaintiff, the evidence referred to was excluded by the court or held to be of no effect upon the issue, and in this we think there was error. There does not seem to be requirement

that any memorandum as to the formal valuation should be made and entered on the minutes, and, if it were otherwise, there could hardly be a more formal expression given than a resolution of the company that the patents be purchased for the full amount of the common stock. Undoubtedly, a transaction of this character should be pursuant to corporate action, but, if such action was held, it would not be rendered invalid because it was, by inadvertence, omitted from the minutes. *Handley v. Stultz, supra.*

It was further contended that "patent rights for North and South Carolina were not worth the par value of the $12,500 of stock and could not be treated as payment for the same." There are, assuredly, well-considered cases to the effect that an untried and worthless patent may not be considered as a valid payment for a stock subscription, but these will be found in jurisdictions which hold to the "true value" doctrine, or to have been rendered on facts widely variant from those presented here. As the case goes back for a new trial of the issue, it is not desirable to dwell upon the evidence at any great length, but, while there is testimony tending to support plaintiff's position, there are also facts in evidence tending to show that these patents, made the basis of the enterprise, were of real value, and, at the time of the transaction, the business gave good promise of substantial returns. There was further testimony on the part of the defendant tending to show that the embarrassment which attended the effort and which resulted in in- (472)
solvency could well be attributed to the use of poor material in the manufacture and to mismanagement in the conduct of the business, particularly on the part of the agents intrusted with the sales, rather than to any defect in the device or the process by which it was protected, and that the patent was and is now a very valuable one. In such case the authorities favor the position that the patent should be considered as property and the facts concerning it should be heard by the jury. *Kimball v. Brick Co.,* 119 Fed., 102; *Nail Co. v. Spring Co.,* 142 Mass., 349; *Whitehill v. Jacobs,* 75 Wis., 474.

Again, it was insisted that no rights were acquired by the company, because S. S. Miles, acting under a power of attorney from his brother, the patentee, had no right to sell for stock, and that he was acting in capacity of dual agent, etc. These considerations might be given weight if Casper Miles, the owner of the patent, were moving in the matter, but cannot avail in this transaction, where the patents were formally assigned and have been used by the company since, and are now held as part of its assets.

On perusal of the record, we are clearly of opinion that the evidence offered should be received and submitted to the jury on the question whether the 31¼ shares of original issue are held by defendant as paid-up stock.

In reference to the dividend stock, 31¼ shares of which are also held by defendant, this is a method not infrequently resorted to for the purpose of distributing the profits of a corporation among its stockholders, and, where the total amount of stock is kept within the charter limits and the profits have been really earned, it is considered in this country as legitimate and, at times, not undesirable. 2 Cook on Corporations (6 Ed.), sec. 536; Thompson on Corporations, sec. 5274. As shown in *Trust Co. v. Mason,* 152 N. C., 660, a holder of such stock has withdrawn nothing from the corporation nor in any way depleted its assets, and accordingly, being issued as paid-up stock, the transaction cannot be assailed by an existent creditor nor by one who has been informed of the circumstances. *Handley v. Stultz, supra;* Clark on Corporations,
(473) pp. 368, 369. It is, however, properly regarded as an increase of the capital stock, and, as subsequent creditors, the holder of such stock may be held accountable, and very much on the principle which obtains here in regard to stock of original issue. If issued in good faith, it may not afterwards, as a rule, be successfully questioned. In this connection, it should be borne in mind that a recognition of the good faith rule does not at all mean that the matter is referred absolutely to the action of the directorate or other managing agents of the company. These officers are supposed and are held to act with good sense and reasonable business prudence. In 10 Cyc. the author, speaking to this question, has said: "It has been held that the belief that a prudent and sensible business man would hold in the ordinary conduct of his own business affairs is what constitutes good faith in the valuation of property for which the stock of a corporation is issued"; and, if they have declared a dividend and issued stock for it by an excessive overvaluation of property or by an excessive and entirely unwarranted estimate of the profits or the unearned increment, this would be evidence from which fraud could be inferred, and, in extreme cases, it might, as we have seen, be regarded as conclusive. While the good faith rule will be administered here in the light of these principles, the fact remains that, under our statute and according to well-considered decisions, obtaining here and elsewhere, in order to charge a stockholder with further liability, who has received his issue by way of a dividend as paid-up stock, actual fraud must be established, and, in consideration of all the facts in evidence, we are of opinion that the question of defendant's liability as to this dividend stock must also be referred to the jury.

It may be well to note that we are considering the case of a corporation embarrased with debt and where the stockholders have taken stock dividends with notice and even knowledge of all the circumstances, and the question of an increase of capital stock issued by a corporation which is a going concern, and apparently prosperous, is in no way presented.

In such case it has been held that within its chartered limits a company may, under some circumstances, issue stock as paid up "at its market value instead of its par value, and, if the transaction is in good faith, the holders will not be held further liable to creditors." (474) *R. R. v. Harress,* 128 Fed., 321; *Handley v. Stultz, supra;* Clark on Corporations, 368; 2 Purdy's Beach on Corporations, pp. 654-655.

It was contended for defendant that he was entitled to insist on a counterclaim by reason of an indebtedness existent in his favor against the company at the time of proceedings instituted, but, under our decisions and on the insolvency of the company and the appointment of receivers, the defendant's claim is lacking in one of the essentials of a valid counterclaim, that the parties, debtor and creditor, must claim in the same right. The receivers now claim for creditors, and defendants are only entitled to an offset to the extent of the dividend declared, and this was awarded him in the judgment as now rendered. *Smith v. French,* 141 N. C., 1-7; *Pate v. Oliver,* 104 N. C., 458. For the reasons heretofore stated, we are of opinion that defendants are entitled to a new trial of the issues, and it is so ordered.

New trial.

BANK OF TARBORO v. GEORGE A. HOLDERNESS ET ALS.

(Filed 11 December, 1912.)

1. Banks—Assets—Trusts and Trustees—Pooling Shares—Illegal Combination—Costs and Expenses.

The assets of a bank are a trust fund, primarily for its creditors and secondarily for its stockholders, and where the officers and directors thereof have entered into an illegal pooling of the stock to secure control of the bank, and money has been expended in the drafting of the illegal agreement and in an endeavor to maintain it in the courts, the bank being a mere nominal party to the action and not a party to the contract, it is unlawful for the directors and officers to charge up this expense to the bank, for it is their individual liability.

2. Same—Shareholders—Right of Action.

When the officers and some of the stockholders of a bank have incurred court costs and other expenses in their effort to maintain an illegal agreement to pool their stock to secure control of its management, which they have caused the bank to pay, an action will lie in behalf of a stockholder to compel the officers and stockholders participating in the illegal agreement to repay the money of the bank thus wrongfully used. In this case the question of *ultra vires* does not arise.

BROWN, J., dissenting.

BANK *v.* HOLDERNESS.

APPEAL by defendants from *Carter, J.,* during the Fall Term, (475) 1912, of EDGECOMBE.

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

John L. Bridgers for plaintiff.
L. V. Bassett and Bunn & Spruill for defendants.

CLARK, C. J. The defendants were parties to a pooling contract or "voting-trust" agreement to secure to themselves for the period of fifteen years the management and control of the plaintiff bank. The defendants were respectively the president, vice president, and cashier of the bank. One of the minority stockholders, who did not join in the agreement to pool the stock, brought an action to determine the legality thereof, contending that it was illegal and void. This Court upheld that contention. *Bridgers v. Bank,* 152 N. C., 293. The defendants, out of the funds of the bank, paid the expenses of the preparation and drafting of said pooling agreement and of defending the action in which it was held illegal. This action is brought by the bank to recover the sums thus expended, on the ground that this disbursement of its funds was unauthorized and that the defendants should have paid such expenses personally. The court below sustained this contention, and the defendants appealed.

The bank was not a party to the contract and agreement, and took no part in the making or execution of the contract. The question of *ultra vires,* therefore, does not arise. The bank was merely a formal party in the action to declare the voting trust illegal.

The defense set up, that these defendants acted in good faith, is not germane to this question, which is merely as to their legal right to use the funds of the bank for this purpose. Certain officers and stock- (476) holders of the bank made an agreement among themselves to pool the stock, which agreement was in violation of both the State and Federal statutes. *Bank v. Bridgers, supra.* The bank was not concerned in that agreement, and did not authorize it. The cost of making it and the expenditure made in the effort to maintain the legality of the "voting trust" cannot be assessed against the bank. Its assets are a trust fund, primarily for its creditors and secondarily for its stockholders. This fund could not be diverted to the payment of the expenses of an agreement among the stockholders, even if such agreement had been valid and signed by all the stockholders. *A fortiori,* such expenses are not a valid charge against the bank when the agreement is invalid and was signed by only a portion of the stockholders.

These defendants should have paid all the attendant expenses out of their own funds. In taking the money of the bank for that purpose they acted without legal authority. The judgment directing payment to the bank of its money thus wrongfully expended by them must be

Affirmed.

BROWN, J., dissents.

W. H. PRITCHARD v. BOARD OF COMMISSIONERS OF ORANGE COUNTY ET AL.

(Filed 20 November, 1912.)

1. Cities and Towns—Bond Issues—Statutes—"Yea" and "Nay" Vote—Separate Readings—Constitutional Law.

While the bonds issued by Orange County for road purposes under chapter 600, Public-Local Laws of 1911, are for necessary expenses, yet if the act was not passed in conformity with Const., Art. II, sec. 14, the county commissioners are not authorized to levy a tax in excess of the constitutional limitation with which to pay interest and provide for a sinking fund. *Analysis* of the constitutional requirements for the levying of taxes by a county for necessary and other expenses by CLARK, C. J., under this article and under Article V, sec. 6, and Article VII, sec. 7.

2. Same—Prior Statutes—Interpretation of Statutes.

An act which has been regularly passed, upon separate days, with the "yea" and "nay" vote required by Article II, sec. 14, of the Constitution, authorizing the levying a tax for the purpose of working the public roads, cannot be construed in connection with an act passed for issuing bonds for road purposes, not passed as required by this section of the Constitution, so as to authorize a tax levy in excess of that limited by the Constitution.

APPEAL by defendants from *Whedbee, J.*, at August Term, (477) 1912, of ORANGE.

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

Manning & Everett for plaintiff.
Frank Nash for defendants.

CLARK, C. J. This is a motion to amend the opinion and judgment rendered in this cause at its term (159 N. C., 636) so as to adjudge that the defendant commissioners have authority to levy a special tax to pay interest and provide a sinking fund to pay said bonds at their maturity.

The purchaser of the bonds has objected that while chapter 600,

Public-Local Laws 1911, authorized bonds which were a valid indebtedness of the county, the county commissioners were not authorized to levy special taxes in excess of the constitutional limitation, because said act was not passed in the manner prescribed by Constitution, Art. II, sec. 14. *Commissioners v. McDonald,* 148 N. C., 125.

The requirements of the Constitution have often been summed up and are as follows:

> **1. For necessary expenses, the county commissioners may levy up to the constitutional limitation without a vote of the people or legislative permission.**
>
> **2. For necessary expenses, the county commissioners may exceed the constitutional limitation by special legislative authority without a vote of the people.**—*Constitution, Art. V, sec. 6.*
>
> **3. For other purposes than necessary expenses, a tax cannot be levied either within or in excess of the constitutional limitation except by vote of the people under special legislative authority.**—*Constitution, Art. VII, sec. 7.*

(478) The above summary and analysis first laid down in *Herring v. Dixon,* 122 N. C., 420, has been quoted *verbatim* and incorporated in *Tate v. Commissioners, ib.,* 815; *Smathers v. Commissioners,* 125 N. C., 488; *Cotton Mills v. Waxhaw,* 130 N. C., 298; *R. R. v. Commissioners,* 148 N. C., 251.

Admitting the objection to chapter 600, Public-Local Laws 1911, is valid, the defendants contend that the defect is cured by Laws 1903, ch. 486, sec. 9, which reads as follows: "The county commissioners of Orange County are hereby authorized and empowered to levy a special road tax for any township or road district in said county not exceeding one dollar on the hundred dollars of property and three dollars on the poll, always maintaining the constitutional equation between property and poll, and may levy a different rate in each township." This last act was passed in entire conformity to the requirements of Constitution, Art. II, sec. 14.

It is true, also, that the Legislature can enlarge a town or county or road district without the act complying with Article II, sec. 14. *Lutterloh v. Fayetteville,* 149 N. C., 65; *Trustees v. Webb,* 155 N. C., 379; *Comrs. v. Comrs.,* 157 N. C., 514. But the act of 1903 was an act to work the roads by taxation, and did not contemplate issuing bonds. The "special road tax" therein authorized was for payment of that expense and not for payment of interest and bonds. The act of 1911, ch. 600, Public Laws, contemplated a "change from a township to a county system," but it also contemplated a bond issue of $250,000, which was not in the purview of the act of 1903.

The "special road tax" in the act of 1903 for working the roads cannot be held authority to exceed the constitutional limitation for payment of principal or interest of the $250,000 bonds authorized by the act of 1911. The special legislative authority required by Constitution, Art. V, sec. 6 (see paragraph 2 of analysis above), must be conferred in the manner required by Constitution, Art. II, sec. 14. As the General Assembly will be in session in a few days, this will not entail (479) much delay. The bonds were nevertheless a valid tender. *Hotel Co. v. Red Springs,* 157 N. C., 140; *Underwood v. Asheboro,* 152 N. C., 641; *Jones v. New Bern, ibid.,* 64; *Comrs. v. McDonald,* 148 N. C., 125.

Motion denied.

Cited: Hargrave v. Comrs., 168 N. C., 627.

P. C. WHITLOCK AND W. S. O'B. ROBINSON, RECEIVERS, v. W. S. ALEXANDER ET AL.

(Filed 20 November, 1912.)

1. Corporations—Insolvency—Directors—Advantage—Debtor and Creditor—Trusts and Trustees—Notes—Indorsers—Payment—Collateral Bonds.

The principle that the directors of a corporation stand in a fiduciary relation to it, and may not, in case of its insolvency, hold to themselves a preference or advantage obtained or attempted over other creditors or more meritorious claimants, does not apply to instances where the directors had been indorsers on the corporation note to a bank, which had become insistent for payment, and the defendant directors issued bonds secured by mortgage on the corporation's assets, purchased them, and with the bonds as collateral to their individual note, obtained the money and with it satisfied the corporation's note on which they had been indorsers, under an agreement to that effect with the bank.

2. Same—Repudiation—Advantage.

When the note of an insolvent corporation has been paid by its directors, who had indorsed it, by giving their personal note to the bank with bonds secured by a mortgage on the corporate assets, issued to take up the corporation's note, and which they had by agreement bought for the purpose, under a pressing demand of the bank for payment, the corporation or its receivers will not be allowed to accept the proceeds of the transaction and repudiate the stipulation attaching to it.

3. Corporations—Insolvent—Directors—Debtor and Creditor—General Assets—Mortgage—Equity—Cancellation.

The directors of an insolvent corporation having issued bonds secured by a mortgage on its assets to take up the corporate note on which they

were indorsers, and having bought the bonds and given their personal note with the bonds as collateral, and taken up the old note, for the payment of which the creditor was pressing; it is *Held*, (1) that the moneys received from the sale of the bonds to the directors were never general assets of the corporation, and, in the absence of bad faith, could not be recovered by the corporation; (2) that the only relief the corporation is entitled to is the cancellation of the mortgage; (3) the directors are general creditors of the corporation according to the amount of their respective claims.

(480) APPEAL by defendant from *Daniels, J.*, at July Term, 1912, of MECKLENBURG. On the verdict the court entered judgment as follows:

"This cause coming on to be heard, and the jury having found the issues submitted to them as appears by the record, it is now, on motion of the counsel for the plaintiffs and upon the facts so found by the jury, ordered and adjudged that the plaintiffs, as receivers of the Carolina Ice Machine Company, do recover of the defendants above named the sum of $15,000, with interest on same from 11 August, 1910, and the costs of the action to be taxed by the clerk. It is further ordered, by consent of the counsel for the respective parties, that no execution shall issue on this judgment until by the taking of an account it shall be ascertained to what credit or credits the defendants may be entitled on account of dividends due to them out of the estate of the insolvent corporation on account of claims due to them as creditors thereof, unless the court for cause shown and upon motion of plaintiffs' counsel shall order execution to issue."

Defendants excepted and appealed, assigning for error that on the facts admitted and established by the verdict the judgment should be so modified as to relieve defendants from payment of the $15,000, and declaring their right to share pro rata in the company's assets.

Burwell & Cansler and Tillett & Guthrie for plaintiff.

Maxwell & Keerans, F. I. Osborne, and Bell & Pharr for defendants.

(481) HOKE, J. The action was brought by plaintiffs, receivers of the Carolina Ice Machine Company, against defendants, directors of said company, to recover of them the sum of $15,000 as the proceeds of the sale of that amount of bonds of the company which the directors had applied to the payment of the company's notes amounting to $15,000, upon which said defendants were indorsers, the corporation at the time of the transaction being insolvent, and defendants knowing or presumed to know of such insolvency. There were statements in the pleadings and

evidence tending to show that on or about July, 1910, the defendant company was indebted to the Commercial Bank in a large amount, $15,000 of which was evidenced by demand notes of the company, on which the defendants were indorsers; that the directors, with a view of raising money to meet the present demands upon the company, determined to issue bonds of the corporation and secure the same by mortgage on its assets; that the bank becoming insistent on payment or further security for its claims, under an arrangement with the managing officers of the company, the defendants agreed to buy $15,000 of these bonds, the proceeds to be applied to the payment of the demand notes of the bank on which said defendant directors were indorsers; that pursuant to this arrangement, $15,000 of bonds, secured by a mortgage on the company's assets, were issued and sold to defendants, who made their note to the bank for $15,000, depositing the bonds as collateral, and with the money so obtained the demand notes, on which the defendants were indorsers, was taken up and satisfied. Liability having been denied, issues were submitted and responded to by the jury as follows:

1. Did the Carolina Ice Machine Company, on or about 11 August, 1910, sell $15,000 of the bonds of the company described in the complaint at par, as alleged in the complaint? A. Yes.

2. Did said defendants, as officers and directors of said corporation, thereupon apply the proceeds of said sale, or any part thereof, to the payment of an indebtedness of the Carolina Ice Machine Company to the Commercial National Bank, amounting to about $15,000, upon which said directors were indorsers or sureties? A. Yes; $15,000.

3. Did the directors, the defendants, pay the money for the (482) bonds under an agreement that money so paid should be applied for the payment of the notes for $15,000 upon which they were indorsers? A. Yes.

4. Was the Carolina Ice Machine Company, at the time of the payment of said indebtedness to said bank, insolvent? A. Yes.

5. If so, was such insolvency known to the defendants? A. Yes.

6. In what amount are the defendants indebted to the plaintiffs on account of the said application of the proceeds of the said bonds? A. $15,000, with interest from 11 August, 1911.

The answer to the sixth issue being made by the court as a legal conclusion from the verdict on the other issues.

The decisions of this Court have been uniformly insistent on the position "that the directors of these corporate bodies shall be considered as trustees in respect to their corporate management and their business dealings with the corporate property," and applying the principle, it has been frequently held that in case of insolvency, their officers shall not

be allowed to secure or hold a preference or advantage obtained or attempted over other creditors or more meritorious claimants. *Pender v. Speight,* 159 N. C., 612; *McIver v. Hardware Co.,* 144 N. C., 478; *Graham v. Carr,* 130 N. C., 271; *Bank v. Cotton Mills,* 115 N. C., 507; *Hill v. Lumber Co.,* 113 N. C., 173.

While giving full adherence to this salutary doctrine, we are of opinion that the facts do not bring the plaintiffs' present claim within the principle; for it proceeds and is dependent upon the erroneous position that the $15,000 arising from the sale of these bonds became assets of the company, subject to general distribution, whereas all the evidence tends to show, and the crucial fact is established by the verdict of the jury on the third issue, "That this money was paid by these defendants under an agreement that the money so paid should be applied on the payment of the notes for $15,000, upon which the defendants were indorsers."

In such case, it is well recognized that the company or its
(483) present representatives will not be allowed to accept the proceeds of the transaction and repudiate the stipulation attaching to it. *Bank v. Justice,* 157 N. C., 373; *Sprunt v. May,* 156 N. C., 388.

It thus appears that the money obtained by the sale of the bonds in question never became the general assets of the corporation, but was procured and advanced by these defendants for the express and only purpose of taking up the notes, upon which they were already indorsers. In *Graham v. Carr, supra,* a case more particularly relied upon by plaintiffs, there was an outright purchase of corporate property by a director of the company, and the proceeds of the sale undoubtedly constituted general assets and were properly so treated; but in our case, as stated, the money was advanced for the specific purpose as indicated and was never held by the corporation for general purposes. The only change wrought by this transaction in defendant's position is that whereas before they were indorsers of the company's notes and on payment thereof would have become general creditors, they are now, as holders of these bonds, creditors to the same amount, secured by a mortgage on the company's property. There is nothing whatever to indicate bad faith on the part of the defendants. Not a dollar of the company's general assets has been withdrawn or appropriated by them. They stand just as they would have done, except for mortgage referred to, giving them a lien on the corporation assets. Under the principle heretofore stated, this advantage must be surrendered, and, in our opinion, on the facts established, this is the extent of the relief to which plaintiffs are entitled. The verdict on the sixth issue and the judgment for $15,000 will therefore be set aside and judgment entered that the mort-

gage on the company's property be surrendered and canceled and defendants declared general creditors of the company according to the amount of their respective claims.

Error.

Cited: *Wall v. Rothrock,* 171 N. C., 391.

(484)

J. L. LUMMUS v. LEROY DAVIDSON ET AL.

(Filed 20 November, 1912.)

Trusts and Trustees—Uses and Trusts—Statute of Uses—Active Trusts.

A devise of lands to be held in trust for the purpose of collecting the rents and profits and paying them over to the beneficiary named, and to perform other duties, creates an active trust, evidencing the testator's intent that the legal title should remain in the trustee to execute the uses designated; and, the trust being active, it is not executed by the statute of uses, and the lands may not be subjected to execution issued on a judgment debt of the *cestui que trust.* The distinction is drawn between this case and those wherein there has been a devise or conveyance of rents and profits to a person directly, by ALLEN, J.

APPEAL by plaintiffs from *Justice, J.,* at October Term, 1912, of MECKLENBURG.

Ejectment.

The plaintiff claims to be the owner of the land in controversy under a sale under execution against LeRoy Davidson, who derived his title and interest under the will of A. B. Davidson, the material parts of which are as follows:

"Item 4. I give and bequeath to my son, E. L. B. Davidson, all my interest in and to a certain lot and house situate in the city of Charlotte and commonly called the 'Bank Building,' and known also as No. 5 East Trade Street, to be held by him in trust, nevertheless, for the following purposes, to wit: to collect the rents and profits arising therefrom and to pay the same over to my son, LeRoy Davidson, after having deducted therefrom the ratable part of the taxes to be assessed against said property, as well as the ratable part of any repairs that may have been made upon said realty necessary to preserve the property; but I hereby expressly charge the real estate in this item devised with the payment of any mortgage that may be upon the same at my death to the exoneration of my personal estate."

"Item 10. I will and direct that all the residue of my estate be converted into money by my executors, and to this end they are hereby authorized and empowered to sell, either at public or private sale, (485) as they deem best, for this purpose, all my real and personal estate, and the proceeds arising therefrom, together with the collections made by them upon debts owing to my estate, after the payment of my debts and incidental expenses of administration, they shall divide equally among my children, share and share alike, living at the date of the execution of this will."

"Item 11. I hereby name and appoint E. L. B. Davidson, and my friend, John E. Oates, executors of this my last will and testament."

At the time of the death of the said A. B. Davidson, on 4 July, 1896, there was a mortgage upon said property to secure a note executed by him in the sum of $2,000, which mortgage has never been canceled and the debt has never been satisfied.

It was admitted on the trial that, at the time of the death of A. B. Davidson, the rents and profis from his one-half of said lot were less than $500 per annum, and out of said rents and profits the interest on the mortgage of $2,000 and the taxes on the property were to be paid; the plaintiff further admitted that the mortgage or deed of trust for $2,000 is still on the property, and that LeRoy Davidson, at the time of the levy and sale under the devise in the will of A. B. Davidson, received the net rents and profits on one-half of said bank lot from the trustee, E. L. B. Davidson, who was in possession.

At the conclusion of the evidence, his Honor, being of the opinion that said trust estate is not liable to levy and sale on execution at law, rendered judgment accordingly, which is set out in the record, and from said judgment the plaintiff appealed to the Supreme Court, and assigned the said ruling as error.

J. W. Hutchison for plaintiff.
Maxwell & Keerans for defendant.

ALLEN, J. We have carefully considered the full and learned brief of counsel for appellant, supplemented, as it was, by an interesting oral argument, but we cannot agree to his conclusions.

Prior to the act of 1812, no equity could be sold under execution, nor can an equity be sold since the statute, "unless the sale of the equity can draw to it the legal estate, which cannot be if the legal estate is (486) hitched to some other equity, because, then, equal forces are pulling in opposite directions." *Tally v. Reid,* 72 N. C., 339; *Love v. Smathers,* 82 N. C., 372; *Everett v. Raby,* 104 N. C., 480; *Gorrell v. Alspaugh,* 120 N. C., 367; *May v. Getty,* 140 N. C., 320.

It follows, therefore, if the trusts created by the will of A. B. Davidson are active trusts, and it is necessary for the trustee to hold the legal title to perform them, that the title or interest of LeRoy Davidson cannot draw to it the legal estate and is not subject to sale under execution.

The line is clearly marked between a devise or conveyance of the rents and profits to a person directly, and the case of such devise or conveyance to a trustee in trust to collect and out of the rents to pay certain amounts, and then to pay the balance to such person.

The first class is considered by *Justice Walker* in *Perry v. Hackney,* 142 N. C., 372, in which he says: "The words, 'all my rents,' were held sufficient to pass real estate; for it was said to be acccording to the common phrase, and usual manner of some men, who name their lands by their rents. 3 Gr. Cruise (2 Ed.), p. 229 (7 Cruise, 176). So a devise of the 'rents, issues, and income' of lands was held to pass the land itself. *Anderson v. Greble,* 1 Ashmead, 136. A person having let several houses and lands for years, rendering several rents, devises as follows: 'As concerning the disposition of all my lands and tenements, I bequeath the rents of D to my wife for life, remainder over in tail.' The question being whether, by this devise, the reversions passed with the rents of the lands, it was resolved that they did, as that was clearly the intention, and the will should be construed according to the intent to be gathered from its words. *Kerry v. Derrick,* Crokes Jac., 104; *Allan v. Backhouse,* 2 Ves. & B., 74. A devise of the income of land was held to be in effect a devise of the land (*Reed v. Reed,* 9 Mass., 372); so a devise of the 'rents, profits, and residue' of the testator's estate received a like construction. *Den v. Drew,* 14 N. J. L., 68. In *Parker v. Plummer,* Cro. Eliz., 190, a devise in the following words, 'I will that my wife shall have half the issues and profits of the land during her life,' the question being whether she had any interest in the premises or was only entitled to have an account of rents, it was determined (487) that she had an estate, 'for to have the issues and profits and the land were all one,' and the same was held with respect to a devise of a 'moiety of the rents, issues, and profits of my estate,' the words being equivalent to a devise of the estate in fee. *Stewart v. Garnett,* 3 Sim., 398."

As to the second class, it is said in Tiedeman on Real Property, sec. 494: "Where a special duty is to be performed by the trustee in respect to the estate, such as to collect the rents and profits, to sell the estate, etc., the trust is called *active.* It is the duty which prevents the operation of the statute, for the trustee must have the legal estate in order to perform his duties"; and in Lewin on Trusts, vol. 1, p. 210: "Special trusts are not within the purview of the Act of Henry the Eighth, and therefore, if any agency be imposed on the trustee, as by a limitation to

A and his heirs, upon trust to *pay* the rents, or to *convey* the estate, or if any control is to be exercised or duty is to be performed, as in the case of a trust to *apply* the rents to a person's *maintenance,* or in making *repairs,* or to *preserve contingent remainders,* and *a fortiori* if to *raise a sum of money,* or to *dispose of by sale,* in all these cases, as the trust is of a special character, the operation of the statute of uses is effectually excluded," both of which are cited with approval in *Perkins v. Brinkley,* 133 N. C., 158.

Many authorities might be quoted in support of this doctrine, but we will do no more than quote the full and accurate statement in Underhill on Wills, sec. 773: "Active uses are not executed by the statute. All uses and trusts are, irrespective of any statute, either active or passive in their nature. Where the feoffee to use has any active duty to perform, the use is active and it is not executed by the statute of uses. If the feoffee to use were by the feoffor directed to *pay the net income* and profits of land to A after paying and *deducting taxes, rates, and repairs,* or if he were directed *to apply the rents* and profits to the support or to the maintenance and education of the beneficiary, or if he is to *receive and pay* the rents to A, or if he is to pay annuities out of the income, or to *lease property* and *collect and pay* over the rents of the same, (488) or to accumulate profits and income, or if he is merely to keep the property in repair, the use, or, in modern language, the trust, is an active one, and it will not be executed by the statute of uses. In other words, where any control is to be exercised or any duty is to be performed by the trustee, *however slight it may be,* or where the trustee is empowered to exercise a discretion in the management of the fund, either as regards its investment or the expenditure of the income, the trust is active. For, inasmuch as it will be impossible for the feoffee or trustee to perform the duties imposed upon him unless he is permitted to retain the legal estate in him, it will be conclusively presumed that the feoffor meant that he should hold it. Equity will not permit the legal title to be transferred to the beneficiary under the statute of uses, against the plain intention of the creator of the use or trust that he should have only an equitable interest. And as the statute of uses also provided that the *cestui que use,* as soon as the use was executed, should stand seized in the same 'quality, manner, form, and condition' as he had in the equitable interest, and as he had only the right to receive the net income, it is clear that the statute had no application to an active trust or use, for no person can be a trustee for himself."

The provisions of the will before us meet all the requirements of an active trust. The land is devised to a trustee, and he is required to collect the rents and profits and pay the ratable part of the taxes and

repairs, subject to the rights of the mortgagee, and to pay any balance to LeRoy Davidson. Active duties are imposed, in the performance of which it is necessary for him to hold the legal title.

We are, therefore, of opinion that the plaintiff acquired no title under the execution sale.

No error.

Cited: *Rouse v. Rouse,* 167 N. C., 210; *Bank v. Johnson,* 168 N. C., 308.

(489)

W. F. RAIFORD AND WIFE v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 4 December, 1912.)

1. Telegraphs—Free Delivery Limits—Mailed Telegram—Negligence—Evidence—Questions for Jury.

When the addressee of a telegram is beyond the free delivery limits of the telegraph company's terminal office, and there is conflicting evidence as to whether the defendant company promptly mailed it to the addressee, a finding of the jury in plaintiff's favor, under an instruction to find for the defendant if the telegram was thus mailed is conclusive.

2. Telegraph—Mental Anguish—Interstate Messages—Lex Loci Contractus—Place of Negligence—Recovery.

When a telegraph company receives for transmission a telegram in a State where a recovery for damages for mental anguish alone is not permitted, to be delivered in North Carolina, where such recovery is permitted, and there is negligence in the delivery here, the decisions of this State control. *Semble,* if the negligence occurred elsewhere, a recovery could also be had here in such case.

BROWN, J., dissenting.

APPEAL by plaintiffs from *Peebles, J.,* at April Term, 1912, of CUMBERLAND.

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

H. L. Cook for plaintiffs.
Rose & Rose for defendant.

CLARK, C. J. This is an action for recovery for mental anguish for failure to deliver a message sent from Bonifay, Fla., to Wade, N. C. The answer admitted the prompt receipt of the message at Wade. The operator testified that he placed the telegram in a stamped envelope and deposited it in the mail box, directed to the sendee, who lived two miles

out, on the R. F. D. route. A colored man corroborated this statement. The mail carrier testified that no such letter was found in that box or received by him. The plaintiff testified that the telegram was never received. The court charged if the letter was thus mailed, to an-
(490) swer the issue in favor of the defendant. The jury found to the contrary, and assessed the plaintiffs' damages at $200.

The jury found upon the evidence that under the laws of Florida the courts do not allow a recovery for mental anguish for failnre to deliver a telegram. The court upon this verdict entered judgment in favor of the defendant, and the plaintiffs appealed.

The negligence alleged occurred entirely in this State, and in any aspect of the case, judgment should have been entered in favor of the plaintiff. *Penn v. Telegraph Co.*, 159 N. C., 306. Even had it not been shown that the failure to deliver promptly occurred entirely in this State, "There have been numerous cases in which mental anguish has been recovered where the message was sent from a point outside this State to a point in this State." The cases will be found collected in *Penn v. Telegraph Co., supra,* which overrules *Johnson v. Telegraph Co.*, 144 N. C., 410, which is the only case in which we have held to the contrary.

Upon the verdict, judgment must be entered in favor of the plaintiffs. Reversed.

BROWN, J., dissenting.

NEW BERN BUILDING AND LOAN ASSOCIATION
v. R. B. BLALOCK AND WIFE.

(Filed 4 December, 1912.)

1. Building and Loan Companies—Shareholder—Status.

A holder of stock in a building and loan association must share in the losses as well as the profits of the concern, and is liable for duly authorized assessments to cover the losses of the corporation.

2. Same—Borrower—Mortgages—Cancellation—Assets—Usury.

A shareholder in a building and loan association, who has borrowed money from it and secured its payment by a mortgage on real property with his shares of stock as collateral, with provision both in his certificates and the mortgage for the payment of assessments, may not compel the cancellation of the mortgage upon the repayment of the principal sum and interest, unless he has also paid his assessment to meet a loss of the corporation; and the usury laws have no application.

(491) APPEAL by plaintiff from *Whedbee, J.*, at April Term, 1912, of CRAVEN.

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

R. A. Nunn for plaintiff.
Guion & Guion for defendants.

CLARK, C. J. Controversy submitted without action. The defendant R. B. Blalock, on 1 April, 1903, subscribed for $1,500 in the capital stock of plaintiff Building and Loan Association. On 1 June, 1903, he borrowed the sum of $1,500, and as security for said loan assigned said stock as collateral security, and as additional security he and his wife executed a deed in trust on certain realty. In February, 1909, the directors of the plaintiff company discovered that the association had lost a sum of money which would require two additional monthly payments on each share of stock to make good said loss in addition to the eighty-four payments theretofore collected. Assessments for two more months were accordingly directed, amounting to $45 against Blalock. The defendant has paid all his monthly assessments and interest except said assessment of $45, which he refused to pay. The payments made by defendant, if applied solely to his loan, would have been sufficient to pay off said loan, with interest. The other stockholders in said series, including such stockholders as were borrowers, have paid the assessment and interest on their loans for said extra two months and their stock has been matured and paid off. The defendants have demanded of the plaintiff that the bond and the deed of trust be canceled and satisfied on the record. This the plaintiff refused to do until said Blalock shall pay his *pro rata* part of said loss, which the plaintiff claims he is legally required to do.

The court below held that, it appearing upon the case agreed that defendants had paid to the plaintiff association a sum more than sufficient to pay off the principal and the interest accruing (492) thereon, the deed of trust should be canceled.

It is true that building and loan associations are governed by the usury law, like every one else. *Meroney v. B. & L. Assn.,* 116 N. C., 882. If the defendant was merely a debtor, the judgment below would be correct; but he is also a corporator, and as such shares in the losses as well as the profits of the undertaking. By the terms of the mortgage itself the realty is bound not merely for the payment of the principal and interest of the debt, but also for the "assessments, installments, dues, and fines upon the stock, which is held as additional security to this loan." The point has often been passed upon by this Court. In *Meares v. Davis,* 121 N. C., 126, the Court held that "A stockholder of an insolvent building and loan association who was also a borrower of its money on mortgage is not entitled to have the excess of the proceeds of the sale of

his mortgaged property, over the mortgage debt, paid to him, when his pro rata share of the deficiency in the assets of the concern is equal to such excess." The Court said: "To grant the order asked for would be to relieve the petitioners from the burdens of the defalcations of their insolvent association at the expense of their associate corporators. We cannot discuss this proposition. It has so recently been discussed and decided by this Court that we will only refer to these cases: *Strauss v. B. & L. Association,* 117 N. C., 308; *s. c.,* 118 N. C., 556; *Thompson v. B. & L. Asso.,* 120 N. C, 420 These cases seem to settle the question raised by the petition, especially the last case cited, where the very question is discussed."

In *Meares v. Duncan,* 123 N. C., 203, it was held: "A married woman who becomes a stockholder in a building and loan association, and also a borrower, must contribute pro rata to the expense and loss account in case of failure, just as she would have participated in the profits if it had been a success." The Court in the opinion said that she could claim no credit on her debt until the expense and deficiency had first been paid. It further said that as the defendant was "one of the corporators and entitled to her part of the profits of the concern, if any had been made, equity says that she must bear her part of the losses as (493) other stockholders have to do. Were she not so liable, the whole equitable settlement of the concern would be destroyed. She got in the same boat with the other stockholders, and, as it sank, she has to take her chances of escape with the others, though she is a married woman. This is the equitable solution of the matter." In *Meares v. Butler,* 123 N. C., 206, it was held: "Where the husband is a borrower and incorporator of a building and loan association and his wife joins him in a mortgage of her land to secure the debt, while she incurs no personal liability, yet she occupies the relation of surety to the extent of her mortgaged property." The above cases are cited in *Meares v. Improvement Co.,* 126 N. C., 665, the Court saying of a borrowing member: "As he is one of the corporators and liable for his part of the loss, this must be accounted for before he can be credited with the payments that have been made."

The defendant being a corporator, the money he has paid must first be credited in discharge of his pro rata share of the losses of the concern just as, in a contrary event, he would have been credited with his share of the profits, and after payment of such losses the mortgaged property as well as himself is liable for the assessments necessary to mature his stock, and neither the bond nor mortgage should be canceled until the balance due by him of $45 and interest thereon is paid.

The judgment of the court below is therefore

Reversed.

EMIL J. STEHLI v. SOUTHERN EXPRESS COMPANY.

(Filed 4 December, 1912.)

Express Companies—Carriers of Freight—Limitation as to Recovery—Interstate Commerce—Negligence.

The stipulation in an express receipt providing that no recovery exceeding $50 for loss or damage to a shipment could be had, is invalid, and a recovery of a larger sum is not an interference with the act to regulate interstate commerce, upon the authority of *Mule Co. v. R. R.*, *ante*, 215.

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

APPEAL by defendant from *Cooke, J.*, at June Term, 1912, of (494) GUILFORD.

This action is to recover damages for the loss by negligence of four bales of silk, shipped from High Point to New York under a contract with the defendant, in which the value of the silk was not given, and in which was the following stipulation: "And if the value of the property above described is not stated by the shipper at the time of shipment and specified in this receipt, the holder thereof will not demand of the Southern Express Company a sum exceeding $50 for the loss or damage to the shipment herein receipted for."

The defendant relied on the valuation clause above set out, and contended that the plaintiff could not recover more than $50, and that to permit the recovery of a larger sum would be an interference with the act to regulate interstate commerce.

The jury returned the following verdict:

1. Did the plaintiff, on 11 July, 1908, deliver unto the defendant the four bales of silk described in the complaint, to be safely transported from High Point, N. C., and delivered to the plaintiff in New York? Answer: Yes (by consent).

2. Did the defendant negligently fail to transport and deliver unto the plaintiff, the consignee, in the city of New York, or elsewhere, the four bales of silk described in the complaint? Answer: Yes.

3. Did the plaintiff present to the defendant, at its office in High Point, N. C., a claim for damages for the loss of the goods, in writing, within ninety days after 11 July, 1908, with the original receipt annexed? Answer: Yes.

4. What amount, if any, are the plaintiffs entitled to recover of the defendant on account of the four bales of silk mentioned in the complaint? Answer: $1,999, with interest.

The defendant appealed from a judgment rendered in accordance with the verdict.

King & Kimball for plaintiff.
John A. Barringer and T. H. Calvert for defendant.

(495) ALLEN, J. It is doubtful if the record presents any question requiring a consideration of the act to regulate interstate commerce, but conceding that it does, our views have been presented and the principles controlling the decision of the contentions of the defendant have been declared in *Mule Co. v. R. R., ante,* 215. There are two cases by that title at this term, and the one referred to is the one in which the interstate commerce act is discussed. We find

No error.

WALKER, J., dissenting: This was an action to recover the value of goods delivered to the defendant for shipment, and lost or destroyed. There was a verdict for the plaintiff and judgment rendered for the full amount claimed, from which judgment the defendant has appealed.

The plaintiff sets out two causes of action, one for breach of contract and the other in tort, for the failure to deliver goods shipped from High Point, N. C., to New York, and alleged the value of the goods to be $1,999, and prayed judgment for that amount.

The defendant answered, alleging that the goods were shipped on a bill of lading or receipt providing that the defendant should not be liable unless the claim should be presented in the time and manner prescribed, and that the claim had not thus been presented; that the contract or receipt provided that if the value of the property was not stated by the shipper, the carrier should not be liable for more than $50 for loss or damage; and that the shipper filled out the blank on which the contract was entered and tendered the same to the defendant for execution, and it was executed in the form tendered. The defendant further alleged that it was a common carrier engaged in interstate commerce, and that its rates for interstate transportation were duly posted and filed with the Interstate Commerce Commission; that the schedule of rates increased according to the valuation of the property shipped, and that the rates applicable to a package of the value of $1,999 would have been higher than to one of $50; that the shipper was charged with knowledge of such schedule of rates, and had actual knowledge of the fact that the rate charged was applicable to a package of the valuation of $50,
(496) and that the acts of the shipper were done for the purpose of procuring transportation of the goods as though they were of the value of $50, whereas the legal rate was higher; and that the shipper knew that he was procuring the transportation at less than the lawful rate applicable to their actual value.

The defendant further alleged that the purpose of the shipper was to obtain, knowingly and willfully, by false billing or false classification, the transportation at less than the regular rates then established and in force, contrary to the provisions of the interstate commerce act and the Ekins act and their amendments; that the shipment was to be transported from High Point, N. C., to New York City, and therefore to be carried in interstate commerce; that the rates, rules, regulations, and classification applicable to interstate shipments were applicable to it; that the acts and doings of the shipper were contrary to law, and that the plaintiffs are not entitled to recover.

The court submitted the following issues to the jury, who made the answers stated:

1. Did the plaintiff, on 11 July, 1908, deliver unto the defendant the four bales of silk described in the complaint, to be safely transported from High Point, N. C., and delivered to the plaintiff in New York? Answer: Yes (by consent).

2. Did the defendant negligently fail to transport and deliver unto the plaintiff, the consignee, in the city of New York, or elsewhere, the four bales of silk described in the complaint? Answer: Yes.

3. Did the plaintiff present to the defendant at its office in High Point, N. C., a claim for damages for the loss of the goods, in writing, within ninety days after 11 July, 1908, with the original receipt annexed? Answer: Yes.

4. What amount, if any, are the plaintiffs entitled to recover of the defendant on account of the four bales of silk mentioned in the complaint? Answer: $1,999, with interest.

The defendant, in apt time, tendered the following issues, which the court refused to submit:

"Is the plaintiff estopped from denying the contract or receipt entered into and given by the defendant to the plaintiff on 11 July, 1908? Answer: .....

"Did the plaintiff write in the contract the following words, (497) 'Value asked and not given,' to avoid the payment of the tariff of 10 per cent on the $100 valuation? Answer: ....."

The plaintiff's evidence showed the following facts: On 11 July, 1908, the plaintiffs delivered to the defendant four bales of silk for shipment to New York. The goods were delivered by the shipper to a driver of an express wagon at the door of the shipper's office, and the driver signed the receipt and handed it back. The receipt for this shipment was filled out by the clerk of the shipper, who inserted the words, "Value asked, but not given." The receipt was for the four bales. It appears from the testimony of the superintendent of the factory, who had charge of this part of the plaintiffs' business and who testified for the plaintiffs, that the plaintiffs knew that the rate they were

paying was not the legal rate for the class of goods shipped. He testified as follows: "We did get a less rate by putting in the words, 'Value asked, but not given,' than we would have gotten if we had stated the actual value of the goods in the receipt. When we inserted the words, 'Value asked, but not given,' we only paid the rate as to pounds, and not as to value. We had been doing this for a number of years." The witness had previously testified that he had been filling out such receipts or contracts, "Value asked, but not given," for five years. An employee of the plaintiffs testified that she was working for them on the date of this shipment, and then said: "I was in the habit of filling out these receipts in the office, 'Value asked, but not given,' prior to that time, since I had been there."

The bill of lading or express receipt was read in evidence by the plaintiff, and in part provides: "If the value of the property above described is not stated by the shipper at the time of the shipment and specified in this receipt, the holder thereof will not demand of the Southern Express Company a sum exceeding $50 for the loss or damage to the shipment herein receipted for." The defendant's evidence shows that the goods were delivered to a driver, who receipted for them, and were then carried to an express car, in charge of an express agent or messenger. The agent of the defendant at High Point testified that
(498) notices were posted in the office of the express company, stating that the tariffs were subject to the inspection of the shipper; that the charges depended not only upon the weight, but also upon its value, and that failure or refusal to give the full value of the shipment and thereby secure a lower charge for transportation is illegal. The agent further testified that the tariff rates of the express company were in the office on the billing counter, right in front of the desk; that they were open to the inspection of anybody, and that they were filed with the Interstate Commerce Commission. Another witness for the defendant, who was employed in the office of the defendant at the time this shipment was made, testified that the book of classifications and freight rates was on the billing counter and open to anybody for inspection. The book of tariffs and classifications in possession of the agent of the defendant was offered in evidence and excluded.

The exceptions and assignments of error relied on by the appellant are grouped and discussed under the following heads:

First. The court erred in excluding the book of classification and rates.

Second. As the motions to nonsuit were denied, the court erred in refusing to charge the jury that the plaintiffs' recovery should be limited to $50.

Third. The court erred in overruling the motions to nonsuit.

The fifth assignment of error is taken to the refusal of the court to

allow the introduction in evidence of a book of rates and classifications which the witness had in his hand in the courtroom, and which was on file in the office of the Southern Express Company at High Point, N. C., on 11 July, 1908. The agent of the defendant at High Point had testified that the tariff rates of the express company were in the office on the billing counter, and open to the inspection of anybody; that they were filed with the Interstate Commerce Commission. It appears that the book of rates and classification from the High Point office, in possession of the agent, the witness, was offered in evidence, and the court took the matter under advisement. When the question was again brought up, the court refused to admit the book.

The sixth assignment is to the ruling sustaining an objection (499) to a question asked a witness for defendant, who was a clerk in the express office at the time this shipment was made: "Were shipments made according to the classifications and rates in that book?" (Page 49.) The seventh assignment is to sustaining an objection to a question asked the same witness: "State whether or not the Southern Express Company acted upon that book in the shipments that were made over the Southern Express Company's line."

The above assignments of error present the points that the book of rates and classifications testified to by the agent as being in use in the express office should have been admitted in evidence by the court as the proper record of the alleged rates and classifications in force, and that the questions ruled out were admissible to identify the book excluded. Upon the testimony of the agent, it was urged by the defendant that the book should have been received under the acts of Congress making it the duty of the carrier to file copies of the schedules and rates with the Interstate Commerce Commission and post them in the local offices; making it a misdemeanor for a carrier to fail to file them; declaring that a carrier shall not engage in the transportation of goods unless the rates have been filed; and declaring that a carrier willfully permitting anything to be done declared unlawful by the act shall be deemed guilty of a misdemeanor. The following are the material parts of the acts of Congress which are considered applicable to this question:

"Every common carrier shall file with the Commission schedules showing all the rates, fares, and charges for transportation. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier." Act of 1887, sec. 6, as amended by Act of 1906, sec. 2.

"The willful failure upon the part of a carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, shall be a misdemeanor." Act of 1903, sec. 1, as amended by Act of 1906, sec. 2.

"No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined
(500) in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act." Act of 1887, sec. 6, as amended by Act of 1906, sec. 2. "That any common carrier who shall willingly suffer or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any thing or things in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor." Act of 1887, sec. 10, as amended by Act of 1889, sec. 2.

It is argued by the defendant, under the above statutory provisions, that when a custodian of a book of classifications and rates identifies such book as in use in his department, it must be presumed that the requirements of the law have been fully complied with in the matter of filing and posting the schedules of the rates and classifications. As this is the legal duty of the defendant, and especially as the failure to comply with the law is declared to be a crime, the burden cannot be cast, even in a civil case, upon the carrier to show that it is innocent of crime. The burden was upon the plaintiffs to show, if such was the fact, that the defendant had not duly filed the rates and classifications with the Interstate Commerce Commission, and that therefore the book offered and excluded did not show the established and legal rates and classifications. "The presumption in favor of innocence of crime is not restricted to proceedings instituted for the purpose of punishing the supposed offense, but applies equally in all proceedings, for whatever purpose, whether the guilt of the person comes in question directly or collaterally." 22 Am. and Eng. Enc. of Law, title "Presumptions," page 1282. "The general maxim, that all things are presumed to have been rightly done, is applied in many ways, in the form of variously expressed presumptions, all in effect amounting to the same thing, that
(501) misconduct and illegality of any kind will not ordinarily be presumed, but must be proved." 9 Enc. of Ev., title "Presumptions," page 917. "It has been held that the presumption of innocence also applies in civil cases where one party is charged with conduct of a criminal nature. But this appears to be merely another statement of the general proposition that honesty and lawful actions are presumed, and the burden of proof is on the party maintaining the contrary." *Ibid.*, page 925. "The presumption against illegality, and its equivalent expressions, that there is no presumption against legality, or in favor of

illegality; that there is a presumption in favor of legality; that facts consistent with legality are presumed to exist, or that where a situation is explainable on the basis of legality it will be assumed that such is the true explanation, present a rule of administration that he who claims the existence of illegality must prove it." 16 Cyc., title "Evidence," 1082; *Macey v. Stark,* 116 Mo., 480; *Gracey v. Bank,* 120 Mo., 161; *McCallister v. Ross,* 155 Mo., 87, and especially *Adams Express Co. v. Carnahan,* 22 Ind. App., 606.

It will be presumed, in the absence of evidence to the contrary, that every common carrier engaged in interstate commerce has complied with the statute establishing rates and of printing, filing, publishing, and posting them. *Meeker v. R. R.,* 163 Fed., 354, and *Adams Express Co. v. Carnahan, supra.* The book of rates should have been admitted.

Second. The fourteenth assignment of error is taken to the following part of the charge of the court: "Now, as to the third issue, if you answer the second issue 'Yes,' that defendant negligently failed to transport and deliver to the plaintiffs, the consignees, in the city of New York or elsewhere, the four bales of silk described in the complaint, the court instructs you to answer the fourth issue '$1,999.99.' If you answer the second issue 'No,' then you will answer the fourth issue '$50.'" The fifteenth assignment is taken to the following part of the charge: "A man cannot limit his liability upon a contract against the consequences that result from a tort, and negligence is a tort; and he cannot contract against liability for the damages that a man would be entitled to recover for the loss of his property, caused by a failure in the per- (502) formance of duty which he owes, not only to the individual, but to the public, that is, to exercise reasonable care." The twentieth assignment is taken to the refusal of the court to instruct the jury as requested, viz.: "If the jury find the facts to be as testified to by all the witnesses in this case, then the plaintiff is entitled to recover only the sum of $50, the amount set forth as the value of the goods in the receipt bearing date 11 July, 1908." And the nineteenth assignment of error is taken to the refusal of the court to submit to the jury the following issues: "Is the plaintiff estopped from denying the contract entered into and receipt given by the defendant to the plaintiff?" "Did the plaintiff write in the contract the following words, 'Value asked and not given,' to avoid the payment of the tariff of 10 per cent on the $100 valuation?"

The defendant argued that, as the court had overruled the motions to nonsuit, which are discussed hereafter, it properly presents, by the above assignments of error, the point that if the plaintiffs are entitled to recover anything, the recovery cannot exceed the contractual limitation of $50, because it appears conclusively from the testimony of the plaintiffs' superintendent that the plaintiffs knew that they were shipping the goods under a false classification, and thereby obtaining an illegal rate. In

this case, the evidence is undisputed, and in fact it conclusively appears from the testimony of the plaintiffs' own witness that they knew that they were obtaining an illegal rate. This evidence is considered in the discussion of the motions to nonsuit.

Third. The defendant submitted motions to nonsuit, at the close of the plaintiffs' evidence and when all the evidence on both sides was in, and excepted to the rulings of the court overruling the motions, and the fourth and eighth assignments of error are based on these exceptions. It is argued, on this branch of the case and upon the facts disclosed, that the plaintiffs knowingly received a rebate, concession, or discrimination by reason of the false classification of the goods shipped, that they thereby brought the shipment and themselves under the prohibitive and criminal provisions of the acts of Congress of 1887, 1889, 1903, (503) and 1906. The following statutory provisions clearly define the liability of a shipper and a carrier acting in violation of the statutes, omitting immaterial parts:

"It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination practiced. Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant, or give or solicit, accept, or receive any such rebate, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* that any person, or any officer or director of any corporation subject to the provisions of this act, or the act to regulate commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court." Act of 1903, sec. 1, as amended by Act of 1906, sec. 2. "Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, and who shall knowingly and willfully, by false billing, false classification, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed

guilty of fraud, which is hereby declared to be a misdemeanor." Act of 1887, sec. 10, as amended by Act of 1889, sec. 2. "In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting within the scope (504) of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person." Act of 1903, sec. 1, as amended by Act of 1906, sec. 2.

Under the foregoing statutory provisions, the defendant contends:

1. That an agreement to ship goods at less than the published rate is illegal.

2. That when a rate is given and obtained at a lower rate than the legal rate, and the shipper knows that it is less than the legal rate, a criminl offense has been committed.

3. That when a contract has been entered into which is void, the aid of the courts cannot be invoked by a party *in pari delicto,* especially when the terms of the contract involved the commission of a crime.

As to the first of the above propositions, reliance is laid on the statutory provisions. As showing how strictly both the shipper and the carrier are held to account for a violation of the statute, the case of *R. R. v. Kirby,* 32 S. C., 648, holds that a shipper cannot recover damages for a breach of the carrier's special agreement by which, contrary to the Act of 4 February, 1887, sections 3, 6, and the Act of 19 February, 1903, it undertook, for the regularly established joint through rate, to expedite a car-load shipment of horses over its lines so that it would reach the point of connection with the next carrier in time to be carried by a special and fast stock train, although the shipper did not see or know that the established rates and schedules made no provision for such special service. It has been held that a contract for less than the schedule rates, induced by mistake, is unlawful and cannot be enforced, and there cannot be a recovery of an amount collected in excess of the contract price. *R. R. v. Dumas,* 43 S. W., 609.

As to the second proposition, defendant relied on the case of *Armour Packing Co. v. U. S.,* 209 U. S., 56. In that case it was held that a device or contrivance, secret or fraudulent in its nature, is not essential to sustain the conviction of a shipper, the Elkins Act of (505) 1903 making it a criminal offense for any person or corporation to offer, grant, solicit, give, or accept or receive any rebate, concession, or discrimination in respect to transportation of property in interstate commerce, whereby any such property shall, by any device whatever, be transported at less than the carrier's published rates, or whereby any other advantage is given or discrimination practiced. It was contended in the above case by the defendant, the plaintiff in error, that in order to warrant a conviction, the shipper must be guilty of some bad faith

or fraudulent conduct in the use of the device or obtain the rebate by some intentionally dishonest or underhand method, concession, or discrimination denounced by the act. But the Court said: "The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates different from the fixed rates, duly posted and published."

On the third point, it was especially insisted that the motions to nonsuit should have been granted, and that the court erred in overruling them, the evidence conclusively showing that the plaintiffs knew the goods were being shipped under a false classification and that an illegal rate was being received. The plaintiffs' own witness, who was superintendent of the factory, testified that, "I have been filling out the contracts or receipts 'Value asked and not given' for five years. We did get a less rate by putting in the words 'Value asked and not given' than we would have gotten if we had stated the actual value of the goods in the receipt. When we put 'Value asked and not given' we only paid the rate as to pounds, and not as to value."

In *Ellison v. Adams Express Co.*, 245 Ill., 410, it was decided that a contract knowingly made in violation of a statute is void, and there can be no legal remedy for its breach where there is nothing in (506) the statute from which it may be inferred that it was the legislative intent to limit the scope of the act to the exaction of a penalty from the wrongdoer and relieve him from the ordinary consequences of making a contract forbidden by law (*Ober v. Katzenstein, ante,* 439); and that a shipper who, for the purpose of obtaining a lower rate of carriage, knowingly and intentionally violates the provision of paragraph 3 of section 10 of the interstate commerce act by refusing to disclose to the carrier the value of the merchandise delivered to him, cannot recover in case the merchandise is destroyed, as his contract is void. The Court said: "Nor in the subject-matter of the legislation do we find anything to justify a presumption that Congress intended to relieve wrongdoers of the ordinary effect of their acts. Compliance with the requirements of the act by the shipper as well as by the carrier is essential to its successful operation, and we cannot presume that Congress intended that the contracts forbidden by it should be valid and should be enforced to the same extent as if there were no prohibition, merely subjecting the offender to the penalty if detected and prosecuted. We see no reason which excepts this case from the rule that a contract

entered into in violation of an express statutory prohibition cannot be made the basis of an action in a court of justice." See also *Church v. R. R.,* 14 S. D., 443. This contention of the defendant and the above authorities are based on the rule that courts will not entertain jurisdiction to aid a party in a matter arising out of an illegal contract, when such party was *in pari delicto.*

"No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim." 9 Cyc., p. 546. This rule is well established in this Court, and has recently been recognized. *Smathers v. Ins. Co.,* 151 N. C., 98; *Edwards v. Goldsboro,* 141 N. C., 60; *King v. R. R.,* 147 N. C., 263.

It cannot be successfully contended that there was not *par delictum* on the part of the shipper. The history of the statutes, the evils they were intended to remedy, and the amendments to the statutes which from time to time it was found necessary to make in the effort to (507) suppress those evils, show that Congress found that it was necessary to extend the prohibitions to the shippers as well as to the carriers. It is well known that in many instances the carriers were at the mercy or under the powerful influence of the large shippers, and that those powerful influences could not be shaken off by the provisions of the statute as originally enacted in 1887, directed as it was exclusively to the acts and conduct of the carriers. An analysis of the statutes up to and including the act of 1906, and as they were in force when this shipment was made, will show that the provisions are substantially identical as to the illegality of giving rebates and concessions to the shipper, and that when an act by a carrier is declared to be a misdemeanor, the correlative act of a shipper, when knowingly done, is also brought under a like statutory denunciation.

As it appears, in any view of the facts testified to by the plaintiffs' own witnesses, that the plaintiffs have no cause of action, and that further proofs of a character to change the result are not possible, this Court, on sustaining the nonsuit, should direct judgment to be entered in the court below. *Mansfield v. New York,* 165 N. Y., 208; *Coffman v. Costner,* 87 Fed., 457; *Mfg. Co. v. Mast,* 89 Fed., 333. "Where, on appeal from a judgment in favor of the plaintiff below, the appellate court decides that plaintiff has not a cause of action and cannot succeed on another trial, it will not order a new trial on reversing the judgment, but will itself render the proper judgment, or order it rendered in the lower court. Thus, where it is apparent that there can be no new evidence introduced by the party against whom a reversal is pronounced, to change the aspect of the case, a new trial will not be ordered." 3 Cyc. (title "Appeal and Error"), 452.

The above is a résume of the position taken by defendant in the court below and of the reasoning by which it was sustained. We have followed somewhat closely the outline of the argument submitted by defendant's counsel, so as to show how the case proceeded in the court, and it appears therefrom, among other adverse rulings, that defendant
(508) was deprived of the proof offered as to the official classification and rates; whereas, if my contention is the right one, it was clearly entitled to this evidence. If I am wrong, the ruling of the court was correct, as it would be idle to hear any evidence as to classification and rates, if it has no legitimate bearing upon the issue. It would be useless to do more than state the proposition, that Congress has the power under the Constitution, as construed by the courts, to regulate commerce between the States; to take exclusive control of the subject and to occupy the entire field, if it sees fit to do so. That it has done so, to the extent, at least, of making the question now before us one of Federal law, would seem not to admit of doubt. The Interstate Commerce Commission assumed jurisdiction to pass upon a question very similar to the one in hand, and held that the agreed-value clause in the bill of lading was a valid stipulation. *Shaffer v. R. R.,* 21 I. C. C., 8. But I do not care to pursue the discussion of this subject, as the reasons and authorities in support of my views are fully given in *Mule Co. v. R. R., ante,* 238, by *Justice Brown* in his dissenting opinion, concurred in by me. If the value of the article transported is one element by which the rate may be determined, or may form the basis of the rate, and it has been held by the highest authority that it is of that character, then it would seem to follow inevitably that the whole question of value and rate is taken into the domain of Federal law and jurisdiction, and the decisions of the Federal courts are, therefore, of binding effect upon us.

I will direct my attention more particularly to the validity of the stipulation itself. It is not an agreement for exemption from negligence, but has been regarded by the great weight of authority as a proper method by which to measure the amount of loss; to apprise the carrier of the nature of the duty he is undertaking and of the degree of care to be used by him in its performance; to guard the carrier against imposition or fraud; to secure a due proportion between the amount for which the carrier may be responsible and the freight he receives, and to protect him against extravagant and fanciful valuations. *Hart v. R. R.,* 112 U. S., 331. In that case the Court said, in support of the rule: "If
(509) the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance

the carrier would otherwise have bestowed. 2 Kent's Comm., 603; *Dunlap v. Steamboat Co.,* 98 Mass., 371; *R. R. v. Fraloff,* 100 U. S., 24. This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract." In *Bernard v. Adams Express Co.,* 205 Mass., 254, the Court had under consideration the validity of a clause in a bill of lading precisely like that in this case. It followed *Hart's case,* and held: "It is not in any proper sense a contract exempting him from liability for the loss, damage, or injury to the property, as the shipper describes it, in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumes. The cases cited above do not go upon the ground that there is a contract of exemption from liability for negligence, but upon the ground that the contract relates directly to the elements and quality, as to value, of that which is to be transported. . . . An estoppel, founded on the agreements of the parties as to the nature or value of the property, is not an exemption from the liability recognized by the common law and affirmed in this statute (interstate commerce act) as resulting from the ordinary (510) undertaking of a carrier to transport property. The decision in *Greenwald v. Weir,* 130 App. Div., 696, 115 N. Y. Supp., 311, is to this effect. A very elaborate discussion of the law, with a citation of many authorities, by the Interstate Commerce Commission, is found in *In re Rules and Rates,* 13 I. C. C., 550, which reaches the same result." The Court, in that case, quotes with strong approval what is further said in the *Hart case,* as follows: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between

the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." The following cases sustain the principle, where the same facts were presented: *Greenwood v. Barrett,* 199 N. Y., 170; *Travis v. Express Co.,* 79 N. J. L., 83; *Greenwald v. Weir,* 115 N. Y. Sup. 311. Those cases hold that section 20 of the Interstate Commerce Act of 1906 does not change the rule. In the *Travis case* the Court said: "It was not intended (by section 20) to abrogate the right to limit liabilities for loss in accordance with the amount paid for carriage."

Judge Emlin McLain has considered the authorities and summed up the law and stated the clear result, as follows, in 6 Cyc., 400: "Although there has been difficulty in distinguishing between a *bona fide* agreed valuation, which is made the basis of the assumption of the duty (511) to transport, on the one hand, and the rate of consideration to be paid, on the other, and an arbitrary limitation of liability to a stipulated amount, such a distinction manifestly exists. And the weight of authority is in support of the proposition that a valuation mutually agreed upon as furnishing the basis of the liability assumed and the compensation to be paid is valid." He says that the rule, while strongly supported in many cases cited in the notes to the text, has not met with universal acceptance, and that there are cases in which a contrary view has been expressed, "although it is believed that an examination of these cases will develop the fact that the real point involved in sustaining an agreed valuation has not been fairly apprehended." He further states the doctrine in this form, and buttresses it with the citation of numerous cases in the notes: "It has already been suggested that where by fraudulent concealment of the shipper for the purpose of avoiding payment of increased charges for transportation the carrier is induced to accept goods under the belief that they are of ordinary character and value, while in fact they are of such exceptional character or value as that a higher rate would have been charged if the facts had been known, the transaction constitutes such a fraud as to relieve the carrier from liability for the exceptional value. And in accordance with this principle, it is generally held competent for the carrier by contract or notice brought to the attention of the shipper to stipulate that he shall not be liable for the goods beyond a certain named sum, unless the value in excess of that

sum is disclosed to the carrier and an increased compensation paid in accordance with the increased value, and such stipulation will be valid, even in case of loss by negligence."

Applying this principle to the admitted facts of this case, the judgment, in my opinion, is not in accordance with the well-settled law in this country, as the great majority of decisions are contrary to what we are about to hold. The plaintiffs entered the words in the receipt, "Value asked, but not given," well knowing what the package contained and that its value was far in excess of the amount they had named in the receipt, and, further, that defendant was ignorant as to the true contents of the package or its value. Plaintiffs also knew that a much higher rate would be charged if the contents were known, and in (512) order to conceal the facts and obtain the lower rate, they made the false representation as to the real value of the silk and got the lower or pound rate. The courts have, with singular unanimity, decided that such a transaction is fraudulent and the plaintiff is estopped, by reason thereof, from showing the real value for the purpose of recovering it in spite of his deceitful representation. Good faith and fair dealing, they say, both require the rigid application of the rule of estoppel, for such estoppels are based upon principles of morality. The rule, as specially applicable to the facts here, is well stated in *Magnin v. Dinsmore,* 62 N. Y., 35, as follows: "Where a carrier, by his contract, limits his liability to a specified amount, if the value of the property is not stated by the shipper, and the goods are of greater value than the amount specified, silence alone, on the part of the shipper, as to the real value, although there be no inquiry by the carrier and no artifice to deceive, is fraud in law which discharges the carrier from liability for ordinary negligence. Where the shipper accepts carriage upon the terms of a limited liability, silence is the same as an assertion of little value; and the carrier is not only thereby deprived of his adequate reward, but is misled as to the degree of care and security which he should provide." *Chief Justice Folger* said in that case: "The defendant now insists that the imposition and deceit upon it, of the plaintiffs, amounting to fraud, relieved it from liability for the loss. It was the duty of the plaintiffs not to practice imposition and deceit upon the defendant so as to add to its risk and to lessen its care and diligence. (*Bank v. Brown,* 9 Wend., 116). Though the duty of a common carrier, and the rigorous liability which is upon him at common law, arises principally from the public employment which he exercises (*Coggs v. Bernard,* 2 Ld. Ray, 917, 918; per *Lord Holt, C. J.,* in *Lane v. Cotton,* 12 Mod., 485; Story on Bailments, sec. 549), yet his hire and reward also enter therein, and he

has a right that his compensation shall be in measure with the risk he takes, and that he shall not be subject to unknown hazards. (9 Wend., *supra.*)

(513) "The defendant insists that there was a fraud wrought upon it by the plaintiffs, in their failure to disclose the real value of the package and the nature of the contents; that the silence of the plaintiffs, and the alleged deceptive form, dimensions, and general appearance of the package, were an imposition and deception. A shipper may become chargeable with fraud upon a carrier, through imposition and deception, as well when he is silent as when he speaks that which is untrue. A neglect to disclose the real value of a package and the nature of its contents if, therewith, there is that in its form, dimensions, and other appearance designed, and even if not designed, if fitted to throw the carrier off his guard, will be conduct amounting to the fraud now spoken of. The intention to impose upon the carrier is not material, if such is the practical effect of the conduct of the shipper." He refers to the case of *Batson v. Donovan,* 4 Barn. & Ald., 21, in which a box, locked and corded, and containing bills, checks, and notes, which was valued by the shippers at £4,000, was deposited with the carrier, with this statement: "It is a box for New Castle." Nothing else was said. The business of the owners of the package was known to the carrier, and they knew of the notice given by the carrier, limiting its liability. The Court of King's Bench held that it was a special acceptance, and though the question as to whether plaintiffs dealt fairly with the defendant in not apprising them that the box contained articles of value, was left to the jury, it was finally decided, on a rule *nisi,* that as matter of law "the facts of a limited liability by notice, and of silence as to value, were enough to debar the shipper of a recovery" of the real value.

The facts of our case are stronger for the defendant than were those in the two cases mentioned for the defendants in them, for here there was an active and not merely a passive representation—a misrepresentation in fact and in law. I will not attempt to vindicate the absolute fairness and justness of the rule, thus laid down in England and in this country, and sustained by the very greatest weight of judicial opinion, as the question is fully, ably, and learnedly discussed in the two cases cited, and the authorities by which it is supported are extensively noted and considered.

(514) We do not reach the charge of negligence, because the first and decisive question in the case is the one of fraud, or, to be technically more accurate, of estoppel founded upon fraud, and it can make no difference whether it is fraud in law or in fact. Where the plaintiffs accuse the defendant of negligence for the purpose of receiving the real value of the goods, the latter may justly and unanswerably

retort: It is not a question of negligence, for you have been guilty of a fraud and deceit which prevented me from exercising that degree of care which I would have used but for your fraud, which misled me and put me off my guard, and by no principle of law or good morals can you fairly accuse me of negligence. You cannot take advantage of your own wrong. I will pay according to my contract, but no more. But the cases nearly all show that the rule applies even if there has been no negligence. *Hart v. R. R., supra.*

I therefore conclude: (1) That the question involved is one of Federal law, and the decision of the Federal court of last resort is controlling upon us. *Hart v. R. R., supra.* (2) That the plaintiffs' act in concealing the true value and, thereby obtaining not only a lower and preferential rate, but one not prescribed in the tariff or schedule of rates, was contrary to the express provisions of the interstate commerce act, and being prohibited by law, no recovery can be had for the real value of the goods. It is a tainted transaction and condemned by the law. (3) That plaintiffs are estopped to allege negligence and recover the actual value of the silks, because of the estoppel arising out of the fraud he practiced upon the defendant, and which prevented him from bestowing proper and adequate care for the safety of the goods. (4) Plaintiffs fixed the value of the package themselves, without any suggestion or participation of defendant. It was their own value, fairly and voluntarily put upon the package, and they should not now be heard to allege that they falsely represented it, when they have had the benefit of the carriage at a much lower rate, and in order to recover the real value, which they fraudulently concealed. If such a recovery is permitted, plaintiffs will have sucessfully taken advantage of their (515) own wrong, and will be rewarded for their own iniquity, contrary to a just, sensible, and cardinal maxim of the law.

BROWN, J., concurs in the dissenting opinion.

Reversed on writ of error. 238 U. S., 605, but this has been changed by the "Cummins Amendment," ratified 4 March, 1915.

Cited: Horse Exchange v. R. R., 171 N. C., 72.

J. E. BURROUGHS v. KATE BURROUGHS.

(Filed 20 November, 1912.)

1. Divorce—Adultery—Circumstantial Evidence—Questions for Jury.

In an action for divorce on the ground of adultery of the wife, the act of adultery is not required to be proved by direct or positive evidence, but it may be established by circumstantial evidence, which is sufficient to establish it if it produce conviction in the minds of the jury by a preponderance of the evidence.

2. Divorce—Adultery—Disposition and Opportunity — Instructions—Appeal and Error.

In an action for divorce on the ground of adultery, under conflicting evidence it is error for the judge to charge the jury that if the adulterous disposition of the parties is shown, and it appears that there was an opportunity to commit the offense, these facts are sufficient to establish the adultery; for such would be an invasion by the judge of the province of the jury, unless construing the charge as a whole it could readily be seen that the jury were not thereby misled.

BROWN and WALKER, JJ., concurring.

APPEAL by defendant from *Whedbee, J.*, at July (Special) Term, 1912, of DURHAM.

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

Bryant & Brogden for plaintiff.
Manning & Everett for defendants.

CLARK, C. J. The court charged: "Evidence to prove adultery may be direct, as where the parties are seen in the act, or it may be indirect or circumstantial, and the charge of adultery may be sufficiently proved by evidence of circumstances leading to an inference of guilt. . . (516) These facts and circumstances must lead your minds to the conviction of the truth; that is, the plaintiff must lead your minds to the conclusion that adultery was actually committed before you would be warranted in answering the third issue 'Yes.'" We find no error in the above instruction. In *S. v. Rinehart,* 106 N. C., 790, *Davis, J.,* says: "From the very nature of the offense, it is usually proven by circumstances, rarely by positive and direct evidence of the adulteruos act," citing *S. v. Eliason,* 91 N. C., 566; *S. v. Poteet,* 30 N. C., 23. His Honor was simply telling the jury that circumstantial evidence would be sufficient to establish adultery, if it produced conviction in the minds of the jury, by a preponderance of the evidence. He had already charged them: "You must not only find that Mrs. Burroughs' conduct was

indiscreet, but you must go further than that, and find more than that, more than that she smoked and drank and associated with Mrs. Carrigan and others, or that her conduct was not such as it ought to be, but you must be satisfied from the evidence and its greater weight that she actually had illicit sexual intercourse with Mr. Galloway."

His Honor, however, further charged the jury: "If an adulterous disposition on the part of the defendant and the alleged paramour is shown, and it appears there was an opportunity for them to commit the offense, these facts are sufficient to establish adultery."

Taking the charge as a whole, we can hardly believe that the learned judge intended to express an opinion that an adulterous disposition and a convenient opportunity was sufficient evidence to establish adultery. But his language enunciates that proposition, and we do not think that it can be sustained. It is true, as *Walker, J.*, well says, in *Kornegay v. R. R.*, 154 N. C., 392, "We are not permitted to select detached portions of the charge, even if in themselves subject to criticism, and assign errors as to them, when, if considered with the other portions of the charge, they are readily explained and the charge in its entirety appears to be correct. Each portion of the charge must be construed with reference to what precedes and follows it," citing *S. v. Lewis*, 154 N. C., 634. But the paragraph above quoted is so calculated, though not so (517) intended, to mislead the jury, that we cannot feel sure that it was not misunderstood and may not have affected their verdict.

Error.

BROWN, J., concurring: I concur in the opinion of the Court in this case. Upon the finding of the jury on the third issue the defendant has been convicted of adultery with A. S. Galloway upon purely circumstantial evidence.

I admit that the evidence is sufficient in its probative force to justify the court in submitting it to the jury, but I am of opinion that his Honor's charge, however unintentional on his part, was an invasion of the province of the jury, and also gave to the evidence an effect which the law does not justify.

His Honor instructed the jury that where an adulterous disposition on the part of the defendant and her alleged paramour is shown, and it appears that there was an opportunity for them to commit the offense, these facts alone are sufficient to establish adultery.

His Honor further instructed the jury "that stolen interviews, clandestine arrangements to bring about an available opportunity, taken with other circumstances, proving that opportunity was actually afforded, may conclusively establish guilt."

I am convinced that if this language was used in respect to circumstantial evidence in the trial of a capital felony, that no court would

hesitate in granting a new trial. This woman's honor, I have no doubt, is as dear to her as life itself, and I think the rules of law should be adhered to with as much strictness as if life itself were at stake.

There is no evidence whatever in this record of an eye-witness to the fact of adultery or to any combination of facts from which adultery must necessarily be inferred or even presumed. The whole testimony itself is composed of suspicious circumstances from which in my judgment a jury may or may not infer the fact that the defendant committed adultery with her alleged paramour. But these facts and circumstances do not show conclusively that she did so, and while they may be sufficient in themselves to justify a jury in arriving at such conclusion, the (518) jurors were at full liberty to reject any such inference. Circumstantial evidence is that which only tends to establish the issue by proof of the various facts sustaining by their consistency the hypothesis claimed. Wills on Circumstantial Evidence, page 15.

"Circumstances generally but not necessarily lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent and not real." Wills, page 17; Starkie on Evidence, 839.

In *Lord Stowell's* celebrated judgment in *Loveden v. Loveden,* 4 Eng. Ecc. R., 461, the fundamental rule is recognized that it is not necessary to prove the direct fact of adultery by positive affirmative evidence, because if that were so, there is not one case in a hundred in which such proof would be attainable, as it is very rare that parties are surprised in the direct act of adultery.

His Lordship says that the fact may be inferred from circumstances that lead to it by a fair inference as a necessary conclusion. What those circumstances are cannot be laid down by any universal rule. He says that "The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion, for it is not to lead a harsh and intemperate judgment, moving upon appearances that are equally capable of two interpretations."

When facts and circumstances introduced in evidence fairly and reasonably lead to the conclusion that the act has been committed, the jury may find the charge sustained. *Obrien v. Obrien,* 49 N. J. Eq., 436.

Under our system it is for the jury and not for the court to say when circumstances are sufficient to establish a necessary fact. Wherever the evidence is circumstantial, his Honor has no right to tell the jury that certain circumstances are conclusive, or any given fact to be inferred from them.

In dealing with such evidence, we do not think the adjective "conclusive" has any authorized place in a judge's charge to a jury. It is,

however inadvertently used, an intimation or expression upon the weight of the evidence. In a similar case to this, the Supreme Court of Illinois said:

"Adultery may be shown by proof of circumstances that natu- (519) rally lead the mind to its belief by a fair inference as a necessary conclusion." And again: "Whether this evidence was sufficient to establish adultery, we are not called upon to determine. It tended to establish that fact, and it was competent, in connection with the other evidence, for the consideration of the jury."

In *Withers v. Lane,* 144 N. C., 187, this Court said: "The Legislature has wisely provided that no judge in charging a jury shall intimate whether a fact is fully or sufficiently proven, it being the true office and province of the jury to weigh the testimony and decide upon its adequacy to establish any issuable fact."

In addition to what I have said in regard to the charge of the learned and able judge who tried this case, I also am of opinion that there is no sufficient evidence set out in this record of stolen interviews or clandestine arrangements to bring about an available opportunity to commit the offense with which the defendant is charged; and that there is nothing for this instruction to rest upon if it were free from the error which I have already pointed out.

It is error for the trial judge to embrace in an instruction facts not supported by the evidence. *Jones v. Insurance Co.,* 153 N. C., 388, and cases cited.

MR. JUSTICE WALKER concurs in this opinion.

Cited: Powell v. Strickland, 163 N. C., 402.

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(520)

THOMAS THOMPSON v. LYNCHBURG NOTION COMPANY.

(Filed 20 November, 1912.)

1. Justices' Courts—Nonresidents—Attachment—Publication of Summons—Motions After Judgment—New Trial—Superior Court—Appeal and Error.

Judgment having been rendered in proceedings in attachment, in a court of a justice of the peace, against a nonresident defendant, who thereafter promptly but unsuccessfully moved in that court for a rehearing upon affidavits setting forth a meritorious defense, the defendant appealed to the Superior Court, which granted the motion, and plaintiff appealed to the Supreme Court; *Held,* the only question presented is the correctness of the ruling on the motion to rehear.

2. Justices' Courts—Nonresidents—Service by Publication—Judgments—Motions—New Trial—Interpretation of Statutes.

The provisions of Revisal, sec. 449, which permits a nonresident defendant, upon whom personal service has not been made, to defend an action after judgment has been rendered therein, under certain prescribed conditions, are construed with reference to other sections of the Code of Civil Procedure, and thus considered with sections 448 and 430, it appears that they are made to apply to actions in the Superior Court.

3. Same—Appeal—Superior Courts—Trial de Novo—Practice.

The sections of Revisal regulating procedure before justices of the peace, being particularly sections 1473, 1474, 1475, which make the general provisions of the chapter applicable, do not confer on a nonresident defendant the right to a rehearing, or, which is the same thing, a new trial, in the justice's court after judgment, upon failure of personal service and a good defense shown; and the remedy is that given by Revisal, sec. 1491, providing for an appeal, so that the action may be heard *de novo* in the Superior Court, where he will be permitted to interpose his defense.

APPEAL by plaintiff from *Lane, J.*, at May Term, 1912, of IREDELL.

On 27 February, 1912, the attorney of the plaintiff wrote the following letter to the defendant:

LYNCHBURG NOTION COMPANY,
Lynchburg, Va.

GENTLEMEN:—Mr. Thomas Thompson has placed his account against you in my hands for collection. He has shown me all your correspondence and a copy of his, together with a copy of your contract with him. You owe him to date, for salary, $182.50, and $15 expenses to Lynchburg to see you, at your request. Now, unless this is adjusted at once, we shall proceed to take legal steps to have your trunks and their contents converted and the money applied to the payment of this debt. The contract is a fraud on its face, and I feel sure will be so treated by
(521) our courts. Let me hear from you at once, else we shall deem that you desire us to take legal steps to protect our rights.

There is no evidence of any reply to this letter, or of any inquiry made by the defendant in regard to it.

On 8 March, 1912, the plaintiff caused the summons in this action and a warrant of attachment to be issued before a justice of the peace, to recover $197.50.

The summons and warrant of attachment were served on the defendant by publication, which was complete on 11 April, 1912, on which last day judgment was rendered in favor of the plaintiff, he having made proof of his claim.

On 27 April, 1912, the defendant caused the following notice to issue and to be served on the plaintiff: "You will take notice that on 7 May,

1912, the defendant will move the court for a rehearing in the above entitled matter, for the reasons set forth in its application, which is hereby attached and made a part of this notice."

The application referred to in the notice was duly verified, and if the facts stated therein are true, they constitute a meritorious defense to the action.

The justice heard the motion on 7 May, 1912, and denied the same, and the defendant appealed. On the hearing of the appeal in the Superior Court, his Honor rendered the following judgment:

"This cause coming on to be heard at this term of the court, upon motion of the defendant for a new hearing, made before C. V. Voils, Esq., which motion was denied by the said justice of the peace, and an appeal by the defendant to the Superior Court, when the same was heard, upon the findings of the following facts: That Thomas Thompson instituted an attachment proceeding against the property of the defendant, the Lynchburg Notion Company, before C. V. Voils, justice of the peace of Iredell County, North Carolina, which summons was dated 8 March, 1912, and the property of the defendant under the warrant of attachment issued on said date was attached, and upon affidavit of the plaintiff, service of summons was made by publication, as required by statute.

"On 11 April, 1912, said cause was heard by the justice, and (522) judgment rendered against the defendant for the sum of $197.50 principal, and the cost of the action.

"On 27 April, 1912, the defendant gave the plaintiff notice that on 7 May, 1912, he would move the court for a rehearing of the cause, and on said date said motion was made, a rehearing was denied the defendant, whereupon it appealed to the Superior Court. The court finds as a fact that the defendant in the cause had no actual notice of the pendency of said attachment proceeding until after rendition of said judgment, and soon after the rendition of the judgment aforesaid, he gave notice above referred to. The defendant also, in its motion, contended that it had a good and meritorious defense to said action, which is fully set forth in his application, and made a part of the findings thereto. That on .... day of ....., 1912, a letter was written by plaintiff's attorney to the defendant, a copy of which, marked Exhibit 'A,' is hereto attached and made a part of this finding.

"Upon the foregoing findings of facts, it is adjudged that the defendant is entitled to a rehearing, and the cause is remanded to the justice of the peace with direction that the case may be reopened, and the defendant be allowed to answer, and the case heard upon its merits.

"It is further ordered that the execution upon the judgment aforesaid be and the same is stayed until the final determination of said cause."

The plaintiff excepted and appealed.

Zeb. V. Turlington for plaintiff.
W. D. Turner for defendant.

ALLEN, J. This action was commenced before a justice of the peace to recover $197.50, and the service of the summons was by publication. The defendant did not appear on the return day, and judgment was rendered against it, and thereafter, the time not being stated, having received notice of the judgment, it moved before the justice for a rehearing. The motion was denied, and the defendant appealed to the
(523) Superior Court. In the Superior Court the motion was allowed, and the plaintiff appealed to this Court. This brief summary of the facts is given for the purpose of showing that the only question before us is the correctness of the ruling upon the motion to rehear. *Finlayson v. Accident Co.,* 109 N. C., 201; *Clark v. Manufacturing Co.,* 110 N. C., 112.

In the *Clark case* the Court says: "The defendant is a nonresident corporation; it was not served with process, and did not appear and answer at the trial before the justice. It had the right to appeal after notice of the judgment. The Code, 876. It appears, however, that the defendant attempted to appeal, not from the judgment generally, but by a limited notice of appeal in the nature of a special appearance. We know of no authority or reason for such practice. An appeal must be from the judgment rendered. If, after the judgment, the defendant, appearing specially for the purpose of the motion, had moved to set aside the judgment for defective publication, and the motion had been denied, an appeal would have carried up only that ruling. *Finlayson v. Accident Association,* 109 N. C., 196.

The motion of the defendant is made under section 449 of the Revisal, which provides: "The defendant against whom publication is ordered, or who is served under the provisions of the preceding section, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition, on such terms as may be just; and if the defense be successful and the judgment or any part thereof shall have been collected or otherwise enforced, such restitution may thereupon be compelled as the court may direct; but title to property sold under such judgment to a purchaser in good faith shall not be thereby affected."

This section is a part of the Code of Civil Procedure, and refers primarily to actions in the Superior Court, the summons of which
(524) "publication is ordered," or which is served as provided in "the

"preceding section" (Revisal, sec. 448), being one which runs in the name of the State, and is signed by the clerk of the Superior Court. Revisal, sec. 430.

We must then turn to the sections of the Revisal regulating procedure before justices of the peace, to see how far the provisions of the Code of Civil Procedure are made applicable to such procedure, and when we do so we find three sections referring to the subject:

Section 1473: "The chapter on civil procedure, respecting forms of actions, parties to actions, the time of commencing actions, and the service of process, shall apply to justices' courts."

Section 1474: "The chapter on civil procedure is applicable to proceedings by attachment before justices of the peace, in all cases founded on contract wherein the sum demanded does not exceed $200, and where the title to real estate is not in controversy."

Section 1475: "The chapter on civil procedure is applicable, except as herein otherwise provided, to proceedings in justices' courts concerning claim and delivery of personal property, and arrest and bail, substituting the words 'justice of the peace' for 'judge,' 'clerk,' or 'clerks of the court,' and inserting the words 'or constable' after 'sheriff' whenever they occur."

The only one of these that can by any possibility include section 449 of the Revisal is the first, and that refers only to "forms of actions," "parties to actions," "times of commencing actions," and "service of process," which falls short of the relief provided in section 449, which relates to judgments after the process has been served.

We conclude, therefore, that the remedy of the defendant must be found elsewhere in the Revisal.

It is true that in *Turner v. Machine Co.*, 133 N. C., 381, an appeal was entertained from a motion to rehear made before a justice, but the right to this remedy was not considered, and it was unnecessary to do so, because it was held that the defendant had lost the right to any relief by his negligence.

It was, however, strongly intimated in that case that a letter (525) not so insistent as the one written by the attorney of the plaintiff in this, was sufficient to put the defendant on notice that an action would be instituted, and to require investigation; but what is there said must be considered in connection with the facts, it appearing that an agent of the defendant knew of the pendency of the action, and that no motion was made until about five months after the rendition of the judgment, and we do not rest our decision on this ground.

When we look to the procedure prescribed, we find first that "a new trial is not allowed in a justice's court in any case whatever, but either party dissatisfied with the judgment in such court may appeal therefrom

to the Superior Court" (Revisal, sec. 1489), "the purpose (of which) seems to have been to prevent parties from using their right to a new trial in an intermediate *nisi prius court,* as a means of causing useless delay and subjecting the successful party, meantime, to the risk of losing the fruits of his victory" (*Ballard v. Gay,* 108 N. C., 546), and "to limit the control of justices over their own judgments within a brief period of time." *Guano Co. v. Bridgers,* 93 N. C., 441. This section (Revisal, sec. 1489) is very near, if not a positive prohibition upon a motion to rehear when the summons has been served regularly, as in this case, as there is only a difference in name between a motion to rehear and a motion for a new trial.

The statutes, however, provide a remedy. If the judgment is rendered in the absence of the defendant, and the process is defective, or there is the appearance of service when in fact none, the defendant may move before the justice to set the judgment aside (*McKee v. Angel,* 90 N. C., 62; *Whitehurst v. Trans. Co.,* 109 N. C., 344), or if the process is regular and has been served *personally,* and the absence of the defendant has been caused by sickness, excusable mistake, or neglect, he may move for a rehearing, as provided in Revisal, sec. 1478, but "if the judgment is rendered upon process not personally served, and the defendant did not appear and answer, he shall have fifteen days, after personal notice of the rendition of the judgment, to serve the notice of appeal." Revisal, sec. 1491.

(526) The last section fits the case of the defendant, and amply preserves and protects his rights, as upon appeal the trial will be *de novo,* and as he has had no opportunity to plead before the justice, he will be permitted to enter any defenses.

We are, therefore, of opinion that the defendant was not entitled to a rehearing, and that there is error.

Reversed.

Cited: Gobble v. Orrell, 163 N. C., 489; *Lowman v. Ballard,* 168 N. C., 18; *Estes v. Rash,* 170 N. C., 342.

JOHN W. SANDERS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 4 December, 1912.)

Railroads—Master and Servant—Safe Place to Work—Projecting Sill—Instructions—Negligence—Contributory Negligence—Questions for Jury.

In an action to recover damages inflicted by a railroad on its employee, there was evidence tending to show that the employee was an uninstructed

porter on defendant's train and at night was told by the conductor to unlock a switch for the train to pass, and as the train was passing with moderate speed the employee, having a lantern in his hand necessary to give him light, caught hold of the grab-iron of the passing train with his other hand, and while boarding it in this manner, his foot struck against a sill of unusual length, projecting from the outside of the curve, of which he had no knowledge, and inflicted the injury complained of: *Held*, (1) evidence sufficient to go to the jury upon the circumstances, on the defendant's negligence in failing to supply its employee a safe place to work; (2) testimony as to the unusual length of the sill was competent; (3) a prayer for instruction that the employee was guilty of contributory negligence in not using both his hands to board the train, under the circumstances, was properly refused, it being a question for the jury.

WALKER and BROWN, JJ., dissenting.

APPEAL by defendant from *Bragaw, J.*, at May Term, 1912, of JOHNSTON.

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

R. L. Ray, J. A. Wellons, and J. H. Pou for plaintiff. (527)
Abell & Ward for defendants.

CLARK, C. J. This is an action for damages for personal injury sustained from negligence of the defendant. The plaintiff was a porter on the defendant's train. As the train reached the north end of the switch at Hope Mills the plaintiff, under the direction of the conductor, alighted, unlocked the switch, and stood about 3 feet south of the switch-post. As the train ran into the switch, the plaintiff caught the grab-iron of the train between the first and second-class coaches, and before he could get on the train, which was moving "not too fast to get on safely," the plaintiff's right foot was jerked against a long crosstie and broken just above the ankle. This tie extended 4 feet and 2 inches beyond the outside rail of the switch. It was about 3 feet longer than an ordinary tie, which extends 16 or 18 inches beyond the rail, and being on the outside of the curve, the end of the long tie stood up 6 inches above the ground. The plaintiff had never unlocked the switch before and did not know the condition of the defendant's roadbed at that point nor that the tie was 3 feet longer and higher off the ground than the other ties. He had not been told about the dangerous condition of roadbed and ties about that place. He was required to get on the moving train, in order to save time, as he was directed to do by the conductor, and while attempting to do so his foot struck the long tie and his leg was broken. The train was running slowly, and the plaintiff could have gotten on without injury had it not been for the long tie.

The plaintiff asserts as ground of negligence the failure to give him warning as to the danger of his act when he was ordered to get on the moving train by the conductor, and the failure to provide a safe place for him to do the work required of him. He also relied upon the evidence of negligence in the medical and surgical treatment by the defendant after the accident.

The defendant relies upon three exceptions: (1) That the witness C. J. Wiggs was asked, "What is the usual length of a cross-tie from the rail?" We see no error in this question, which was one of fact and pertinent to the issue before the court.

(528) The second exception is to the refusal of a motion for a nonsuit. This motion was allowed so far as the alleged negligence of the defendant, in not giving proper medical treatment and attention to the plaintiff, but was overruled as to the alleged negligence of the defendant in not providing a safe place for the plaintiff to do the work required of him. We think it needs no discussion that the evidence on that point was properly submitted to the jury.

The third assignment of error is that the court refused to instruct the jury, as prayed, "that if the plaintiff could have gotten on the defendant's train in safety by using both hands and taking hold of both the grab-irons, the one on the platform as well as the one on the car, it was his duty to do so, and his failure to do so was not exercising the ordinary care of a prudent man, and he thereby by his own negligence contributed to his own injury and is not entitled to recover in this case."

Aside from the erroneous conclusion of the prayer, which justified its refusal (*Norton v. R. R.*, 122 N. C., 934, and cases there cited), it seems clear to us that this instruction ought not to have been given. The evidence is that the plaintiff had a lantern in one hand. There was no evidence that it is necessary for persons to use both hands in getting on a train, and it is probably common observation that such is not the case. It would have been error for the court to have instructed the jury as a matter of law that the failure to use both hands, under the circumstances of the case, was negligence upon the part of the defendant. That was a matter for the jury. Even if the jury should find, on a retrospective view of the occurrence, that if the plaintiff had used both hands he would probably have avoided the accident, this would not of itself make him negligent. It was not the plaintiff's hands, but his foot, that was hurt. He did not fall from the grab-iron which he caught hold of, nor did it give way. In all probability, the accident would have occurred just as it did, had he used both hands. The injury was caused because the plaintiff's foot struck a long cross-tie before he could pull himself up. Had he attempted to use both hands while holding a lighted lantern in his hand, the probability is that his getting upon the car would

have been slower instead of faster. It was foggy and a little before (529) day. The plaintiff needed the lantern to see how to unlock the switch. As he was ordered to alight and unlock it by the conductor, the conductor must have seen him with the lantern and have known that he needed to use it.

No error.

WALKER and BROWN, JJ., dissenting.

AMERICAN SODA FOUNTAIN COMPANY v. O. P. SCHELL.

(Filed 11 December, 1912.)

1. Claim and Delivery—Judgment—Interest—Questions for Jury—Interpretation of Statutes—Practice.

Under a contract reserving title in the seller, the plaintiff brought claim and delivery proceedings for a balance due on the purchase price and interest, and the defendant denied plaintiff's title, alleged a want of consideration, and claimed damages arising from a breach of warranty. The jury found that defendant owed the plaintiff $840 on his outstanding notes given for the purchase, and that he had been damaged by breach of plaintiff's warranty in a certain amount: *Held*, in proceedings of this character, interest is not allowed as a matter of law, and upon the jury's finding, the defendant was only chargeable with interest on the $840 from the date of the judgment. If the trial court had been in doubt as to verdict's bearing interest on the notes, he should have referred the matter back to the jury. Revisal, 552.

2. Appeal and Error—Assignments of Error—Motions—Judgments.

It is not necessary for the record on appeal to contain appellant's assignments of error when the appeal is only from the judgment entered, and a motion to dismiss the appeal and to affirm the judgment of the lower court, on that account, will be denied.

APPEAL by defendant from *Webb, J.*, at Special March Term, 1912, of HARNETT.

R. L. Godwin for plaintiff. (530)
J. C. Clifford, E. F. Young, N. A. Townsend for defendant.

CLARK, C. J. This was an action for claim and delivery of a soda fountain, the plaintiff claiming title by reason of the possession of notes, reserving title to the seller, on which it alleged that there was a balance due of $871.50, with interest from April, 1909. Defendant denied plain-

tiff's title, alleging a breach of warranty and failure of consideration and a counterclaim for damages arising out of said breach of warranty in the sum of $2,062.84. The jury found:

1. That the defendant was indebted to the plaintiff on account of his notes exceuted to the plaintiff and outstanding, $840.

2. That plaintiff warranted the soda fountain;

3. That it did not come up to the warranty, and

4. That by failure of the soda fountain to come up to said warranty the defendant had sustained damages, $1,262.84;

5. That the plaintiff was the owner and entitled to possession of the property; and

6. That at the time of the seizure the soda fountain and fixtures were worth nothing to the defendant.

The court entered judgment that the plaintiff was the owner and entitled to the recovery of the property, but instead of deducting the $840 awarded the plaintiff in the first issue from the $1,262.84 awarded the defendant in the fourth issue, the court added interest on the $840, *i. e.*, $149, making a total of $989, and entered judgment in favor of the defendants for $273.84 only. The defendant excepted and appealed.

The only question presented is whether upon the answer to the first issue, "In what amount, if any, is the defendant indebted to plaintiff on account of his notes now outstanding? Answer: $840," this judgment is correct.

We think the court erred in allowing the plaintiff $149 interest. It is true that in an amendment to the complaint the plaintiff averred that there was a balance of $871.50 due on the notes for the purchase money.

(531) It does not appear in the record that there was any denial in the answer. But presumably the allegation was taken as denied, because the first issue was submitted without objection, and the verdict was that the defendant was indebted to the plaintiff "on account of his notes executed by the plaintiff and outstanding, $840." *Prima facie,* the jury find that $840 was the balance due the plaintiff at the date of the verdict. The judgment on such verdict would bear interest from the date of the judgment. It is not like a note that is found or admitted to be due and on which the interest is calculated according to the tenor of the note. Revisal, 1952. Here there are several notes, and the plaintiff averred that the amount due on them was $871.50, with interest from 1 April, 1909. The jury did not accept that contention, but fixed the amount due "on account of the notes" at $840, which was presumably the balance due, calculating interest up to date and allowing credits. If there was any doubt, his Honor should have referred the matter back to the jury to make it plain. Revisal, 552, provides that when a "verdict is found for the recovery of money, the jury must assess the amount of the recovery."

Besides, this was an action for claim and delivery, and in such cases interest is not allowed as a matter of law. *Patapsco Co. v. Magee,* 86 N. C., 350.

The motion to dismiss the appeal because there is no assignment of error, and the motion to affirm because there is no case on appeal, must be denied. The appeal being from the judgment alone, neither is necessary. *R. R. v. Stewart,* 132 N. C., 248; *Wallace v. Salisbury,* 147 N. C., 60.

Judgment should have been entered upon the verdict in favor of the defendant for $422.84 by deducting the $840 found to be due to plaintiff on the first issue from the $1,262.84 found to be due the defendant on the fourth issue.

Reversed.

(532)

O. D. DELLINGER v. CHARLOTTE ELECTRIC RAILWAY COMPANY.

(Filed 20 November, 1912.)

1. Pleadings—Variance—Merits—Appeal and Error—Interpretation of Statutes.

The variance between the allegation and proof which will entitle the opposing party to a new trial on appeal must be such as to have misled him to his prejudice in maintaining his action upon the merits. Revisal, secs. 515, 516.

2. Same—Party Not Misled.

In an action to recover damages of a street car company, it was alleged as the ground of recovery, that the plaintiff was a conductor on defendant's street car and was injured, while assisting in getting the derailed car back upon the track, by the negligence of the motorman in turning on the current when he should have observed the danger to plaintiff in doing so. In a separate paragraph it was alleged that the shock, causing the injury complained of, was received while using a switch rod, furnished for the purpose in a certain position with reference to the car and the rail, and the proof was that the position of the rod was the reverse from that alleged: *Held,* the defendant was not prejudiced by the variation in the allegation and proof; (*a*) the ground of the action being the negligent turning on the electricity by the motorman; (*b*) it appearing that the defendant was ready with his evidence in rebuttal to the evidence admitted over its objection; (*c*) the trial judge substantially found as a fact that the defendant had not been misled.

3. Street Cars—Electricity—Negligence—Proximate Cause—Instructions.

There being conflicting evidence in this case as to whether the plaintiff, while engaged in hs duties as defendant's conductor on its electric street cars, in helping to replace a derailed car, received the injury complained

of by the negligence of the motorman in turning on the electric current, seeing the danger to the plaintiff, or whether it was the plaintiff's negligence in permitting the trolley pole to remain on the wire while performing his work: *Held*, the question of proximate cause was one for the jury, and a prayer for special instruction which made the issue as to contributory negligence depend upon the jury's finding as to whether the plaintiff disobeyed instructions in leaving the trolley pole on the wire while using the switch rod, if the injury would not otherwise have occurred, is erroneous, as it leaves out of consideration that the plaintiff under the circumstances, may have safely done his work had not the electricity been negligently turned on.

(533) APPEAL by defendant from *Lyon, J.*, at April Term, 1912, of MECKLENBURG.

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

The plaintiff was in the employment of the defendant as a conductor, and was engaged at the time of his injury in replacing a derailed car on the track.

The plaintiff, among other things, alleged in his complaint:

"(4) That after the derailment of the car as aforesaid, and after the electric current and voltage used in the operation of the said car had been turned off by the motorman in charge of the said car, it became the duty of the said plaintiff, in the course of his employment and under express instructions and directions from his *'alter ego'* and superintendent as aforesaid, to help in assisting in putting the car back on the 'T' iron or tracks, and in order to obey his express instructions and directions, and in the due course of his duty and employment, it was further necessary for this plaintiff to take an iron rod (commonly known as the switch rod) and fasten one end of the said rod to the derailed car and place the other end on the 'T' iron or track of the defendant company, in order to enable him to carry out his instructions and directions of the said superintendent as aforesaid, and further to get the car back on the track.

"(5) That while the plaintiff was thus engaged in carrying out the express instructions and directions of the said superintendent, as aforesaid, and without any default or misconduct on his part, and just as he had fastened the crooked part of the rod to the car and while still holding to same and in the act of placing the other end on the 'T' iron rail, the defendant company, its servants, agents and employees, without any knowledge or warning, or signal of danger to this plaintiff, notwithstanding the fact that the defendant company, its servants, agents and employees well knew, or by the exercise of ordinary care and diligence on its part could have known, the position in which the plaintiff was,

(534) willfully, wantonly, and negligently turned and caused to be

turned the entire current and voltage of electricity on the car and through its dynamo and on the 'T' iron and tracks where the plaintiff had hold of the switch rod, as aforesaid, and while carrying out the express orders and directions of the company and its superintendent, as aforesaid, thereby driving and causing to be driven the entire current and voltage of the electricity through the plaintiff's body, which said terrific electrical shock and electrical voltage, as aforesaid, rendered plaintiff unconscious, knocking him to the ground, leaving his hands gripped and pinned to the said rod."

When the case was called for trial, the plaintiff's counsel made a motion to amend sections 4 and 5 of his complaint, so as to allege that the plaintiff, in making the connection between the derailed car and the track, for the purpose of replacing the car upon the track, placed one end of the switch rod against the rail, and then placed the other end of the rod against the car, instead of the reverse of the proposition, as alleged in said sections of the plaintiff's complaint. The defendant objected to the change in the complaint, because it was a material one, and the defense had not prepared its case to meet such change in the plaintiff's proof. The court declined to permit the amendment, except upon the continuance of the case. Thereupon the plaintiff withdrew the motion and announced his readiness for trial.

The plaintiff was permitted to testify that he placed one end of the switch rod against the rail, and then placed the other end against the car, and defendant excepted upon the ground that the evidence did not conform to the allegation in the complaint.

The plaintiff gave the following account of his injury: "I am 23 years old, and live in Catawba County. I began work for the Charlotte Electric Company on 15 January, 1911. I was then in good health and weighed 160 to 175 pounds. I was employed by R. L. Womack, superintendent. He gave me an application blank, and after this was signed, sent me to the car-shed; told me to stay there and look around for a few days, and he would put me on the line. I stayed there four and one-half days. No one helped me to look around. They called me in the office and asked me a few questions and sent me out on the line. (535) I was on the line five days. I knew nothing of running a street car, or of electricity, or the appliances, or workings. I went to work as a street car conductor on 15th January. The only instructions that Womack gave me were, if a car was derailed 'to take the switch rod on the car that the motorman used to throw the switch back, and use that switch rod connecting up that rail to the car.' He did not tell me how to do it. This was all he or any one else told me. As conductor, my duties were to help passengers on and off the cars, and I was instructed how to take up fares. I had been working for the company four months

and eight days when I was injured. Never had a car derailed until the 23d May, the day I was hurt, and had no experience in putting them back. My car was derailed on Eleventh and Brevard streets, in the city of Charlotte, about 4 o'clock that day. It was a single-truck car, four wheels. Mr. Clark was the motorman. Clark reached out the window and about half-way threw the switch and pulled up on it at pretty good speed and split the switch and jumped the track. Two wheels went off the rails about 12 inches. I went to the front where Clark was and told him to knock out the overhead switch, cut it off, and I knocked out the one on the rear. I knocked the overhead switch, because I had learned from experience that that would keep the current off the lower part of the car, and there is no current on the car after the switch is throwed off. These overhead switches are to each end of the car and you knock them up or in, in case they pull out, and that cuts on or off the current. Clark cut off the controller and took the key out in his hand, so there would be no danger whatever from the current. I then told Clark not to start until I told him; that I would go back and take the rod and place it, and make the connection between the rail and the car. The switch rod is a steel or iron rod about 5 feet long and crooked at one end like a shepherd's crook. The rod was used to throw the switch and to connect up the rail to the car in getting the current to place the car back on the rail. This was a part of my duty, but I had never been instructed (536) how to place the rod by Womack or Drum. I learned to cut off the overhead switch by noticing it fly out when the motorman would be going fast. And one night, a short time before I was hurt, a man standing on the car knocked it in and told me to do that every time. I have knocked it in a hundred times, but the company did not show me. Clark was kinder mad that morning. I took the switch rod and placed it in the flange, where it turned the curve. I placed the small end of the rod on that flange and I took the other end, with the crook on it, and put it up to one side of the car over the rod, and it slid up on the rod and touched on the rail and rod too, and when I got it fixed just right, the current struck me.

"It was something like a half minute after I placed the rod when I felt the electric current pull me right down, and I felt a jumping sensation, and that is the last I remember.

"When I was employed by the defendant company, they sent me to the barn, but said nothing about instructions. Do not know who was in charge of the barn. Know Mr. Smith when I see him. Mr. Womack gave me a book about Westinghouse cars, but said 'there wouldn't be anything much in there about our cars, but to look over it.' These were not Westinghouse cars. Smith gave me no instructions. I stayed at the barn four and one-half days. Dodjin showed me how to punch trans-

fers and take up fares. He told me about the streets and schedules. He never gave me any instructions about the trolley except to change it at the end of the line. He showed me how to pull it down and put it back on the line; to handle the trolley is the business of the conductor. In case it was necessary to take off the current, he told me I could either take off the trolley or knock out the overhead switch. In case of derailment of the car, Dodjin did not tell me to first remove the trolley pole, and then take the switch rod to make the connection from the rail to the car. He never mentioned how to replace a car if derailed. Womack only told me to take the rod and connect it up. The current is connected through the wire by means of the trolley to the controller and the car. This switch rod is used to make the connection between the car and the rail, when you get ready to turn the current on. The (537) iron rod makes the channel or path for the current to pass to the rail. If one end is on the car and the other against the rail, the current would pass from the car to the rail.

"I was on the left side of the car, stooping down with the rod in both hands, and Clark, the motorman, was at the other end, with the key in his hands, waiting for me to give him orders. I did not give him any orders to move. He should have stood beside the car watching for orders. He could have stood with his head outside the car. If he had been standing thus watching me, when I got ready for him to turn on the current, I could have depended on his turning it on, both from what he saw and from what I told him. He could not turn it on from what he saw; that is against the rules, because it was dangerous for him to go fooling around, knocking in overhead switches. He should have watched; he should not have taken chances with a man's life. He should have stayed away from the controller while I was adjusting the rod. There would have been no danger if he had stayed away from the controller. He should have stayed till I got ready. He should not have done anything until I gave him the order. If the trolley had been taken off, the car could not have moved, unless down hill. The trolley was not taken off. To knock out the overhead switch is the same thing as pulling down the trolley, and when the car stopped I cut off the controller, knocked out the overhead switches, and that broke the connection, which acts the same as taking down the trolley pole. If the trolley was taken off, you could not get the current to the car."

There was evidence in behalf of the defendant that the plaintiff had been instructed by one employee, in the event of a derailment, "to knock off the overhead switch or take off the trolley pole," and by another, "to remove the trolley whenever using the switch rod to make a connection, and then put the trolley back on."

There was also evidence on the part of the defendant that the overhead switch had not been knocked in at the time of the injury, and that "the purpose of the overhead switch is to control the current to the motor, and then the power is off until the overhead switch is
(538) knocked in. There was an overhead switch over Clark's head and he could have knocked it in."

The defendant also offered evidence tending to prove that if the plaintiff had connected the rod first to the rail, as he testified, that the current would have passed to the car and he would not have been injured.

The defendant, in apt time and in writing, requested the court to give the following instructions, to wit:

"1. If the jury should find from the evidence that the plaintiff had been instructed by the agent of the defendant to always remove the trolley pole before using switch rod, and the plaintiff was acting in violation of such instructions, but for which the plaintiff would not have been injured, then the plaintiff was guilty of contributory negligence, and the jury should answer the second issue 'Yes.'"

The court declined to give this instruction, but modified the same by adding after the word "Yes," the following: "if you find that such contributory negligence was the proximate cause of plaintiff's injury," and the defendant excepted.

"2. If the jury should find from the evidence that the plaintiff was instructed by the defendant that before using the switch rod to always turn off the overhead switch or take down the trolley pole, and further instructed the plaintiff that to remove the switch and not the trolley pole, that the current might still pass to the car, and that to remove all danger, to take down the trolley pole, and if the jury find from the evidence that the plaintiff was endeavoring to use the switch rod without removing the trolley, and that a man of ordinary prudence, under the same circumstances, would not have done so, then the plaintiff would have been guilty of contributory negligence, and the jury should answer the second issue 'Yes.'"

The court declined to give this instruction, as asked by the defendant, and modified the same by the addition of the following: "if you find that such contributory negligence was the proximate cause of the plaintiff's injury," and the defendant excepted.

His Honor charged the jury on the issue of contributory negligence as follows: "Contributory negligence is such an act or omission on
(539) the part of the plaintiff, concurring or coöperating with some negligent act or omission on the part of the defendant as makes the act or omission of the plaintiff the proximate cause of the injury complained of. Proximate cause means the direct cause, producing a

result without any other cause supervening and bringing about the injury. If you find from the evidence and by the greater weight of the evidence, the burden being on the defendant, that, notwithstanding the negligence of the defendant, that the plaintiff's injuries were caused by his contributory negligence, by not obeying orders that were given him as to how to place a derailed car back on the track, that it was proximately caused by his failure to pull down the trolley pole and disconnect the current, or was caused by his ordering the motorman to go forward or come backward, if you find that he did so—if you find that his injury was proximately caused by such conduct on his part, it will be your duty to answer the second issue 'Yes'; otherwise, answer it 'No.'"

Upon the return of a verdict in favor of the plaintiff, the defendant moved the court to set aside the verdict of the jury and for a mistrial on the ground of variance between the plaintiff's allegation and the proof.

Motion overruled, and defendant excepted, the court stating that he did not see how the defendant was misled.

There was a judgment in favor of the plaintiff, and the defendant appealed.

T. L. Kirkpatrick, E. R. Preston, and Clarkson & Duls for plaintiff.
Pharr & Bell and Osborne & Cocke for defendant.

ALLEN, J. The plaintiff alleges that at the time of his injury he was using an iron rod to replace the derailed car on the track, and that he first connected the rod with the car and then with the rail, and he was permitted to prove that he first connected the rod with the rail and then with the car.

The defendant insists that this is a material variance, because it changed its line of defense and gave it no opportunity to prepare its evidence to meet the case of the plaintiff as proved; that if the evidence of the plaintiff had conformed to his allegations, it was (540) prepared to show that he was acting in disobedience of instructions, and that if he had alleged his cause of action as he proved it, the defendant could have furnished evidence that the plaintiff could not have been injured if he had connected the rod with the rail and then with the car.

There is undoubtedly a variance, but it is not every variance between allegation and proof which will justify granting a new trial.

The Revisal, secs. 515 and 516, establishes the standard.

Section 515: "No variance between the allegation in a pleading and the proof shall be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it shall be alleged that a party has been so misled, that fact

shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the judge may order the pleading to be amended upon such terms as shall be just."

Section 516: "Where the variance is not material as provided in the preceding section, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs."

Commenting on these sections, as contained in The Code of 1883, *Merrimon, J.*, says in *Mode v. Penland,* 93 N. C., 295: "It may be that the court rejected the evidence because there was a variance between it and the allegations in the complaint. If so, still the evidence should have been received, because the variance was not such as misled the defendant to his prejudice in making his defense. The substance of the material allegations of the complaint was that the defendant, by the negligence of his agent in the course of the business of his agency, injured the plaintiff. The evidence tended to show that the agent was not exactly such as alleged, but it went to prove that he was such agent in substance and effect, although he may have been the defendant's partner."

In *Asbury v. R. R.,* 125 N. C., 575, the plaintiff alleged that the defendant *caused* the car to start, and was permitted to prove that the car started because of a failure to perform some duty, and in

(541) *Coore v. R. R.,* 152 N. C., 702, it was held, "There is no material variance between the allegations and the proof in an action for damages for personal injuries, the averments of the complaint substantially being that the alleged injury was caused by the negligent, etc., starting the train of defendant railroad company by the engineer, without signal or warning, which violently jerked the slack out of the train, pulled the cars farther apart, causing plaintiff to miss his footing and fall, to his injury, between the cars; the evidence objected to being that 'the engineer started off at high speed—quick start,' etc."

Applying these principles, we are of opinion there is no material variance.

(1) The act of negligence complained of is not in the fourth paragraph of the complaint, but in the fifth, and consists in the allegation that while engaged in replacing the car, the current was negligently turned on, and the manner in which he was doing the work was mere matter of inducement.

(2) The defendant denied the fourth allegation of the complaint, and introduced several witnesses, who were present and knew how the rod was placed. The fair inference is, that if the plaintiff had testified according to his allegation, that the defendant would have proved that he connected the rod with the rail and then with the car.

(3) The defendant was not misled, because it introduced evidence that the plaintiff could not have been injured if he placed the rod as he testified, and it did not attempt to show, on the motion for a new trial or since, that it could produce other evidence to the same effect, and if we were to send the case back for a new trial, upon the ground of a fatal variance, we cannot see, upon an amendment of the complaint, that the evidence on such trial would not be as it is now presented to us.

(4) His Honor substantially found that the defendant had not been misled.

Nor do we think there was error in the modification of the prayers for instruction, by adding the element of proximate cause. The theory of the plaintiff was, that after the derailment he knocked out the overhead switch, and that this broke the connection and made it safe for him to continue his work; that he was working in full view of the motorman and the switch was over his head; that while he was (542) doing his work, the motorman knocked in the overhead switch and turned on the current; that he was not disobeying instructions as to the manner of placing the rod, but if he was, the motorman knew it, and that the proximate cause of the injury was the act of the motorman, and there was evidence to support this theory.

If so, it would seem to follow that the use of the language in the prayer for instruction, "but for which the plaintiff would not have been injured," is itself equivalent to a charge that the negligence of the plaintiff must be proximate, in which event the words, added to the instruction, detracted nothing from its force, for it was the duty of his Honor to tell the jury that the disobedience of instructions must be the proximate cause.

In other words, if the defendant instructed the plaintiff to remove the trolley pole before attempting to replace a derailed car, and he failed to do so, and the plaintiff was working in full view of the motorman, who knew the trolley pole had not been removed and of the dangerous position of the plaintiff, and the motorman then turned on the current and injured the plaintiff, the real cause of the injury was the act of the motorman. *Boney v. R. R.*, 155 N. C., 95.

This view of the case was excluded by both prayers for instruction. We find

No error.

(543)

LUTHER WRIGHT v. J. C. HARRIS.

(Filed 20 November, 1912.)

1. Appeal and Error—Attachment—Judgments—Presumptions.

When in an action for malicious abuse of the process of the court in suing out a warrant of attachment, it appears that the creditor prosecuted the former action regularly and orderly in accordance with the statutory requirements, the judgment therein sustaining the attachment will be upheld on appeal if the allegations of the complaint or affidavit are sufficient, and it will be assumed that the court below found facts sufficient to sustain its judgment, when the record is silent regarding them.

2. Process, Abuse of—Attachment—Failure of Proof.

It does not necessarily follow that a plaintiff has abused the process of the court in suing out attachment proceedings against his debtor which he has not sustained.

3. Process, Abuse—Attachment—Regular Proceedings—Ulterior Purpose—Motions—Laches—Estoppel—Burden of Proof.

In an action for the wrongful abuse of process in suing out a warrant of attachment on the property of the debtor, it was made to appear that the proceedings in attachment were usual and regular, following the statutory methods prescribed, and there was no evidence tending to show that the creditor had any ulterior or wrongful purpose or intent in instituting the proceedings: *Held*, the remedy of the debtor was by motion to vacate the attachment under our statute, and recover damages from the creditor and the surety on his bond; and for him to recover in an independent action for malicious prosecution, it is necessary for him to show the successful termination of the proceedings in attachment. The difference between maliciously suing out an attachment and the wrongful abuse of process thereafter, pointed out and discussed by WALKER, J.

4. Process, Abuse of—Damages—Malice — Evidence — Punitive Damages — Burden of Proof.

While in an action for damages for the wrongful abuse of process of the court in suing out a warrant of attachment it is necessary to show malice, the absence of probable cause is evidence of malice, to support a recovery for actual damages; but, in order to recover punitive damages, express and not merely technical malice must be shown.

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

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

Thomas W. Alexander for plaintiff.
No counsel for defendant.

WALKER, J. This action was brought to recover damages for the wrongful abuse of process, though it may be that there are sufficient allegations in the complaint, liberally construed, stating a cause of action for maliciously suing out an attachment. In the other action, the defendant in this case had alleged a good cause of action for (544) goods sold and delivered, and his affidavit for the attachment was based upon grounds sufficient to justify the issuing of the process. The attachment proceedings are not set out in the case, as they should have been if they were attacked for invalidity, and, therefore, we must assume that they were regular, as error is not presumed in this Court. The plaintiff really relies, for recovery of damages, upon an abuse of process, and there is not the slightest evidence of it.

There seems to be a misconception of the term, "abuse of process," and some think that because a plaintiff may bring an action to recover a debt, and by an allegation that defendant has absconded, or concealed himself to avoid the service of process, and so forth, has attached his property, that plaintiff has abused the process of the court, if the allegations of plaintiff prove to be false. But not so. If the action in which the attachment was issued in the case supposed was wrongful, in that it was not based on probable cause, and malicious, defendant is liable, because his action was unlawful, and the wrong is actionable; but his action may have been legal, and yet, if he uses any process, mesne or final, in the course of the litigation wrongfully, with a bad motive or intention, or if, after it was issued, he uses it for a wrongful purpose, taking advantage of his right to have it, he puts it to an unlawful use. Then we have quite a different remedy at hand.

The first cause of action was for maliciously suing out the attachment or maliciously prosecuting the attachment; the second, assuming even that the process was rightfully issued and based upon regular and lawful proceedings, is founded upon the idea that some foreign and false use is made of the process, the writ of attachment, for instance, as the *Chief Justice* has so aptly put the case, in *R. R. v. Hardware Co.,* 138 N. C., 175, where the plaintiff used the process to make an excessive levy upon plaintiff's property.

Much confusion as to the exact nature of these torts and their differential characteristics has grown out of the fact that the malicious suing out of process has been confounded with the malicious abuse of process. The latter will support an action even if the process was (545) lawfully issued, but *in its execution* has been illegally used. If this is not so, it results that the law has given two remedies for the same wrong, when one was all-sufficient. There is a marked distinction between the maliciously suing out of process and the abuse of that process when lawfully issued, as illustrated very clearly by our case. We

tried to state the distinction between the two causes of action in *Jackson v. Telegraph Co.*, 139 N. C., 347, the facts of which case sharply presented the essential difference bewteen these two kinds of torts, accentuating the features of each, which easily indicated the dividing line between them. We there said, at p. 356: "An action for damages lies for the malicious abuse of lawful process, civil or criminal, even if such process has been issued for a just cause, and is valid in form, and the proceeding thereon was justified and proper in its inception, but injury arises in consequence of abuse in subsequent proceeding." 1 Jaggard Torts, 632-634. See the cases cited in the annotated edition of that volume.

The plaintiff in this case hardly states a cause of action for malicious prosecution, and if he has done so, there is absolutely no proof of it. The plaintiff proceeded in the orderly way to make service of the process by publication, proved his cause of action, and did everything else required by the law. The proceeding was regular in all its stages. The defendant in that action, plaintiff in this one, should have appeared and moved, upon affidavits or for other reasons appearing by the papers in the cause, to vacate the attachment, as being false in fact, or upon other legal grounds. The complaint, or affidavit, alleged enough to entitle plaintiff to an attachment, and we must assume that when the court upheld the attachment in that action, it found such facts, if not set forth in writing, as sustained its judgment. *Lumber Co. v. Buhmann, ante,* 385. The defendant in that suit, plaintiff in this, is concluded or estopped by his inactivity from asserting that he was not given a fair chance in the progress of that cause. The facts show conclusively that he was negligent at every turn in the case, and the blame for his loss or damage, if any, lies at his own door, and was the result of his own remissness. There is not the slightest proof of malice or improbable
(546) cause, as we construe the evidence, but, on the contrary, very suspicious circumstances tending to show that plaintiff in this action and defendant in the former suit intended to hinder, delay, and defeat plaintiff and his other creditors, by concealing himself to avoid the service of process and removing his goods. Honest men do not act the way he did. The former case proceeded regularly, in an orderly manner and according to the statute, and there was no misuse of any process, mesne or final. The plaintiff, if he has any at all, has misconceived his cause of action, and we cannot help him.

Mr. Alexander has presented his client's case very ably and learnedly, in his well prepared brief, but he did not have sufficient facts with which to win a verdict for him, and we must decide upon the facts.

We hope learned counsel will note the distinction between unlawfully and maliciously suing out an attachment or other process, and the

wrongful abuse of process. The line of demarcation is well defined. An abuse of process consists in its employment or use for some unlawful purpose, which it was not intended by the law to effect, and amounts to a perversion of it. It is not the illegality or maliciousness of legal proceedings leading up to it, which forms the basis of a distinct cause of action for its abuse, which is independently actionable, when the process itself is used for an unlawful or oppressive purpose, or is used to coerce or harass the defendant. *Lockhart v. Bear,* 117 N. C., 304; *Sneeden v. Harris,* 109 N. C., 357; *Perry v. Tupper,* 71 N. C., 380; *Hewitt v. Wooten,* 52 N. C., 184; *Kirkman v. Coe,* 46 N. C., 428; *R. R. v. Hardware Co.,* 135 N. C., 73 (*s. c.,* 138 N. C., 175, and 143 N. C., 54); *Jackson v. Telegraph Co.,* 139 N. C., 347; *Ely v. Davis,* 111 N. C., 26; *Grainger v. Hill,* 4 Bing. N. C., 212 (33 E. C. L., 328). The latest case is *Ludwick v. Penny,* 158 N. C., 104, at p. 111, where we said: "Speaking of the malicious abuse of process, he (Judge Cooley) distinguishes it from a malicious civil suit, where there is an interference with property or business, as follows: 'If process, either civil or criminal, is willfully made use of for a purpose not justified by the law, this is abuse for which an action will lie. The following are illustrations: Entering a judgment and suing out an attachment for an amount (547) greatly in excess of the debt; causing an arrest for more than is due; levying an execution for an excessive amount; causing an arrest when the party cannot procure bail and keeping him imprisoned until, by stress thereof, he is compelled to surrender property to which the other is not entitled. In these cases, proof of actual malice is not important, except as it may tend to aggravate damages; it is enough that the process was willfully abused to accomplish some unlawful purpose. Two elements are necessary to an action for the malicious abuse of legal process: First, the existence of an ulterior purpose, and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process. In a suit for malicious abuse of process it is not necessary that there should have been a termination of the suit in which the process was issued, nor a want of probable cause for the suit.' Cooley on Torts, p. 354 *et seq.* The distinction is clear; one consists in commencing and prosecuting a suit maliciously, and interfering with property or business, and the other consists in the willful, unlawful, and wrongful use of the process itself."

We can see nothing in this case but a plain action of debt, with the ancillary remedy of attachment, properly constituted and conducted. If the plaintiff lost anything in that suit, his failure, as we have said, is imputable to his own fault, for which no action lies. No man can base

a cause of action upon his own laches. Plaintiff in this action had at least two remedies by which to redress his supposed wrong. He could have moved to vacate the attachment under The Code and recovered his damages out of the bond, or he could have sued for a wrongful and malicious attachment, if there was not probable cause for resorting to the writ and he had vacated it. There is no "wrongful abuse of process," in the technical sense, alleged or shown in this case. It would be necessary, in order to recover for malicious prosecution or maliciously and wrongfully suing out of the attachment, to show that the suit had been terminated favorably to plaintiff in this suit, at the time the action was commenced. Defendant's suit may have been unlawful, and the (548) allegations upon which it was based may have been false in fact, but he pursued the regular and usual procedure of the law. There was no abuse of process in the sense of an unlawful use of it, that is, where it is employed for some wrongful purpose, not intended or contemplated by the law; in other words, a perversion of it. *Lockhart v. Bear, supra; Sneeden v. Harris, supra; Ludwick v. Penny,* 158 N. C., 104; *Jackson v. Telegraph Co.,* 139 N. C., 347. *Kirkman v. Coe,* 46 N. C., 428, and *Abrams v. Pender,* 44 N. C., 261, were actions on the case for maliciously suing out an attachment, and not for the unlawful abuse of process. If a litigant has a capias, or warrant of attachment, or an execution or other mesne or final process, and wrongfully uses it, that is, in a way not designed by the law, but to injure and oppress another, as, for example, to extort money from him, or to commit any other wrong to his prejudice, it is an illegal abuse of process, and in that case it makes no difference whether the suit in which the process issued has been determined or not, or how it ended, whether for or against the wronged party. The damage is done at once with the process, and the injuria or complete cause or right of action comes into being instantly. The process may have lawfully and rightfully issued, and yet be abused. This idea clearly marks the difference between abuse of process and malicious prosecution or wrongful and malicious attachment. The distinction is well drawn by *Judge Battle,* in *Hewitt v. Wooten,* 52 N. C., 182, which was held to be an action on the case for malicious arrest or malicious prosecution. He said that plaintiff's allegations, upon which he recovered, may have been false and maliciously so, but he adds in this case, "There is not the slightest proof that the defendants gave the sheriff any instructions, not enjoined by the exigency of the writ, which he then had in his hands." He cites and comments upon the leading English case of *Grainger v. Hall,* 4 Bing. N. C., 212 (33 Eng. Com. Law, 328), as follows: "After the plaintiff had proved the facts, alleged in his declaration, it was objected that he could not recover, because he had not shown that the suit commenced

by the defendant had been terminated. *Tindell, C. J.,* said: 'The answer to this objection was, that the action was for an abuse of the process of the law, by applying it to extort property from the (549) plaintiff, and not an action for a malicious arrest, or malicious prosecution. The learned *Chief Justice* then draws the distinction between the two kinds of action thus: 'In the case of a malicious arrest, the sheriff, at least, is instructed to pursue the exigency of the writ; here the directions given to compel the plaintiff to yield up the register were not part of the duty enjoined by the writ. If the course pursued by the defendant is such that there is no precedent of a similar transaction, the plaintiff's remedy is by an action on the case, applicable to such new and special circumstances; and his complaint being that the process of law has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit, which that process commenced, has been determined or not, or whether or not it was founded on reasonable and probable cause.' *Bosanquet, J.,* said: 'This is not an action for a malicious arrest or prosecution, or for maliciously doing that which the law allows to be done; the process was enforced for an ulterior purpose, to obtain property, by duress, to which the defendant had no right. The action is not for maliciously putting process in force, but for maliciously abusing the process of the court.' *Park* and *Vaughan, JJ.,* expressed themselves to the same effect." If a person should sue out a writ for the purpose of using it in extorting money, and he so uses it, a case for unlawful abuse of process is presented. *Hewitt v. Wooten, supra.* But not so where, in prosecuting his action for the recovery of money due to him, as is the case here, he pursues, in the usual way, only the ordinary and regular processes of the law. In the latter case, in order to constitute an actionable malicious prosecution, there must be shown both malice and want of probable cause. Malice alone will not do; they must concur, but, from lack of probable cause, malice is implied or inferred by the jury as a fact, or, to put it differently, want of probable cause is evidence of malice. 26 Cyc., 21. Plaintiff must also aver and prove, as an additional element, the favorable termination of the former prosecution, for until such original proceeding has been so finally ended, there is no remedy, because there is no wrong, the process being valid and lawful until set aside, and questions concerning want of probable cause and malice are im- (550) material. 29 Cyc., pp. 55 and 56; *Kirkman v. Coe, supra; R. R. v. Hardware Co.,* 138 N. C., 175. There is a suggestion made in *Kirkman v. Coe, supra,* which seems contrary to what *Chief Justice Tindall* said in *Grainger v. Hall, supra,* viz., that it is only necessary to prove a want of probable cause in an action for maliciously suing out an attachment, or any other extraordinary process, and upon the ground

that, when one in the assertion of a civil right resorts to an extraordinary process, without probable cause, and thereby injures his neighbor, there is no reason of public policy upon which to excuse him, and this idea is accepted as correct in *R. R. v. Hardware Co., supra;* but we do not think, with all possible deference to the opinion of the great *Chief Justice,* that the expression is accurate, or that the rule is stated with his usual nicety. What is meant, we presume, is that where a want of probable cause is established, the law will sometimes presume the legal malice necessary to support the action, that is, that kind of malice which, according to the famous and generally accepted definition of *Justice Bailey* in *Bromage v. Prosser,* 10 Eng. Com. Law, 321, consists in a wrongful act intentionally done and without just and lawful cause or excuse. This is legal malice, as distinguished from express or actual malice, and is sufficient to support the action. When plaintiff seeks to recover punitive damages, he must show actual malice, or something more than technical malice. The distinction is well marked in *Stanford v. Grocery Co.,* 143 N. C., 419, where it is said substantially (by *Justice Hoke*) that, in an action for malicious prosecution, there must be shown that an action or proceeding has been instituted, without probable cause, from malice, and that damage has resulted therefrom, and, in addition, that the proceeding complained of has been terminated in favor of the defendant in that proceeding, while in an action for malicious abuse of process there must be shown an ulterior purpose and some act done with the process, not proper in its regular and ordinary use—a willful perversion or misuse of the process to effect some collateral end. In such a case it is not necessary to show a want of probable cause or the
(551) termination of the former action. It is a settled rule that if a man prosecutes another for real guilt, however malicious his motives may be, he is not liable in damages for malicious prosecution, nor is he liable if he prosecutes him for apparent guilt, arising from facts and circumstances which he himself believes to exist. *Plummer v. Gheen,* 10 N. C., 66; *Stanford v. Grocery Co., supra.* It is said in 1 Jaggard on Torts, pp. 632-634: "An action for damages lies for malicious abuse of lawful process, civil or criminal, even if such process has been issued for a just cause, and is valid in form, and the proceeding thereon was justified and proper in its inception, but injury arises in consequence of abuse in subsequent proceedings." *Jackson v. Telegraph Co.,* 139 N. C., 347; *Dickey v. Johnson,* 44 N. C., 405. Not so in an action for malicious prosecution, for in *Ely v. Davis,* 111 N. C., 24, the Court said, *Justice MacRae* writing its opinion: "It is essential to the maintenance of an action for malicious prosecution that the complaint should contain an averment of the want of probable cause, or a statement of facts which, if proved, would establsh a want of probable cause."

We are not inadvertent to the fact that several cases, decided in other jurisdictions, hold that there is an exception to the general rule we have stated, that the prior suit must have been terminated favorably to the plaintiff in an action for malicious prosecution, the exception being that where the former proceedings were *ex parte,* and the defendant in them had no opportunity of being heard, as, for example, in cases of malicious attachment, the rule does not apply. 26 Cyc., 57 and notes 15 and 17. We have examined the cases cited in note 17, and find that most of them were founded upon facts which would constitute an unlawful abuse of process, as an excessive levy under a warrant of attachment, not for the legitimate purpose of collecting the debt, but to harass and oppress the defendant therein. *Zinn v. Rice,* 154 Mass., 1, which is like the case in this Court of *R. R. v. Hardware Co.,* 143 N. C., 54 (opinion by the *Chief Justice*), in which it was held that an excessive levy under an attachment was a wrongful abuse of the process, the *Chief Justice* saying: " 'If process, either civil or criminal, is willfully made use of for a purpose not justified by the law, this is an abuse for which an action (552) will lie.' 1 Cooley Torts (3 Ed.), 354. 'Two elements are necessary: first, an ulterior purpose; second, an act in the use of the process not proper in the regular prosecution of the proceeding.' *Ib.,* 355; 1 Jaggard Torts, sec. 203; Hale on Torts, sec. 185. 'An abuse of legal process is where it is employed for some unlawful object which is not the purpose intended by law. It is not necessary to show either malice or want of probable cause, nor that the proceeding had terminated, and it is immaterial whether such proceeding was baseless or not.' *Mayer v. Walter,* 64 Pa. St., 283," citing, also, *Jackson v. Telegraph Co.,* 139 N. C., 356. The decisions in some of the cases referred to in note 17 seem to have been influenced by local regulations, as in the case of *Allsop v. Ledden,* 130 Ala., 548, following *Brown v. Master,* 104 Ala., 463, the statute in that State, in the language of *Justice Tyson,* providing that the defendant cannot "deny or put in issue the cause for which the attachment issued" (Ala. Code, sec. 2999; Code of 1896, sec. 565), and the nonexistence of the statutory ground for issuing the warrant must, therefore be shown *dehors* the record. This is not so in our State. The case of *Fortman v. Rotteir,* 8 Ohio St., 548, more nearly decides that, in the case of a malicious issuing of an attachment as an ancillary remedy, it is not necessary to aver or prove that the former suit terminated adversely to the plaintiff in it. But the court relied mainly upon the authority of *Grainger v. Hall,* 33 E. C. L., 338, which we have already shown was an action for the abuse of process. The declaration in the *Grainger case* shows clearly that it was not for an ordinary malicious prosecution, but for an unlawful abuse of process. Plaintiff was on the eve of sailing from port in his smack, of which he was the master, and, as the declara-

tion runs, upon plaintiff refusing to comply with an unjust demand for goods not embraced in the mortgage given by plaintiff to secure his debt to defendants, on pain of being refused the proper registry or clearance for sailing, or to submit to any unlawful exaction by them, the latter thereupon, "wrongfully and unjustly contriving and intending, as aforesaid, to imprison, harass, oppress, injure, and impoverish the plaintiff, and to cause and procure him to be arrested and imprisoned, and (553) to prevent his making and prosecuting any voyages in his smack or vessel, and wholly to ruin the plaintiff thereby, they, well knowing that plaintiff was entirely unprepared and unprovided with bail," falsely and maliciously caused the arrest of plaintiff, under a writ of capias, which they had caused "to be sued and prosecuted out of the Court of our Lord the King of the Bench at Westminster," for the purpose of using it, not to collect an honest debt in a legal way, but to wrong and oppress the plaintiff. This case is much like that of *Jackson v. Telegraph Co., supra,* which was decided by this Court, and has several times been cited by us as authority upon the subjects of the "abuse of process."

The precise point in the case of *Grainger v. Hall* will appear from the headnote, which is as follows: "Placing a party under restraint of a sheriff's officer who holds a writ of capias is an arrest, without proceeding to actual contact. In an action for abusing the process of the court in order illegally to compel a party to give up his property, it is not necessary to prove that the action in which the process was improperly employed has been determined, or to aver that the process was sued out without reasonable or probable cause." So we do not think it sustains the conclusion of the Court in *Fortman v. Rottier, supra,* nor are we satisfied with or convinced by the reasoning in that case. *Judge Sutliff* filed a dissenting opinion, which seems to us to be a full and complete answer to the argument of the Court in support of its decision. He said: "I cannot perceive a want of analogy between the causes of action for maliciously commencing the suit without cause against a defendant, and for that of maliciously suing out an attachment against a defendant without cause." He reasons thus: "Suppose, further, that in the civil suit the plaintiffs below had offered to prove to the court that the cause of action alleged against them was utterly groundless and fraudulent, and also had offered the same proof to dissolve the attachment upon the same motion, and suppose the justice to have refused to admit the proof of plaintiffs, either against the right of action or the right of attachment; it seems to me that in such a case there is no reason for holding the plaintiffs precluded in their right of action for instituting the suit against them which does not equally obtain to preclude their (554) right of action for suing out the attachment against them. If the

suit were destitute of merits, the defendants might appear and defeat the same. If the attachment was improperly sued out, they had the same right to appear and defeat the same, and procure its dismissal. But it is said they were not bound to move for the dismissal of the attachment. Nor were they bound to defend the suit commenced without cause and maliciously against them. The plaintiffs below might have been seriously injured by the commencement of a suit in the case supposed; perhaps as seriously injured as they could have been by an attachment being sued out. Suppose a case where a merchant, with a limited credit, and indispensably necessary to be preserved for his success in business, were sued for a large pretended debt, for the purpose of destroying his credit. The very commencement of the suit might have ruined him in his business; yet we all agree no action could be maintained for the wrong unless the injured party could aver and show that such suit was terminated without a recovery. "I confess I can see no reason for not applying the same rule to cases of attachment wherever the party had an opportunity of defending against the alleged wrongful proceeding against him. I hold the law to be that he must aver and show the dismissal or termination of such legal proceedings, in his favor, as indispensably necessary to entitle him to a recovery for such alleged wrongful prosecution against him." He cites strong authority for his position, and we agree in his conclusion. At least that has been the law of this State, as will appear by our decisions upon the question. A case directly in point is *Kramer v. Light Co.*, 95 N. C., 277. That case decided that "the wrong or injury cannot be complete until the action or the provisional remedy has been heard and determined, and then only will the cause of action accrue." A defendant can move to vacate the attachment, under our Code, by notice and motion, and then he can have a full opportunity to be heard, as much so as in the principal suit, though the method of hearing it may be different. The case of *R. R. v. Hardware Co., supra,* sustains this view of the matter. The plaintiff in the case at bar has not averred or proved the termination of (555) the other action favorably to him. But we do not think he has shown the presence of malice or the absence of probable cause for instituting the former suit. The essential facts of this case are the same as those of *Williams v. Hunter,* 10 N. C., 545. The intimation of the Court, which induced the nonsuit, was correct.

No error.

Cited: Carpenter v. Hanes, 167 N. C., 554; *Jerome v. Shaw,* 172 N. C., 862.

IN RE POLLY GARLAND'S WILL.

(Filed 20 November, 1912.)

1. **Wills—Statutory Right.**

The right to dispose of property by will is entirely statutory, and in order to make a valid will, the requirements of the statute must be observed.

2. **Same—Nuncupative Wills—Personalty—Interpretation of Statutes—Request—"Bear Witness"—Words and Phrases.**

Our statute, Revisal, sec. 3127 (3), among other things, requires that a nuncupative will must be proved "on the oath of at least two credible witnesses, present at the making thereof, who state that they were specially required to bear witness thereto by the testator himself," etc.: *Held*, It is sufficient to show, on the question of the testator's requesting that the witness "bear witness" to the will, that believing himself to be *in extremis*, he told the witness during his last illness that he wanted to make a will, who, at his request, called in another, and while they were at his bedside, testator gave specific directions for the disposition of his personal property; and though he had theretofore expressed his wish to make a written will, and had failed in his effort to do so, the matters sought to be established as the nuncupative will were declared at a time he was apprehensive he would become unable to talk, and his death occurred about four days thereafter.

APPEAL by propounders from *Lyon, J.*, at July Term, 1912, of MITCHELL.

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

(556) *W. L. Lambert, Charles E. Green, Hudgins, Watson & Watson for propounders.*

Gardner & Gardner, Black & Wilson for caveator.

CLARK, C. J. There is no natural right to devise or bequeath property. It is entirely statutory. When one is dead he no longer owns anything. No one has the right, unless by statute, to dispose of his property after death, or even of his body. 2 Blackstone, 10; *Burroughs v. R. R.*, 15 Conn., 129; *Crane v. Reeder*, 21 Mich., 73; *S. v. Hamlin*, 86 Mo., 605; *Sturgis v. Ewing*, 18 Ill., 186; *Gibson v. VanSyckle*, 47 Mich., 439; *Hodges v. Lipscomb*, 128 N. C., 58. Society takes possession of both, and in countries where there is no will allowed, and in other countries when there is no will legally executed, provides for the distribution of the property, and the regulations are very diverse. Mr. Blackstone tells us (2 Blackstone Com., 374, 491) that in Greece wills were not permitted except at Athens, and there not until the time of Solon.

Plutarch in his life of Solon earnestly denounces the evils produced by this innovation. In Rome wills were not permitted till the "Law of the Twelve Tables" (2 Blacktone, 491), and were unknown among the ancient Germans (Tacitus, Germania, chap. 20). In England down to the time of Henry II., only one-third of the personalty, called "a reasonable part," could usually be bequeathed. This was held to be law in Magna Carta and was still the law in Scotland in Blackstone's time (2 Bl., 493). This was gradually changed in England, but the power to bequeath all of the personalty did not become fully recognized until the statute of 15 George II., less than two centuries ago. Wills of realty were not valid till the statute of 34 Henry VIII., ch. 5. Indeed, under the feudal law, land did not descend to the heir without payment of a fine, and the tenants *in capite* paid *primer seisin* of one year's profits of the land.

In England, the oldest son still inherits by right of primogeniture, and in France and other countries that observe the *Code Napoleon* a father has no right to devise more than a child's part of his estate. Upon this principle of the right of the State to control or dispose, England levies a graduated inheritance tax of from 1 to 15 per cent upon all property before it is allowed to pass by descent or devise, and in France the inheritance tax, which is taken out before the estate can pass by (557) descent or devise, ranges from 1 to 23½ per cent, graduated according ot the size of the estate. The disposition of the property of the decedent being purely statutory, the regulation thereof, both in cases of testacy and intestacy, varies greatly in different countries and from time to time with changes in the statute.

The propounders in this case claim the personal property of the decedent, Polly Garland, by virtue of an alleged nuncupative will, the requirements of which, under our statute, are prescribed. Revisal, 3127 (3). These are that such will must be proved "on the oath of at least two credible witnesses, present at the making thereof, who state that they were specially required to bear witness thereto by the testator himself. It must also be proved that such nuncupative will was made in the testator's last sickness, in his own habitation, or where he had been previously resident for at least ten days, unless he died on a journey or from home." It is further provided that such will must be proved within six months from the making thereof, unless it was put in writing within ten days from such making, and further, that a citation must first be published "for six weeks in some newspaper in the State, to call in the widow and next of kin to contest the will, if they think proper." Such will can dispose only of personal property. *Newman v. Bost,* 122 N. C., 533.

In the present case it is not contended that there is any defect in these requirements except in the first particular, as to the witnesses being requested to bear witness. The evidence is that the decedent said to the witness, Charles Warwick, "I want to fix up my business. I want to make a will," and directed him to call the witnesses, which he did, and when Lethea Cox had come to the bedside, the testatrix, in the presence of said Warwick and Lethea Cox, made the following statement: "I want Hester's children to have all I have around here, except my notes and money, which I want equally divided between Cornelius and Hester's children. I don't want Emma or any of Win Garland's folks to have anything I have got, as they have now got two or (558) three times their share. All that is here is mine. Rube had nothing here." That she believed herself in extremis is shown by her statement, "I might get so I can't talk, and I want the heirs to have what I have got."

It is true that she expressed her wish to make a written will, and asked the witness Warwick if he could write the will, but after that she remarked, "I might get so I can't talk," and said, "Call witnesses," and thereupon Warwick called Mrs. Cox, and the declaration as above was made. This statement was made on Tuesday, and she died on the following Saturday night. On Friday she made an effort to have Dr. Bradshaw write her will, but some one came in and it was not written.

Her remark to Warwick, "Get witnesses," and, upon Warwick calling Mrs. Cox, her statement of her wishes when they came to her bedside was a sufficient request by the testatrix to the witnesses. Indeed, Mrs. Cox testified: "She told me to stand around and listen to what she said and to witness it. Her mind was good."

This case much resembles *Haden v. Bradshaw,* 60 N. C., 259, where $13,000 in cash was bequeathed, and in which the Court said: "The statute requires that only some of the witnesses present at the making of the nuncupative will shall be 'specially required to bear witness' to it." The Court said further: "The object of this requirement of the statute is that it may be known with certainty that the testator was making his will and that witnesses, by having their attention drawn to it, might understand and recollect what the will was."

The doctrine in *Haden v. Bradshaw* has been followed in *Smith v. Smith,* 63 N. C., 637; *Bundrick v. Haygood,* 106 N. C., 468; *Long v. Foust,* 109 N. C., 114. The evidence in this case is very similar to that in *Haden v. Bradshaw* and *Smith v. Smith.* In *Bundrick v. Haygood,* relied on by the ceveator, the witnesses did not say or intimate that they were called as witnesses by the testatrix, who merely said that she "wanted to see her sister and wanted her to have all her things," but did not express any intention, as here, to make a will or call any witnesses.

In the present case, if the testimony of the witnesses Warwick and Cox is to be believed, the statute was complied with. The case should have been submitted to the jury.

Reversed.

Cited: Fellowes v. Durfey, 163 N. C., 313; *S. v. Darnell,* 166 N. C., 305; *Edwards v. Yearby,* 168 N. C., 666; *In re Edwards,* 172 N. C., 371.

(559)

J. R. RHYNE v. WILLIAM R. RHYNE.

(Filed 20 November, 1912.)

1. Appeal and Error—Second Appeal—Res Adjudicata.

Matters finally adjudicated on a former appeal are *res adjudicata* on a second appeal, and only new questions of law properly presented will then be considered.

2. Contracts—Bond for Performance—Collateral Matters—Liquidated Damages—Penalty—Measure of Damages.

Where a stipulated sum is wholly collateral to the object of the contract sued on, and was evidently inserted merely as a security for its performance, it will not be allowed to control the amount of the recovery as liquidated damages or as a penalty beyond which a recovery can be had, when the action is brought upon the contract which the bond was given to secure.

WALKER, J., and ALLEN, J., dissenting.

APPEAL by plaintiff from *Lyon, J.,* at March Term, 1912, of GASTON.

This issue was submitted to the jury: "Is the defendant indebted to the plaintiff on account of the bond or obligation sued on, and if so, in what amount? Answer: Yes; $400."

His Honor rendered judgment for $225. Both plaintiff and defendant excepted and appealed.

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

A. C. Jones, Mangum & Woltz for plaintiff.

Burwell & Cansler, Wilson & Valz for defendant.

PLAINTIFF'S APPEAL.

BROWN, J. All the questions presented by the appeals in this case, except the one presented now by plaintiff's appeal, were passed on and adjudicated in an action between the same parties, reported 151 N. C., 400.

In that case a copy of the obligation sued on is set out, and the facts are practically the same as in this. The consideration of the bond or obligation was a conveyance to the defendant by his father of a
(560) certain tract of land. The bond was executed to secure the performance of the defendant's agreement to provide a support for his imbecile brother, James R. Rhyne, the plaintiff in this case.

It is useless to repeat what is stated in the opinion in that case. As between the parties to this action, it is *res adjudicata.*

The only question we need consider now is the ruling of his Honor that the plaintiff is limited in the sum total of his recoveries upon the obligation to $1,000. In the former case, plaintiff recovered $775. His Honor rendered judgment in this case for $225 only.

The plaintiff is not suing to recover the penalty of the bond, but to enforce the performance of the contract to secure which the bond was executed.

This contract, as we held in the former case, was entered into to secure to plaintiff a support during his life. In that opinion we said: "We do not think that the failure to fill up the blank space avoids the contract and renders it impossible for plaintiff to recover. On the contrary, we are of the opinion that the failure to fill up the blank manifests a purpose not to limit the amount thought to be necessary for plaintiff's support when not living with defendant excepting by such limitations as is imposed by the condition of life in which plaintiff had lived.

"To arrive at the intent of the parties, it is proper to look at the entire instrument, the condition of the parties, and the purpose for which it was entered into.

"The father had made provision for himself, and at the same time he undertook to provide for his weak-minded son. The sole purpose which induced the father to convey the land to the defendant was to secure the support for plaintiff."

The sum of $1,000, inserted in the bond to secure the performance by defendant of his agreement, was intended neither as a penalty nor as liquidated damages.

It is generally held that where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages or as a penalty beyond which recovery cannot be had. *Robinson v. Cathcart,* 2 Cr. C. C., 590; *Richards v. Edick,* 17 Barb. N. Y., 260; 1 Sedgwick on Damages, sec. 410, and cases cited.

(561) In a case very much like this, the West Virginia Court said: "The sum stipulated is only collateral to the object of the contract; that object is support and maintenance. Most evidently the sum was inserted simply as security for the performance. There is nothing

so peculiar in the case as to make us view it otherwise. Where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages." *Wilkes v. Beimer,* 69 S. E., 366.

In *New Holland v. Lancaster Co.,* 71 Pa. St., 442, a case directly in point, the Supreme Court of Pennsylvania said: "It is not a mere bond in a penalty on a condition to be void upon the doing or not doing of a collateral act, either by the obligor or a third party. Such is the usual case in official bonds with sureties conditioned for the faithful performance of the duties of some office, or for accounting for money, or an ordinary private bond of indemnity by sureties. In such cases it may be conceded that the penalty of the bond is the limit of liability on the instrument itself." Citing *United States v. Arnold,* 9 Cranche, 104.

And further in this opinion it is said: "The weight of authority is very preponderant that upon such a bond with a penalty, covenant will lie to recover damages, and that wherever such is the case the amount of damages recovered may exceed the penalty."

The principle is well stated by *Lord Mansfield* in *Lowe v. Peers,* 4 Burr., 2228. "There is a difference in covenants general and covenants secured by a penalty or forfeiture. In the latter case the obligee has its election, and he may either bring an action of debt for the penalty and recover the penalty (after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction of the whole), or, if he does not choose to go for the penalty, he may proceed upon the covenant and recover more or less than the penalty *toties quoties.*"

The following additional authorities will be found to sustain the conclusion we have reached: Hale on Damages, 123-217; *Perit v. Wallace,* 2 Dallas, 252; *Meinert v. Boltcher,* (Minn.) 62 N .W., (562) 276; *Sherman v. Gray,* (Col.) 104 Pac., 1004; *Noys v. Phillips,* 60 N. Y., 468.

In this last case the Court said: "Being a penalty and containing an agreement *inter partes,* the plaintiff has his election to sue for the penalty or for the breach of the contract. In the latter event he is not limited in the amount of damages to the penalty."

Both the actions brought by plaintiff are upon the contract to secure the performance of which the bond was given, and the plaintiff is not limited in his recoveries to the penalty named in the instrument.

Let judgment be entered in the Superior Court for the sum of $400, the sum assessed by the jury.

Error.

DEFENDANT'S APPEAL SAME CASE.

PER CURIAM. What we have said in plaintiff's appeal disposes of the defendant's appeal. The defendant will pay the costs of both appeals.

Affirmed.

WALKER, J., and ALLEN, J., dissenting.

Cited: *Lumber Co. v. Boushall,* 168 N. C., 507.

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(563)

STATE BOARD OF EDUCATION v. R. C. REMICK.

(Filed 4 December, 1912.)

1. Tax Deeds—Recitations Sufficient.

The recitations in a tax deed of swamp lands made by the sheriff to the Governor in 1799, that no person listed the lands for taxes; that it was advertised in the newspapers agreeable to law and was sold pursuant to such advertisement, a fair offer was made to any person to pay the taxes, but no one offered to do so, and the same was struck off to the Governor and his successors in office, are sufficient to justify the levy and sale of the lands for taxes, and the deed is not inoperative and void on that account.

2. Tax Deeds—Recitations—Prima Facie Evidence—Presumptions—Interpretation of Statutes.

Since chapter 137, Laws 1887, now Revisal, sec. 2909, the recitals in a tax deed are *prima facie* true, and the burden of proof is on the one seeking to establish the contrary.

3. Same—Constitutional Law.

The Legislature having the power to change the rules of evidence, Laws 1887, ch. 137, now Revisal, sec. 2909, changing the burden of proof to the one attacking a tax deed, to show that the recitations therein are not true, embraces tax deeds theretofore made.

4. Tax Deeds—Recitations—Listing for Taxes—Sufficiency—Interpretation of Statutes.

A tax deed made by the sheriff to the Governor in 1799, among other things, recited that "the land was not given in by any person or persons whatever for the payment of taxes thereof," and it is *Held,* that this made the land liable to taxation under Laws 1782 (Iredell's Statutes, ch. VII, sec. 6, p. 430), and the objection to the deed, that it does not state that the land had not become "liable to be sold for taxes," is untenable.

5. State's Swamp Lands—Tax Deeds—Appraisement and Valuation—Subject to Taxation—Presumptions—Burden of Proof—Interpretation of Statutes.

As to a tax deed for swamp lands, Revisal, sec. 4047, makes it presumptive evidence that the assessors valued and appraised the land therein conveyed, with the burden of proof to the contrary on the one setting up its invalidity; and further, by the provisions of Revisal, sec. 2909, it must be shown by him that either such property was not subject to taxation for the year or years named in the deed, or that the taxes had been paid before the sale, or that the property had been redeemed from the sale.

6. State's Lands—Tax Deeds—Presumptions—Interpretation of Statutes—Constitutional Law.

Revisal, sec. 4047, making the recitations in a tax deed for swamp lands *prima facie* true, is constitutional and valid.

7. Tax Deeds—Seal—Interpretation of Statutes—Record—Agreement of Parties—Appeal and Error.

The objection in this case that the sheriff did not affix his seal to a tax deed is cured by Pell's Revisal, sec. 949 (*a*), relating to all deeds executed prior to 1 January, 1895, and is also obviated in this case by an agreement amending the record, by the parties, that the seal was in fact affixed.

8. Tax Deeds—Description—Parol Evidence—State's Lands—Grants.

The tax deed for the lands in question is held, in this case, not too indefinite in its description of the lands, it referring to a grant from the State which identified them sufficiently, and they could also be identified by parol evidence; but as the tax deed was made to the Governor, and the lands were originally granted by the State, if the description in the grant were too indefinite, the title would have remained in the State.

9. State's Lands — Literary Fund — Subsequent Grants — Interpretation of Statutes.

By the Laws 1825, ch. 1268, sec. 1, all vacant and unappropriated State swamp lands were transferred to the Literary Fund for the support of common schools; by Revised Statutes, 1837, ch. 67, sec. 3, all the swamp lands not theretofore duly entered and granted to individuals were vested in that corporation in trust for education and establishing schools, and a like provision was made in Laws 1842, ch. 36, sec. 2. Hence, a grant of lands, embraced in the above transfers to the Literary Fund, made in 1849, was void, the grantee admittedly not having been in possession, at any time.

10. State's Lands—Literary Fund—"Vacant and Unappropriated"—Interpretation of Statutes.

State swamp lands granted in 1795 were sold for taxes and a valid deed made thereof to the Governor in 1799, and transferred by the State to the Literary Fund under the various legislative acts. In 1849 the State issued a grant which is set up as a defect in the title of the Literary Fund on the

ground that it did not meet the statutory requirement that the lands be vacant and unappropriated: *Held*, the objection was untenable under the provisions of Laws 1788, p. 115, Iredell's Collected Statutes.

APPEAL by defendant from *Carter, J.*, at September Term, 1912, of PENDER.

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

Attorney-General for plaintiff.
Rountree & Carr for defendant.

CLARK, C. J. On 22 January, 1795, a grant was issued to Daniel Wheaton for 44,160 acres of land lying in New Hanover County, near Pender, that is commonly known as "swamp lands." On 18 (565) December, 1899, William Nutt, sheriff of New Hanover, executed a tax deed to Benjamin Williams, Governor, for the said property, and the title remained in the Governor and his successors until it was vested in the Literary Fund by Laws 1825, ch. 1268, sec. 1, which transferred to said fund for the support of common schools, together with other property, "all of the vacant and unappropriated swamp lands in the State," and Revised Statutes 1837, ch. 67, sec. 3, provides: "All the swamp lands in this State not heretofore duly entered and granted to individuals shall be vested in said corporation and successors in trust as a public fund for education and establishment of common schools." Laws 1842, ch. 36, sec. 2, also provides: "All the swamp lands to which this State is now entitled, or to which this State shall afterwards become entitled under the provisions of this act, or otherwise, shall be and are hereby vested in the present directors of the Literary Fund of North Carolina and their successors, in trust as a public fund for education and the establishment of common schools."

On 22 March, 1849, a grant was issued to Ezekiel Chadwick for 62 acres of land, lying within the boundaries of this 44,160-acre tract. But there is no evidence tending to show that he or those claiming under him were ever in possession, and it is admitted that they have not been.

On 1 September, 1912, the State Board of Education agreed to sell to R. C. Remick and he agreed to buy the 62 acres at $3 per acre, "provided the State Board of Education could convey a good and indefeasible title in fee to said land," which sale was to be closed by 10 September, 1912. Remick, the defendant, refused to pay the purchase price and accept the deed for said land, on the ground that the State Board of Education did not have title to the property and cannot make him a good deed. The question involved in this proceeding is whether or not

the State Board of Education has title to the 44,160 acres embraced in the grant to Daniel Wheaton, which are the same lands as are described in the deed from William Nutt, sheriff, to the Governor.

On the "agreed state of facts," *Judge Carter* entered judgment for plaintiff, and the defendant appealed.

The first assignment of error is that the tax deed from William (566) Nutt, sheriff, to Benjamin Williams, Governor, was invalid because the recitals in the deed, if true, are insufficient to justify the levy and sale of the land for taxes, and the said deed is therefore inoperative and void. The recitals in the deed are as follows: That no person listed the land for taxes or offered to pay the taxes; the land was advertised in the newspapers agreeable to law and was sold pursuant to such advertisement; a fair offer was made to any person to pay the taxes, but no one offered to do so and the same was struck off to the Governor and his successors in office.

In these recitals every fact necessary as the basis for a proper and legal sale of the property is set out in the deed, and if taken as true there can be no doubt that they are sufficient. 37 Cyc., 1439, says: "The tax deed is required to show by distinct recitals that the land was in fact sold for the nonpayment of taxes, by what officer the sale was made, to whom it was made, and the manner of the sale, as that it was at public auction, to the highest bidder or to the bidder who would take the least quantity of land, for the taxes, etc., at least so far as to show that no provision of the statute was violated in the conduct of the sale."

It is contemplated, however, that the plaintiff has not shown (and after the lapse of 113 years certainly will be unable to show) that the recitals in the deed are true, and hence that the deed is void unless the truth of those recitals are proven, though no one has claimed the land or paid taxes on it for more than a century. Prior to chapter 137, Laws 1887, now Revisal, 2909, it was held in *Land Co. v. Board of Education*, 101 N. C., 39, that there must be evidence *dehors* the deed that the recitals in the sheriff's tax deed are true. It was also held in *Fox v. Stafford*, 90 N. C., 298, that the recitals in a tax deed were not evidence against the owners of property or *prima facie* evidence that the law had been complied with, and the burden of proving these things was on the purchaser.

The result of the above decisions was that up to 1889 no tax deed had ever been held valid on appeal to the Supreme Court and the State was a heavy loser; besides, the taxation which should have been borne by tax defaulters was thrown upon those who had already borne (567) the burden of their own taxes. To remedy this evil, a Tax Commission was appointed to examine into the provisions for the sale of land for taxes in other States, and on their report, chapter 137, Laws 1887

(now, with some modification, Revisal, 2909), was adopted, which made certain recitals in a tax deed presumptive evidence and certain others conclusive evidence. The effect of that act was to change the burden of proof, and the power of the Legislature so to enact was sustained in *Moore v. Byrd,* 118 N. C., 688, and in many cases since, quoting that decision. Indeed, it seems to be established beyond controversy that it is competent for the Legislature at any time to change the rules of evidence applicable to existing contracts, including deeds. *Thompson v. Missouri,* 171 U. S., 380; Brannon XIVth Amendment, 292. It has also been frequently held that the Legislature may make the recitals in a tax deed *prima facie* evidence of their truth. In addition to the decisions in our own Court above referred to, are *Rietler v. Harris,* 223 U. S., 437; 2 Wigmore Ev., sec. 1354 (3), pp. 1670, 1671. It is useless to cite further authorities for a principle so well sustained.

It is further objected, however, that said deed of William Nutt, sheriff, does not state that the land had become "liable to be sold for taxes." But it does recite that "the land was not given in by any person or persons whatever for the payment of taxes thereof," and this certainly made the land liable to taxation under the act of 1782; Iredell's Statutes, ch. VII, sec. 6, p. 430.

But it is further contended that there is no recital in the deed that the assessors did so value and appraise his property. Revisal, 4047, however, expressly names among the presumptions raised as to the tax deeds for swamp lands that "The manner in which the listing, assessment, levy, and sale was conducted was in all respects as the law directed; that *all the prerequisites of the law were duly complied with by all officers or persons who had, or whose duty it was to have, any part or action in any transaction relating to or affecting the title conveyed or purporting to be conveyed* by the deed from the listing and valuation of the prop-
(568) erty up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale and vest the title in the purchaser was done and that all recitals in such deed contained are true as to each and every of the matters so recited." This is made presumptive evidence, and the burden is shifted upon any one claiming the lands by reason of the alleged invalidity of the deed to show that the presumption is incorrect. Besides, it is provided in Revisal, 2909, that in order to defeat the title which such deed purports to convey, it must have shown that either such property was not subject to taxation for the year or years named in the deed, or that the taxes had been paid before the sale, or that the property had been redeemed from the sale. None of these things have been done in the present case.

Under Revisal, 4047, the presumption, therefore, is not only that the land had not been listed for taxation and the tax not paid as provided,

among other things, in Revisal, 2909, but the deed itself carried a further presumption, that on failure to list property for taxation the proper officers had valued it and placed it on the tax list as required by the statute then in force.

The owner of land has notice that he must pay taxes, and that if it is not paid the land will be sold. It is true, this Court in *Parrish v. Cedar Co.,* 133 N. C., 478, and since in *Lumber Co. v. Lumber Co.,* 135 N. C., 743; *s. c.,* 137 N. C., 444, held unconstitutional a provision that where the owner of swamp land had failed to pay all arrearages of taxes *levied and assessed thereon,* or which *ought to have been levied thereon* before a certain date, the land *ipso facto* should be forfeited and vested in the State without any judicial proceedings. In *King v. Mullins,* 171 U. S., 420, the point was thoroughly discussed, and contrary to the decision of our Court above cited, such a statute was held constitutional. However, such provision has been struck out of our statute, and Revisal, 4047, contains no such provision. It merely provides that the deeds for land to the State Board of Education under a sale for taxes shall be presumptive evidence of the facts recited in that section, and throws the burden of proof upon the party contesting the title to prove that the taxes have been paid or other defect in any of the steps which would make the deed invalid.

This, as we have seen, is within the authority of the lawmaking (569) body. The presumption, therefore, is that the proper officers, upon the failure of Wheaton to list the land for taxes, assessed the said property and placed it on the tax list. This is what the statute then, and now, requires to be done before the sheriff is authorized to sell, and the Legislature is as fully competent to provide that such presumptions arose as that the recital in the deed is a presumption that the land was not listed by the owner and the taxes were not paid. The deed recites that the advertisement was made in the newspapers agreeable to law and that the land was sold pursuant thereto.

There was further objection that the seal of William Nutt was not affixed to said deed. This is cured by Pell's Revisal, sec. 949 (*a*), as to all deeds executed prior to 1 January, 1895. Besides, the parties have filed an agreement amending the record, showing that as a matter of fact the seal or scroll was affixed. Further, the court could from the recitals in the deed have decreed that the seal should be placed thereon now. *Moore v. Quince,* 109 N. C., 85.

It is further objected that the description in the deed from Sheriff Nutt was not sufficient to convey the 44,160 acres of land set out in the grant to Daniel Wheaton which he purports to convey. The deed from Nutt to the Governor describes the land as follows: "A certain parcel of land entered by Daniel Wheaton, on the east side of the northeast

branch of the Cape Fear River, including part of the Holly Shelter Pocosin, beginning at a large cypress and water oak on the edge of Holly Shelter Creek, on the south side thereof, about one-quarter of a mile above James Howard's line, containing 44,160 acres." By comparing the above description with the grant to Daniel Wheaton, for a like acreage with like beginning, it will be seen that the same land is referred to and can be identified as a matter of law. This would be made more definite by reference to the entry and plat. But if the same description in the grant from the State to Daniel Wheaton was too indefinite, then the State has never granted the land. Besides, the land could be identified by parol evidence. *Blow v. Vaughan,* 105 N. C., 198; *Euliss v. McAdams,* 108 N. C., 507.

(570) It is further assigned as error that the land was not vacant and unappropriated land. Iredell's Collected Statutes, Laws 1788, p. 115, provides: "That it shall be the duty of any sheriff, before he settles his account with the Comptroller, to deposit said deed or deeds in the office of the Secretary of State, who shall record and keep the same in his office for the benefit of the State; and the said land so conveyed shall be deemed *vacant land and liable to entry.*"

We have already set out above the acts of 1825, 1837, and 1842, by which the State transferred all its vacant and unappropriated swamp lands to the Literary Fund. It follows, then, that the grant of 62 acres to E. Chadwick, in March, 1848, within the boundaries of this tract, was without the authority of law and void. It is admitted that Chadwick has not been in possession.

Revisal, 4047, is an admirably drawn and most necessary statute. It applies only to actions concerning Swamp lands and to which the State Board of Education is a party. Without it, this tract of land, which has paid none of the burdens of government for 113 years, would be a derelict as to which nothing could be done. The State after the lapse of all these years could not show that the land had been listed by the assessors nor that the other acts required by the statute had been complied with. It is entirely proper and competent for the State to provide that the presumption that public officials have done their duty should apply, and throw upon any adverse claimant the burden of proving the contrary. This decision does not, in any way, conflict with the cases of *King v. Cooper,* 128 N. C., 347; *Warren v. Williford,* 148 N. C., 474; *Matthews v. Fry,* 141 N. C., 582, and *Rexford v. Phillips,* 159 N. C., 213, the facts in those cases and this one being very different.

Upon full consideration of the exceptions, the judgment below must be Affirmed.

(571)

LENOIR DRUG COMPANY v. TOWN OF LENOIR.

(Filed 20 November, 1912.)

1. Cities and Towns—Charter Powers—Taxation—Trades—Soda Fountains—General Law—Interpretation of Statutes.

When the charter of an incorporated town gives it, in addition to the powers therein named, "all the power incident and usual to corporations of like character under the general law of the State," by section 2924 of the Revisal, the power is conferred upon it to "annually levy a tax on all trades, etc.," defined to be "any employment or business embarked in for gain or profit," which includes the operation of a soda fountain for that purpose; and a tax thereon of $5 per annum is upheld as valid, notwithstanding the Revenue Act of that year makes no provision for a tax of that character.

2. Controversy Without Action—Courts—Jurisdiction.

The submission of a controversy without action under Revisal, sec. 803, must be to a court of competent jurisdiction over the subject-matter; and as the Superior Court has no jurisdiction over an action to recover a town tax of $5 to an incorporated town under written protest, an action therefor in that court should be dismissed.

APPEAL by plaintiff from *Cline, J.*, at June Term, 1912, of CALDWELL.

This is a controversy submitted without action upon the following statement of facts:

1. The plaintiffs stated in the caption are partners, trading under the name and style of Lenoir Drug Company, and said copartners are residents and citizens of the county and State aforesaid.

2. Defendant town of Lenoir is a municipal corporation, created by the General Assembly of North Carolina, its charter being chapter 37, Private Laws of 1909, which said charter contains certain specific powers of taxation, which will appear by reference thereto.

3. It is agreed that under chapter 46, Public Laws 1911, entitled "An Act to Raise Revenue," no license or privilege tax is placed upon the owners or operators of a soda fountain.

4. The following is a true copy of all the ordinances of the (572) town relating to the subject-matter of this controversy, to wit:

"There shall be collected annually the following taxes as license for the privilege of carrying on the business or doing the act named, but nothing herein contained shall be construed to have the effect of relieving the person paying the license taxes from the *ad valorem* taxation provided by law. The license issued under this section shall be for twelve months from the date of the issuance thereof. Such license shall be a

personal privilege and shall not be transferable, nor any abatement of the tax allowed. Such license taxes shall be payable to the tax collector of the town and shall be as follows, viz.:

"SEC. 43. On every soda fountain, $5."

5. The plaintiff drug company is the owner of and engaged in operating a soda fountain, and was such owner and so engaged in the operation from 10 September, 1911, to this date.

6. That on or about 10 September, 1911, the tax collector of said town made demand on the plaintiff for the payment of license tax imposed under the foregoing ordinance for the period of twelve months, beginning 10 September, 1911; that such demand was at that time refused, but on 28 May, 1912, plaintiff paid such license tax of $5 under written protest, as required by statute, insisting that at the time of such payment such tax was illegal, upon the grounds that by the charter of the said town of Lenoir the said town could only lawfully collect license or privilege taxes upon such subjects or privileges or persons as were actually named in the revenue acts of the General Assembly in force at the time of the collection of said tax, and which were permitted to be collected by towns by such revenue acts.

7. The town of Lenoir insists that it is allowed to collect taxes on all privileges and subjects within the corporate limits, and on all itinerant or resident persons plying any trade, profession, or calling which is liable for taxation for State and county purposes, unless prohibited by the general law of the State. That the collection of the tax aforesaid is not prohibited by the general law of the State, and that the imposition and collection of the tax aforesaid is permitted and permissible under the general law of the State, and the town is not restricted to the
(573) collection of license and privilege taxes which are specifically named in the Revenue Act.

If, upon the foregoing statement, the said tax shall be adjudged to be a valid one, judgment shall be entered in favor of the defendant for the costs hereof. If the court shall be of the opinion that such tax is invalid, then judgment shall be rendered against said town for the sum of $5 and the costs hereof.

His Honor held that the tax was legal, and rendered judgment against the plaintiff, who excepted and appealed.

J. W. Whisnant for plaintiff.
Mark Squires for defendant.

ALLEN, J. It is true, as contended by the plaintiff, that the defendant derives its power to tax from legislative authority, and if it has not been conferred, it does not exist. *S. v. Bean,* 91 N. C., 554; *Winston v. Taylor,* 99 N. C., 211.

We must look, then, to the charter of the defendant (chapter 37, Private Laws 1909), and we find there that certain powers as to taxation are specifically enumerated in section 8, and it is further provided, in section 1, that the defendant, "in addition to the powers and privileges hereafter specially conferred, shall have all the power incident and usual to corporations of like character under the general laws of the State."

Chapter 73 of the Revisal is devoted to "Cities and Towns," and section 2924 confers the power on them to "annually levy a tax on all trades, professions, and franchises carried on or enjoyed within the city, unless otherwise provided by law," and the word "trade," as used in acts to raise revenue, is defined to be "any employment or business embarked in for gain or profit." *S. v. Worth,* 116 N. C., 1010.

We are, therefore, of opinion that as the business of the plaintiffs is embraced in the term "trades," and as the general law, which is substantially incorporated in the charter of the defendant, confers the power to lay an annual tax on "trades," that the plaintiffs are not entitled to recover.

The action might also have been dismissed for want of jurisdiction, as it was brought in the Superior Court and the sum demanded is $5.

The section of the Revisal which permits the submission of a (574) controversy without action (section 803) says it may be submitted "to any court which would have jurisdiction if an action had been brought."

Affirmed.

B. F. SMITH v. AMERICAN BONDING COMPANY.

(Filed 20 November, 1912.)

1. Attachment—Wrongful Levy—Judgment — Replevin — Limitation of Actions—Interpretation of Statutes.

In an action to recover on the bond given by the creditor and his surety in attachment proceedings for a wrongful levy therein, the statute of limitations begins to run from the rendition of the judgment (Revisal, sec. 763), and not from the time the property was replevied, the recovery of the judgment in the former action being the condition authorizing the present suit, and a vacation of the attachment. Revisal, sec. 786.

2. Attachment—Damages—Judgment—Probable Cause—Evidence — Instructions.

When the debtor, in attachment proceedings, has successfully defended the suit to judgment, and brings his action to recover damages on the creditor's bond therein, the latter's requested prayer, in the present suit, that the plaintiff has failed to show probable cause, is properly denied.

3. Attachment—Damages—Wrongful Levy—Expenses—Measure of Damages.

In an action to recover on an attachment bond for the wrongful levy therein, damages may be awarded for the reasonable expense the plaintiff has incurred in procuring the undertaking he had given to obtain the release of the property attached.

4. Same—Traveling Expenses—Time.

Damages may not be recovered in an action for a wrongful levy in attachment for railroad and traveling expenses, and the value of the plaintiff's time in procuring the release of his property.

5. Attachment—Damages—Wrongful Levy—Loss by Contract—Measure of Damages.

One who had contracted to erect a building for another had his property seized under a wrongful levy issued in attachment upon the material he had provided for that purpose, which he replevied in two weeks time. It was shown that he could not have secured other material in that time: *Held*, under the circumstances of this case, the debtor did not delay unreasonably in securing the release on his property, and he was entitled to recover the damages he had thus sustained.

6. Actions—Parties—Misjoinder of Parties—Motions — Practice — Principal and Surety.

An action will not be dismissed for a misjoinder of parties where the plaintiff is suing, in the same action, the principal and surety on an attachment bond. The remedy is by motion to have the causes divided, especially in this case, where a nonsuit has been taken as to the principal, and the further prosecution of the action is against the surety on his bond.

(575 APPEAL by defendant from *Bragaw, J.*, at Spring Term, 1912, of PERQUIMANS.

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

Pruden & Pruden and P. W. McMullan for plaintiff.
W. M. Bond and A. F. Aydlett for defendant.

CLARK, C. J. This is an action to recover damages alleged to have been sustained by reason of the wrongful levy of an attachment upon the property of the plaintiff in a former proceeding in which he was defendant and successfully defended the suit.

The plea of the statute of limitations cannot be sustained. Though the property seized under the attachment was released upon the execution of the defendant's undertaking more than three years before the beginning of this action, the "recovery of judgment by the defendant," which was the condition authorizing suit upon the undertaking (Revisal, 763) given by the plaintiff in procuring the attachment, took place less than two years before the institution of this action. Such recovery of

judgment in the former action was a "vacation of the attachment ordered by the court." Revisal, 786. In view of the rendition of such former judgment, the judge properly refused to charge the jury that the plaintiff had failed to show probable cause.

The items of damages allowed and excepted to are four:

1. Sixty dollars, which was the amount the plaintiff paid for (576) procuring the undertaking given by him to procure the release of the property attached. In the absence of evidence that it was excessive or unreasonable, it was properly allowed as damages. We cannot agree with the defendant that it should have been taxed as costs in the former judgment. It was no part of the court proceeding, but was a proper item of damages in an action upon the bond of the plaintiff in the attachment.

The second item, allowing the plaintiff $20.60 for railroad fare and berth and board on trip attending to the release of the attached property, and the third item of $25, for value of his time in so doing, cannot be allowed. Every litigant necessarily incurs some expenses beyond the fees of his witnesses and of the officers of the court. But for these personal expenses and his time he cannot be allowed compensation, for it would open the door to great abuses, and would often result in oppression. *Hyman v. Devereux,* 65 N. C., 588; *Midgett v. Vann,* 158 N. C., 128.

The only other item is $300, which the plaintiff was required to pay as penalties by reason of the delay in the execution of another contract for building caused by the attachment of his property which he was using in the execution of such other contract. The property was attached on 25 March and the undertaking to secure the release thereof from the attachment was filed on 8 April. The evidence is that there was no unreasonable delay in executing the undertaking to secure the release of the property and that he could not have purchased new material and had it shipped in less time. Such damage was within the purview of the bond, even under *Sledge v. Reid,* 73 N. C., 440.

The defendant contends that it was a misjoinder to join a cause of action against the principal for wrongfully suing out an attachment and an action against the surety upon the undertaking given by the plaintiff. *R. R. v. Hardware Co.,* 143 N. C., 56. But, as it was pointed out in that case, this would not entitle the defendant in this action to have it dismissed, but only to have the action divided, and as a nonsuit has already been taken as to the principal, there is no ground of objec- (577) tion to proceeding in this action, which is now against the surety only.

The judgment will be modified by striking out $45.60 as above pointed out. The judgment is therefore

Modified and affirmed.

J. W. PATTERSON v. CHARLOTTE ELECTRIC RAILWAY, LIGHT AND POWER COMPANY.

(Filed 20 November, 1912.)

Street Railways—Pedestrians—Crossing Track—Negligence—Evidence—Presumptions—Nonsuit.

One who attempts to cross the track of an electric railway, from a place of safety, in front of a car rapidly approaching at night, with signal lights and giving the customary warnings of its approach, and does so in spite of the warnings of a companion, causing a collision and its consequent injury to him, under circumstances which rendered all reasonable efforts of the motorman unavailing to stop the car from the time the danger was apparent to that of the impact, sustains the damages through his own recklessness, which the motorman could not reasonably have anticipated. and not by reason of the defendant's negligence; and a judgment of nonsuit upon the evidence should be entered.

APPEAL by plaintiff from *Cline, J.*, at Special May Term, 1912, of MECKLENBURG.

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

J. D. McCall for plaintiff.

Z. V. Taylor, Osborne & Cocke, and H. C. Miller for defendant.

WALKER, J. Plaintiff's intestate was killed on West Trade Street in the city of Charlotte, as he was crossing the track of defendant's street railway, on 9 July, 1911. The court, after hearing the evidence of plaintiff, dismissed the action under the statute, because there was no (578) evidence to show that negligence on the part of defendant caused the death of intestate. Plaintiff appealed. After a careful examination of the testimony, considered as true and construed in the most favorable light for the plaintiff, and, further, giving him the full benefit of all reasonable inferences therefrom, we are constrained to hold that the ruling of the court was right. Intestate and B. L. Manus were walking from Seversville, a suburban village, towards the city, and intestate crossed the track from right to left, in front of the car, which he could easily have seen and heard. He evidently knew it was approaching, as it was only 150 or 200 yards away, with lights burning. Besides, when he was standing on the left side of the track, a place of perfect safety, he was warned by his companion "that the car was coming," and the motorman, who kept a constant and careful lookout ahead, sounded his gong and applied his brakes, as he was descending a grade in the street, and notified intestate and Manus of the car's approach. It further appears that, suddenly and within a time too brief for the motorman to stop his

car, intestate attempted to recross the track in front of the moving car, and so near thereto as to prevent the car from being stopped in time to save him. The car was rolling down grade without any power and by its own acquired momentum. As soon as the motorman discovered the danger to which intestate was exposed by his own negligence and recklessness, he reversed his lever, which reverses the current and the direction of the power and of the car, driving it backwards. He acted so promptly and applied the increased force of the current in the opposite direction so quickly that at the very moment he struck the deceased the "circuit-breaker" or switch overhead, placed there as a "safety valve" or appliance to prevent injury to passengers and the burning of the car by an excess of current, was disconnected, affecting even the current at the power house. Under the great strain, it held up to the very time the deceased was stricken. All the evidence shows that the motorman was competent; that he kept a proper lookout, even a vigilant one, and that he gave timely notice of the car's approach, and that when suddenly confronted by the emergency, he acted promptly and with due care in his effort to stop the car.

The efficient cause of the death was the negligence of the intes- (579) tate himself. He could see the car as it was moving towards him, as it was plainly visible, and could also hear it; he was warned by B. L. Manus of its approach, and also by the motorman, who rang his gong; but notwithstanding all this premonition, he carelessly, heedlessly, and even recklessly attempted to cross the track in front of a rapidly moving car, about 25 or 30 yards from him and descending a grade in the street. The motorman certainly could not anticipate that a man, in a place of safety near the track, would so suddenly and in spite of all warning, cross the track in front of his car, when it was too late to save him. The authorities are practically all one way on this question. A few cases will indicate the uniform trend of the decisions:

1. "If plaintiff did not observe the poles and trolley wires immediately in front of him, it was plaintiff's fault. All of the evidence as well as the photograph exhibits show that they (the tracks, poles, and trolley wires) were visible some distance ahead of him. It is manifest that the collision was brought about by the unwarranted attempt upon the part of plaintiff to rush across the track ahead of the approaching car. The evidence is not sufficient to show that the motorman by ordinary prudence, under the circumstances, could have either foreseen or prevented the consequences of plaintiff's recklessness. His injury was brought about by his own fault, and the consequence of his recklessness should be borne by him, and not by the defendant." *Lindley v. Manufacturing Co.*, 153 N. C., 394.

2. "Had he used his senses, he could not have failed both to hear and to see the train which was coming. If he omitted to use them, and

walked thoughtlessly upon the track, he was guilty of culpable negligence, and so far contributed to his injuries as to deprive him of any right to complain of others. If, using them, he saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of his mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind." *R. R. v. Houston,* 95 U. S., 697; *Schofield v. R. R.,* 114 U. S., 615; *R. R. v. Freeman,* 174 U. S., 379.

(580) 3. "The court was therefore right in charging the jury that the doctrine of 'sudden peril' has no application to this case, and that the motorman was not bound to anticipate that the plaintiff, whether frightened or not, would leave a place of safety, or, having left it, would go into a place of danger, when she might just as well have gone in another direction; and further, the motorman was not bound to presume that the plaintiff, whether frightened or not, would run into the car, when she could easily see and hear it. He had the right to presume even to the last moment, when it was too late to save her, that she would not do so reckless an act." *Crenshaw v. S. Railway Co.,* 144 N. C., 314; *Doster v. R. R.,* 117 N. C., 651; *Moore v. R. R.,* 136 N. C., 554.

4. "It is to be presumed that a rational being will not needlessly venture into places of peril, and if he does, that he will use proper precautions to guard against injury. If he fails to do either, and suffers damage in consequence, it must be regarded as caused by his own rash act and inattention to his own security." *Parker v. R. R.,* 86 N. C., 222. Authorities in harmony with those cited are: *High v. R. R.,* 112 N. C., 385; *Neal v. R. R.,* 126 N. C., 634; *Markham v. R. R.,* 119 N. C., 715; *Pharr v. R. R.,* 133 N. C., 610; *Bessent v. R. R.,* 132 N. C., 934; *Matthews v. R. R.,* 117 N. C., 640; *Syme v. R. R.,* 113 N. C., 565; *Norwood v. R. R.,* 111 N. C., 236; *Meredith v. R. R.,* 108 N. C., 616. There are numerous cases decided in other jurisdictions which sustain our view and hold that, if a person attempts to cross a street railway track in front of a rapidly moving car, which he sees, or after being warned of its approach, and by miscalculating his chances is injured, without fault of the men in charge of the car, his negligence is the proximate cause of his injury, and bars his recovery. *Craemer v. R. R.,* 156 Mass., 320; *Itskowitz v. R. R.; Riedel v. Traction Co.; Everett v. R. R.,* 6 Am. Elec. Cases (Cal.), 460; *Carson v. Street R. R.,* 147 Pa. St., 219; *Watson v. Street R. R.,* 6 Am. Elec. Cases, 500, and many other cases which will be found in defendant's brief, and to which reference can be easily had for any additional light upon the subject.

This case is much more favorable in its facts for the defendant (581) than were several of those we have cited. In the case at bar, we

can find no evidence of the failure to notify the intestate of the car's approach; on the contrary, he was fully warned by the sound of the gong and the noise incident to the motion of the car, which he could readily have heard, and also by the brightly shining lights, which he could easily have seen, and by the cry of his friend. It is marvelous that he essayed to cross the track under such circumstances, when nearly every sane man would have known that he was taking all possible risks, and that his life would be immediately imperiled. The fault was all his own, as the motorman (plaintiff's witness) acted with due care, and stated that "he did not believe that any power in the world would have stopped the car before it struck him." In this connection we quote what was said in *Watson v. Mound City Street Railway Co., supra:* "That deceased saw the moving train before going upon the track is demonstrated not only by the fact that it was close to him, and he 'had eyes to see,' but by the positive evidence that 'he hurried to go round the cars.' There is no evidence that the motorman in charge of the cars could have known that deceased intended venturing across the track until he got upon it. Deceased was not, then, in a situation of peril which called for action by the motorman, until he went upon the track. When he stepped upon the track he knew, or should have known, that the cars would run upon him unless he was very quick in his movements, or unless their speed was checked. In the circumstances, no fair and just conclusion can be drawn but that the negligence of deceased was a direct, contemporaneous, and proximate cause of his own death. In the face of known and imminent danger, he took the risk of crossing the track, and he must bear the consequences of his contributory negligence."

We sustain the nonsuit, as the court properly held that the death of the intestate could not be referred to any wrong of the defendant, but only to his own fault and reckless conduct.

Affirmed.

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(582)

STATE EX REL. CORPORATION COMMISSION v. OXFORD SEMINARY CONSTRUCTION COMPANY.

(Filed 4 December, 1912.)

1. Educational Corporations—Taxation—Exemption — Constitutional Law—Statutes.

Article V, sec. 5, of our State Constitution authorizes the Legislature to exempt from taxation "property *held* for educational . . . purposes," and our statute, Laws 1911, ch. 50, sec. 71, provides that "all property used exclusively for educational purposes shall be exempt from taxation, State and local": *Held*, that under our Constitution it is the

use to which the property is devoted and to the extent of the interest so dedicated which should control, rather than the title or other tenure by which it is held, and its provisions are broad and comprehensive enough to uphold the legislative exemption as to all property used exclusively for educational purposes.

2. Same—Interpretation of Statutes.

The provisions of Article V, sec. 5, of our State Constitution are permissive in their nature, and the Legislature may establish the exemption to the full constitutional limit or it may provide for a lesser one; and to obtain the benefit of the exemption which is established, as, in this case, for educational purposes, the property must be devoted exclusively to that purpose, it being required for incorporated colleges, etc., that the real estate exemption be confined to buildings with the land they occupy, and to such adjacent land, etc., which is wholly devoted to educational purposes, and which belong to and are actually and exclusively occupied by these institutions, and to the buildings on such lands used as residences by the "officers and instructors of such educational institutions."

3. Educational Corporations—Taxation—Exemptions—Personal Profit—Statutes—Interpretation.

The provisions of Article V, sec. 5, of our State Constitution and those of Laws 1911, ch. 50, sec. 71, make no distinction between public and private educational corporations, or between institutions which are in part conducted for the personal profit of the owner and those which are run on a salary basis, using any profits which may arise in the extension of the work.

4. Educational Corporations—Taxation—Exemptions—Constitutional Law—Statutes—Interpretation.

In interpreting the authority, our State Constitution, Article V, sec. 5, conferring upon the Legislature power to exempt property incorporated for educational purposes from taxation, reference may be made to Article III, sec. 14, declaring that "schools and the means of education shall be forever encouraged," which appears also in our State Constitution of 1776, and Revisal, sec. 71, exempting all property used exclusively for educational purposes, is constitutional in purview of both of these articles of the Constitution construed together.

5. Same.

It is held in this case that the fact that an educational incorporation had gone for a long period of time without paying taxes unchallenged by both the legislative and executive departments of the Government is deserving of great weight by the court in construing Article V. sec. 5, and Article III, sec. 14, of our Constitution in connection and with reference to Laws 1911, ch. 50, sec. 71.

6. Same—Personal Profit.

It appearing in this case that the president of an educational institution and his predecessors, for fifty years, had consecrated their efforts to con-

ducting a college with success, and that it having become necessary to renew and enlarge the school building, resort was had to the formation of a corporation for that purpose, the president of the college taking 264 shares of the capital stock of 543 shares, his friends and fellow-citizens the remainder in small amounts in recognition of the benefits of having the college in their community; that the funds available not being sufficient, the corporation, to complete the building, exclusively devoted to school purposes, borrowed $10,000, secured by a deed of trust on the property, the entire investment turned over to the president of the college at a nominal rental, and with the purpose of creating a sinking fund for the payment of the debt, the other incorporators thus far receiving no return upon their investment: *Held*, the property thus used is exempt from taxation under Laws 1911, ch. 50, sec. 71, and the statute is constitutional; and the fact that the president may receive private or separate benefit from the enterprise does not affect this construction.

APPEAL by defendants from *Carter, J.*, at Spring Term, 1912, of GRANVILLE.

Proceedings to assess property of defendant for taxation, instituted before the Corporation Commission and heard on appeal to the Superior Court, before his Honor, *Frank Carter, judge,* at April Term, 1912, of the Superior Court of Granville County. On the hearing it was made to appear that the Oxford Seminary Construction Company, incorporated, "for the purpose of constructing, altering, enlarging, etc., (584) buildings and dwelling-houses, etc., to be used for school purposes, etc., etc., had rebuilt the buildings of Oxford College," a seminary of learning, conducted and controlled by F. P. Hobgood, who owns 264 of the 543 shares of the capital stock of the company. That the building of this Oxford College is the only thing done thus far by the company in the exercise of its chartered rights. That all of the company's assets consist of this lot of lands and buildings, situate in the town of Oxford. That the real estate in question and the buildings thereon are "used exclusively for school purposes and have been so used for many years past." Stating facts more in detail, the affidavit of said F. P. Hobgood was filed in terms as follows: "That he is the president of Oxford Seminary Construction Company, a corporation duly created by and under the laws of the State of North Carolina, with its principal office in the town of Oxford, said State and county; that said Oxford Seminary Construction Company is the owner of the buildings and grounds now used and occupied by the Oxford College and wholly and exclusively devoted to school purposes, and the total number of shares of the capital stock issued and now outstanding of said corporation is 543, of the par value of $25 per share, making a total of the capital stock of said corporation issued and outstanding of $13,575; that for the purpose of completing buildings to be used for and exclusively devoted to school

purposes it became necessary for the said corporation to borrow the sum of $10,000, which was secured by a deed in trust upon the property of the said corporation; that of the said $10,000 thus borrowed, $1,000 has been repaid, leaving a balance due by said corporation on said loan of $9,000; that the said corporation leases the said grounds and buildings to this affiant for school purposes; that said ground and buildings are exclusively used for and devoted to school purposes; that this affiant pays as rental for said school property the interest on the money borrowed by said corporation, pays the insurance premiums on the buildings situate thereon, keeps said buildings and grounds in good repair, and pays into the treasury of said corporation the sum of $250 per annum for the purpose of creating a sinking fund with which to dis-
(585) charge the principal of the money borrowed as aforesaid; that said lot of land and the buildings thereon have been used exclusively for school purposes for more than fifty years; and that during all these years neither the State nor the county nor the town of Oxford have ever demanded the payment of any taxes on said school property." On these, the facts chiefly relevant to the inquiry, the Corporation Commission held the property liable for taxation, basing its ruling principally on the ground that the term "held for educational purposes" in the constitutional provision did not sanction or permit the exempting of school property used for the private and personal profit of the proprietor and head of a school, and that neither the Constitution nor the statute made or intended to make any exemption in such case. Quoting from the learned opinion of Hon. E. L. Travis, who spoke for the Commission: "It will be noted that the language of the Constitution is somewhat different from that of the statute; that the Constitution authorizes the General Assembly to exempt only 'property held for educational purposes,' but the statute declares as exempt 'property used exclusively for educational purposes' and buildings and lands 'wholly devoted to educational purposes, exclusively occupied and used by a school or college for such purpose.' The matter was argued before us upon the language of the statute only, and without reference to the Constitution, but it is clear that the statute cannot operate to exempt any property except that which is authorized by the Constitution to be exempted. It, therefore, could not, if it attempted to do so, exempt any property except such as is 'held for educational purposes.' We think that the words 'held for educational purposes,' included only the property so held in respect to its title and beneficial ownership; that the property itself, and all its profits and accretions, are dedicated to educational purposes, in such sense that neither the property nor its profits could be diverted by the holder, either in whole or in part, to any other use or purpose, as distinguished from property which, though used for educational work, is held for a private

person or corporation for his or its own benefit, with a view to private gain or profit, and which the holder may at will put to any other use or appropriate to his or its private purposes." And further: "To make a valid exemption, the property must come within the pro- (586) vision of both the Constitution and the statute. To be within the former, it must be 'held for educational purposes.' To come within the latter, if general property, it must be 'used exclusively for educational purposes,' and if buildings and lands, it must be 'wholly devoted to educational purposes' and must 'belong to and be actually and exclusively occupied and used by' an incorporated college, school, etc., for such purpose.

"It will be noted that the buildings and lands, of which the property in question consisted, to be exempt under the statute, must belong to as well as be 'exclusively used' by the school so using them. We might dispose of this particular matter on the ground that they did not belong to the school, but to the construction company. We find, however, that Mr. Hobgood, who conducts the school, is president of the construction company, and is the owner of the greater part of the capital stock in this corporation; so that the diversity of ownership is legal rather than actual. We, therefore, prefer to put our decision of the matter, which is important as affecting other schools in the State, on the broad ground that the property is not 'wholly devoted to' nor 'used exclusively for educational purposes' within the meaning of the Constitution and the statute.

"The property, whether considered as held by the construction company or by Mr. Hobgood, is not 'held for educational purposes.' It is held by the construction company generally for its own benefit, with full power to use, sell, or consume the same, and its profits, in any manner and at any time it sees fit, and to put the same to any use or purpose it may desire for its own profit. We are of the opinion that this property is neither 'wholly devoted to' nor 'used exclusively for educational purposes,' within the meaning of the statute."

And again: "The contention of the company, claiming this exemption, seems to be rested upon the view that the words 'used' and 'purposes' are synonymous, and have in this statute and the Constitution practically the same meaning. These two words have, however, different meanings and different scope, according to our view, as used in the statute and Constitution. *Williamette University v. Knight,* 31 (587) Oregon, 33; *University v. People*, 99 U. S., 309. The word 'used,' in this connection, signifies mere employment, but 'purposes' has reference to and comprehends the ultimate end or result contemplated by such use or employment. The exemption depends, not upon the use, but rather upon the purpose of that use. If one of the purposes of the use

or one of the ends in view is private gain or profit, then the purpose necessarily cannot be 'exclusively' for education. We might credit the able educator, who conducts this school, with the high motives to which he is doubtless entitled, and concede that his purpose in using this property solely in school work is as much the promotion of education as the earning of profit, or even more; yet, if his purpose is in part the making of a profit, such purpose is not 'exclusively' for education."

The ruling of the Commission was affirmed in the Superior Court, and defendant excepted and appealed.

The Attorney-General and Assistant Attorney-General T. H. Calvert for plaintiff.

F. P. Hobgood, Jr., and B. S. Royster for defendant.

HOKE, J., after stating the case: Article V, sec. 5, of our State Constitution contains provision, among other things, "That the General Assembly may exempt from taxation 'property held for educational, scientific, literary, charitable, or religious purposes,' and our legislation under said article on matters more directly relevant to this controversy, Public Laws 1911, ch. 50, sec. 71, enacts:

"The following real estate, and no other, shall be exempt from taxation, State and local:

"1. Real estate directly or indirectly owned by the United States or this State, however held, and real estate lawfully owned and held by counties, cities, towns, or school districts, used wholly and exclusively for public and school purposes, and all property used exclusively for educational purposes."

Subsection 4:

"4. Buildings, with the land they actually occupy, wholly devoted to educational purposes, belonging to and actually and exclusively oc-
(588) cupied and used by churches, public libraries, incorporated colleges, academies, industrial schools, seminaries, or other corporate institutions of learning, together with such additional adjacent land owned by said churches, libraries, and educational institutions as may be reasonably necessary for the convenient uses of such buildings, respectively, and also the buildings thereon used as residences by the officers or instructors of such educational institutions."

Subsection 7, Clause 3:

"3. The furniture, furnishings, books, and instruments contained in buildings wholly devoted to educational purposes, belonging to and actually and exclusively used by churches, public libraries, incorporated colleges, academies, industrial schools, seminaries, or other incorporated institutions."

In the section of the Constitution referred to, a perusal of the words employed gives clear indication that it is the use to which the property is devoted and the extent of the interest so dedicated which should be regarded as controlling, rather than the title or other tenure by which it may be held, and while the language of the Constitution is very general in its terms, permitting to some extent of legislative definition (*Ferrall v. Ferrall,* 153 N. C., pp. 174-179), these terms, in any aspect of them, are sufficiently broad and comprehensive to uphold the legislation applicable to the question presented.

The constitutional provision being altogether permissive in its nature, as shown in the well-considered case of *Congregation v. Commissioners,* 115 N. C., 489, the Legislature may establish the exemption to the full constitutional limit or it may provide for a lesser one. And from this case and a further perusal of the present statute, it appears that in order to obtain the benefit of the exemption which is established, the property must be devoted exclusively to the favored purpose, and in case of "incorporated colleges, academies, industrial schools, seminaries, or other corporate institutions of learning, the real estate exemption is confined to buildings, with the land they occupy, with such adjacent land, etc., which are wholly devoted to educational purposes and which belong to and are actually and exclusively occupied by these institutions, and to the buildings on such land used as residences by the "offi- (589) cers and instructors of such educational institutions." Where the property of one of these incorporated companies, such as this, otherwise comes within the terms of the exemption, we find nothing in the Constitution or statute which distinguishes between public and private undertakings or between institutions which are in part conducted for the personal profit of the owner and proprietor and those which are run on a salary basis, using any profits which may arise in the extension of the work. Certainly in the statute there is no such distinction, for it exempts "property held by counties, towns, or school districts" used wholly and exclusively for public and school purposes, *and* all property used exclusively for educational purposes." Both in the Constitution and statutes, it is the use to which the property is devoted which is made determinative, and not the presence or absence of consequential pecuniary benefit to the owner or proprietor. This being our view as to the meaning of the Constitution and statutes applicable, we may not approve the position that the exemption cannot be extended to cases where, as in this case, an incorporated college has for one of its objects the personal profit of the president and owner. The history of this Commonwealth affords full and ample evidence that its Government has always had the education of its people very closely at heart. In another article of our Constitution extended provision is made for this beneficent and

enlightened purpose, beginning with the notable declaration taken from the act to establish a government for the Northwestern Territory, section 14, Article III, as follows: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged." This same purpose appears in the State Constitution of 1776, and the legislation under both of these instruments, including the act now before us, is against the distinction which is now attempted to be made. Speaking to this subject on a different occasion, our Attorney-General has impressively said: "This declaration, embodied in our organic law, was a registration of the faith of our fathers that religion, education,
(590) and charity are the handmaidens of civilization and worthy of peculiar favor at the hands of the State. All subsequent legislation must be viewed in the light of this constitutional declaration."

Again it appears that for fifty years and more no taxes have been claimed from this school by the sheriffs and tax collectors of the State and county; and this interpretation of the law by both the legislative and executive departments of the Government, unchallenged for this period of time, while not conclusive, is deserving of great weight on the construction which should finally prevail as to the proper meaning of the constitutional provision on the subject (*Gill v. Commissioners, ante,* 176); and the position, assumed and acted on by these officials, finds ample support in authoritative decisions here and elsewhere construing constitutional and statutory provisions of similar import. *United Brethren v. Commissioners,* 115 N. C., *supra; Stewart v. Davis,* 7 N. C., 244; *Phillips County v. Sister Estelle,* 42 Ark., 536; *Cassiano v. Ursuline Academy,* 64 Tex., 673; *School v. Chamberlain,* 55 N. J. L., 292; 37 Cyc., 932-33; 12 A. & E. (2 Ed.), 324-325. In *Munday v. Van Moose,* 104 Ga., 292, an authority much relied upon by the appellee, the Court, in holding that property used for purposes of private or corporate profit or income were not exempt from taxation, seems to have been construing a section of their Constitution which provided in express terms that the exemption should not obtain if the property was used for "purposes of private or corporate profit or income" (see 104 Ga., p. 298), but no such proviso appears in our Constitution or statutes, nor in our view is any such construction permissible. We are not inadvertent to the fact that the legal title to this property is in the corporation, and that the same has been rented to F. P. Hobgood, who conducts and controls the school, and we are in full accord with the well-considered decisions which hold that the words "used exclusively for school purposes" or "wholly devoted to educational purposes" do not ordinarily apply to the case where an owner builds a schoolhouse and rents it to another for purposes of a school. *United Brethern v. Commissioners,* 115

N. C., *supra; Ins. Co. v. Kent,* 151 Ind., 349; *Tament v. Muscatine,* 59 Iowa, 404; *College v. Crowell,* 10 Kan., 442; *Institute v. New York,* 183 N. Y., 151. But looking through the form to the substance, it appears that for fifty years and more this school has been successfully conducted by F. P. Hobgood and his predecessors, who have consecrated their energies and talents to the education of the young women of the State and from beyond its borders, and it having become necessary to renew and enlarge the school buildings, resort was had to the form of incorporation in which F. P. Hobgood took 264 of the 543 shares and his friends and fellow-citizens the remainder in small amounts, this being done by them in recognition of his worth and of the great benefit that such a school had been and promised to be to this community. The funds available not being sufficient, the corporation, in order to complete the buildings exclusively devoted to school purposes, borrowed $10,000, secured by deed of trust on the property and the entire investment is turned over to the management and control of said F. P. Hobgood, to be used exclusively for school purposes, at a nominal rental of $250, for the purpose of creating a sinking fund with which to discharge the principal of the money borrowed. The other incorporators have thus far neither received nor asked anything for their own benefit, and assuredly until the debt is paid and some return is received or demanded from this property regarded as an investment, we are of opinion that the ownership and control and management should be considered as one and the same, and that this property comes within the exemption established by the statute, the same being at present entirely dedicated to educational purposes. The learned and able commissioner who wrote the opinion, with commendable frankness puts aside the view that there was a severance in the ownership and management and rests his decision on the ground that no exemption should be recognized as to property exclusively devoted to school purposes when it is made to appear that "one of these purposes is the personal profit of the owner."

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For the reason stated, we are constrained to differ from this position of the commission, and the judgment of the Superior Court affirming their action must be

Reversed.

Cited: Southern Assembly v. Palmer, 166 N. C., 82.

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GREENSBORO LIFE INSURANCE COMPANY v. S. W. B. KNIGHT.

(Filed 11 December, 1912.)

1. Evidence—Conflicting—Questions for Jury.

Where there is conflicting and competent evidence upon whether a premium note was given for a policy of life insurance induced by false and fraudulent representations of the insurance agent made at the time the note was delivered, it presents an issue of fact, upon which the finding of the jury is conclusive.

2. Insurance—Contracts—Fraud—Parol Evidence.

Testimony of representations of an insurance agent falsely and fraudulently made, which would, if established, vitiate a policy of life insurance, is not governed by the rule of evidence that the written policy may not be varied by parol testimony.

3. Insurance—Contracts—Principal and Agent—Fraud—Corroborative Evidence—Intent—Statements Made to Others.

Where the validity of a life insurance policy is attacked for the false and fraudulent representations of the agent, as thus inducing the contract, it is competent to show, in corroboration of the plaintiff's evidence, that the agent sold only one kind of policy, and by others that he made the same representations to them as an inducement to insure; and also as evidence of the intent of the agent in making the representations to the plaintiff.

4. Insurance—Contracts — Corroborative Evidence — Declarations—Justice's Court—Harmless Error.

Where the declarations of an insurance agent are competent as corroborative of the testimony of the plaintiff as to fraud in the procurement of the policy of life insurance, and as to the intent of the agent in making them, it is admissible to show, in the same action on appeal to the Superior Court, that the agent had testified in the magistrate's court to certain facts; and if error was committed in admitting these declarations, it was cured by the agent's testimony to the same effect in the Superior Court.

APPEAL by plaintiff from *Cline, J.*, at Spring Term, 1912, of NORTHAMPTON.

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

Mason, Worrell & Long and T. C. Harrison for plaintiff.

Winborne & Winborne, D. C. Barnes, Gay & Midgett, and Peebles & Harris for defendant.

(593 CLARK, C. J. This was an action begun before a justice of the peace for the recovery on a note of $133.38 for the first premium on an insurance policy for $2,000. The defendant refused to pay the

note, upon the ground that the execution of the note had been secured by false and fraudulent representations of the plaintiff made at the time the note was executed and delivered. The whole case turned upon that point and the jury found the facts with the defendant. Upon this proposition, there was testimony on both sides, and being an issue of fact, it is not necessary to state the evidence upon which the jury acted.

The first exception was because the defendant was allowed to state what representations were made to him by the insurance agent, and cannot be sustained. The rule that parol agreements are merged in a written contract is not applicable where the allegations and issue are that the written contract was procured by false and fraudulent representations. *Gwaltney v. Assurance Society,* 132 N. C., 928, and cases there cited.

Exception 2 was abandoned and Exception 3 was because the witness was allowed to state what Mourer, the insurance agent, said in his testimony at the trial before a justice of the peace relative to the character and kind of insurance he had written for other parties in the county at the time he solicited this insurance. This was competent, because the evidence showed that the agent had only attempted to write one kind of policy, and they all were of the same kind as that of the defendant. If error, it was harmless, for Mourer testified to same purport at this trial.

All the other exceptions are practically to admission of testimony of the seventeen witnesses who testified, in corroboration and to show the intent of the insurance agent in making the false representations to the plaintiff, that he made the same representations to them. The court so told the jury at the time he admitted the testimony, and also in his charge. He charged them that such evidence was competent for that purpose only, if they found that the agent did make false representation, and that the jury could consider the evidence as to the transactions and conversations of the agent with these other parties in that way, and for no other purpose.

Evidence of a collateral offense of the same character and (594) tending to prove guilty knowledge of the party, when that is an essential element of the crime, is admissible. *S. v. Graham,* 121 N. C., 627; *S. v. Jeffreys,* 117 N. C., 727. These conversations and transactions were made by the same agent about the same kind of policies, about the same time; were representations of the same character, and made to thirty-eight different parties, to the same purport.

Such evidence is admissible in criminal actions and *a fortiori* it is admissible in civil actions. *Brink v. Black,* 77 N. C., 59.

Upon an examnation of all the exceptions, we find

No error.

Cited: Machine Co. v. McKay, 161 N. C., 587; *Guano Co. v. Mercantile Co.,* 168 N. C., 225.

DRAINAGE COMMISSIONERS v. C. A. WEBB & CO.

(Filed 4 December, 1912.)

Drainage Districts—Bond Issues—Taxation—Exemptions—Constitutional Law.

Drainage districts are not regarded as municipal corporations in purview of the Constitution, Article V, sec. 5, and a legislative act exempting their bonds from taxation violates the uniform rule as to taxation required by Article V, sec. 3, and by Article V, sec. 9, and hence such an act is unconstitutional.

APPEAL by plaintiffs from *Ferguson, J.,* at May Term, 1912, of DUPLIN.

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

Kerr & Gavin for plaintiffs.

C. A. Webb and T. H. Calvert for defendants.

CLARK, C. J. The only question presented is whether the Legislature had the power by chapter 177, Public Laws 1911, to exempt from taxation bonds issued by the commissioners of the Muddy Creek Drainage District in Duplin County.

(595) Constitution, Art. V, sec. 3, declares: "Laws shall be passed, taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property." And Article VII, sec. 9, provides: "All taxes levied by any county, city, or town or township shall be uniform and *ad valorem* upon all property in the same, except property exempted by this Constitution."

The language of the Constitution is explicit, and the court below properly held that the bonds of this drainage district could not be exempted from taxation. The plaintiffs contend that the Legislature has such power to exempt bonds from taxation under Article V, sec. 5, which provides that "Property belonging to the State or to municipal corporations shall be exempt from taxation." But its own bonds are not the property of the drainage district. Nor is such district a municipal corporation; certainly not within the meaning of that paragraph of the Constitution, which merely contemplates exempting property belonging to the State and to counties, cities, and towns. The reason for this is that as the State has the taxing power, if its bonds are not exempted the amount of the taxes will merely be added to the rate of interest, and it would be useless to collect additional taxes to pay the interest when it will save commissions thereon to deduct the taxes in advance, thus reduc-

ing the rate of interest. We do not know of any county or municipal bonds being exempted, but if it can be done, the exemption would only extend to taxes of the county or municipality issuing such bonds; else, to the extent of the exemption, such county or municipality would be taxing the people of the rest of the State.

As stated by *Hoke, J.*, in *Sanderlin v. Luken,* 152 N. C., 743, these drainage districts are regarded as "public *quasi*-corporations, but partaking to some extent of the character of a governmental agency." Their assessments upon the land, it is said, quoting *Shuford v. Commissioners,* 86 N. C., 552, are "regarded as a local assessment and made with reference to special benefits derived from the property assessed from the expenditure, while taxes are public burdens imposed as burdens for the purpose of general revenue."

It is clear that the drainage commissioners have no power to (596) levy taxes for the purpose of general revenue. They can only levy local assessments for the purposes of the public *quasi*-corporation. Hence, such drainage districts are not municipal corporations whose property or whose bonds can be exempted from taxation. To exempt either is equivalent to taxing all other property for their benefit. In *Loan Association v. Commissioners,* 115 N. C., 413, *Burwell, J.*, says: "The General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable, or religious purposes, and also the personal property of the taxpayer to a value not exceeding $300. Constitution, Art. V, sec. 5. It has no power to make any other exemptions. It is impliedly forbidden to do so." To same effect, *R. R. v. Allsbrook,* 110 N. C., 137; *Pullen v. Corporation Commission,* 152 N. C., 548.

In view of the plain provisions of our Constitution restricting exemptions to the above recited purposes and requiring taxation to be uniform and *ad valorem* upon all other property, it will be useless to discuss decisions in other States with constitutions more or less variant from our own.

The drainage districts have conferred upon them the right of eminent domain, just as a railroad company or an electric power plant has, and for the same reason, that they are *quasi*-public corporations. But they do not come within the definition of "municipal corporations" in Constitution, Art. V, sec. 5. They have no governmental taxing power for general purposes. It is true, the formation of these districts is encouraged by our statutes, because they are expected to aid largely in the development of the State. But so do railroads, electric power plants, and other *quasi*-public corporations. No one can contend that property or bonds of those companies can be exempted from taxation, nor can those of a drainage district.

Affirmed.

ALLEN, J., concurring: I concur in the result upon the ground that the drainage district is not a municipal corporation within the meaning of Article V, sec. 5, of the Constitution.

WALKER and BROWN, JJ., concur in this opinion.

Cited: Shelton v. White, 163 N. C., 93; *Drainage Comrs. v. Farm Assn.,* 165 N. C., 700; *Southern Assembly v. Palmer,* 166 N. C., 80; *S. v. Knight,* 169 N. C., 352; *Leary v. Webb,* 172 N. C., 26; *Price v. Trustees, ib.,* 85.

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SAVANNAH SEXTON, ADMINISTRATRIX, v. GREENSBORO LIFE INSURANCE COMPANY.

(Filed 4 December, 1912.)

1. Insurance, Life—Premium Notes—Maturity—Possession of Insurer—Nonpayment—Evidence.

In an action to recover upon a life insurance policy, the defendant produced, in its possession, and put in evidence a promissory note, past maturity, signed by the deceased insured, which expressed upon its face that if it was not paid at maturity the policy was void: *Held,* competent, as tending to corroborate the evidence of the defendant that the note had not left its possession, and tending to show that payment had not been made by the deceased, and that the defendant had not waived the payment.

2. Insurance, Life—Premium Notes—Renewals—Nonpayment—Evidence.

A premium note given for the policy sued on in this case, in the possession of the defendant after maturity, and containing the provision that the policy would be void in the event the note was not paid, is *Held* to be a renewal of a note of like character, formerly given, and not a payment thereof, and, without more, no evidence that the premium had been paid so as to keep the policy in force.

3. Same—Waiver—Nonsuit.

In an action to recover upon a policy of life insurance, the plaintiff put the policy and proof of death in evidence with a letter from the defendant that it had received the remittance in settlement of the policy, and stating, "Your official receipt has been attached to your note." The defendant put in evidence a letter it obtained from the plaintiff, upon due notice to produce, to the effect that the note had been returned unpaid from the bank, marked "No attention," and to keep the policy in force the plaintiff must send remittance by return mail with inclosed formal health certificate, etc.: *Held,* the evidence showed that the premium note had not been paid, and whatever may have been the effect, as a waiver, of

presenting the note for payment, the failure of the plaintiff to pay negatived it after that date, and viewing the evidence in the light most favorable to the plaintiff, a judgment of nonsuit was proper.

4. Insurance, Life—Policy—Loan Value—Extended Insurance.

Upon the maturity of a policy of insurance with provision as to a loan value and the extension of the insurance after several yearly premiums have been paid, the administrator of the deceased may not claim the extension, when the loan value, which carries the insurance, has been made available by the deceased by borrowing the full amount.

APPEAL by plaintiff from *O. H. Allen, J.*, at April Term, 1912, (598) of DAVIDSON.

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

E. E. Raper and McCrary & McCrary for plaintiff.
Walser & Walser, T. S. Beall, and King & Kimball for defendant.

CLARK, C. J. This is an action upon a life insurance policy, and was before this Court, 157 N. C., 142. In that case, *Brown, J.*, says: "The controversy is over the payment of the premium due 1 August, 1909, of $34.57. If that was paid, the plaintiff is entitled to recover. If it was not paid, or payment waived, plaintiff is not entitled to recover."

On 13 September, 1909, the intestate paid cash $16.40 and gave a note due 1 November, for $18.17, which was never paid. After the death of plaintiff's intestate this note was in the possession of the defendant. It expressed on the face of it the agreement that if the note was not paid at maturity, the policy was void. At the former trial, upon notice, the defendant produced in court this note and the attached receipt for premium due 1 August, 1909, and they were put in evidence by the plaintiff. On appeal, the Court held that this was error. On this trial said note and the attached receipt were put in evidence by the defendant. The plaintiff contends that as it was held error on the former appeal for her to put the note and receipt in evidence, it must be error now for defendant to put them in evidence. This by no means follows. On the former trial they were put in evidence by the plaintiff as proof of payment of the premium. This Court said: "Had the receipt been in the plaintiff's possession, it would be very strong evidence of payment; but as it was in defendant's possession and had never been delivered, it was no evidence of payment, and the introduction of it as evidence by the plaintiff under the circumstances was inadmissible."

On this trial the note and receipt were introduced by the defend- (599) ant for the opposite purpose. On behalf of defendant they were

competent as corroborative of the proof that they had never left the defendant's possession, and tending to show that there had been neither payment nor waiver of the payment of the premium in question.

The only other assignment of error is to the nonsuit directed in this case. We have stated above the substance of the controversy as set out by *Brown, J.*, in the opinion in that case. Upon that opinion, it was clear that on the evidence then before the Court the plaintiff was not entitled to recover.

In the opinion in the former case it was said: "There is no evidence that the defendant accepted the note as a payment for the premium. It is merely an extension of the time of payment. In express terms the note on its face declares the policies void if the note is not paid when due. This note is similar to the language construed in *Ferebee v. Ins. Co.*, 68 N. C., 11." In 3 Cooley Ins., 2269, and cases cited, and *Pitt v. Insurance Co.*, 100 Mass., 500, it is said that when a policy or a note contains "a stipulation to this effect, a failure to pay at maturity a note given for a premium will work a forfeiture of insurance." On this trial, there was no new testimony adduced tending to show payment of premium.

The plaintiff contends that as it puts the policy in evidence with proof of the death of the assured and the letter of 14 September, 1909, from the company to the deceased, which stated that it had received the remittance in settlement of the policy, that this made out a *prima facie* case, and that the words in the letter, "Your official receipt has been attached to your note," called for explanation by evidence from the defendant, and, therefore, the case should have gone to the jury. The court refused to grant a nonsuit at close of plaintiff's evidence. The defendant put in evidence the following letter, which it obtained from the plaintiff upon due notice to produce the same, dated 30 November, 1909: "Your note of $18.17 and interest, total $18.55, has been returned to us by the bank, marked 'No attention.' In order to keep Policy No. 724 in force, it will be necessary for you to let us have check for (600) above amount by return mail, together with the inclosed informal health certificate for the approval of the medical department." This was written evidence showing that the premium note had not been paid, and that whatever might have been the effect, as a waiver, of presenting the note for payment, the action of defendant on that date negatived any waiver after that date, unless the deceased should make payment. There was no evidence contradictory of this, and the court properly sustained a motion to nonsuit, for upon the evidence, taken in the most favorable aspect, the plaintiff could not recover.

It is true, the plaintiff claims that under the automatic extension feature of the policy, there having been payment of three annual pre-

miums, the plaintiff was entitled to an extension to the amount marked on the policy. The policy, which was in evidence, provided that the "nonforfeiture value on the margin of this page shows the several guaranteed values of this policy corresponding to the number of years for which annual premiums have been paid, and in the event of any indebtedness against this policy these values will be reduced proportionately." This table shows that where three annual premiums had been paid, as in this case, the loan value was $60, which would have entitled the insured to three years and one month's extension. But it appeared in the evidence of the plaintiff that the insured had borrowed said $60 from the company, which was unpaid, and therefore, upon the plaintiff's evidence, the insured was entitled to no extension.

Affirmed.

Cited: Murphy v. Ins. Co., 167 N. C., 336.

ADDENDA

Gill v. Comrs., p. 176, is cited in *Chitty v. Parker*, 172 N. C., 127.
McKay v. R. R., p. 260, is cited in *Hinton v. R. R.*, 172 N. C., 589.

AMENDMENTS TO RULES OF COURT

Substitute for Rule 7 of the Supreme Court the following:

RULE 7. *Call of Each Judicial District.* Appeals from the several districts will be called for hearing on Tuesday of the week to which the district is allotted, as follows:

From the First District, the first week of the term.
From the Second District, the second week of the term.
From the Third District, the third week of the term.
From the Fourth District, the fourth week of the term.
From the Fifth District, the fifth week of the term.
From the Sixth District, the sixth week of the term.
From the Seventh District, the seventh week of the term.
From the Eighth and Ninth districts, the eighth week of the term.
From the Tenth and Eleventh districts, the ninth week of the term.
From the Twelfth District, the tenth week of the term.
From the Thirteenth District, the eleventh week of the term.
From the Fourteenth District, the twelfth week of the term.
From the Fifteenth and Sixteenth districts, the thirteenth week of the term.
From the Seventeenth and Eighteenth districts, the fourteenth week of the term.
From the Nineteenth District, the fifteenth week of the term.
From the Twentieth District, the sixteenth week of the term.

Where two districts are allotted to one week, the appeals will be heard in the order in which they are docketed.

RULE 22 (*a*), *Amendment Adopted February 19, 1913:*

1. The evidence in case on appeal shall be in narrative form and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception.

(602) When this rule is not complied with and the case on appeal is settled by the judge, this Court will in its discretion hear the appeal, or remand for a settlement of the case to conform to this rule.

If the case is settled by agreement of counsel, or the statement of appellant is the case on appeal, and the rule is not complied with, and the appeal is from a judgment of nonsuit, the appeal will be dismissed.

In other cases the Court will in its discretion dismiss the appeal, or remand for a settlement of the case on appeal.

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1. *Appeal and Error—Lower Court—Opening and Concluding Speeches.*—The determination of the lower court as to which party litigant should open and conclude the argument to the jury is not appealable. *Elks v. Hemby*, 20.

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8. *Appeal and Error—Assignments of Error—Motions—Judgments.*—It is not necessary for the record on appeal to contain appellant's assignments of error when the appeal is only from the judgment entered, and a motion to dismiss the appeal and to affirm the judgment of the lower court, on that account, will be denied. *Fountain Co. v. Schell*, 529.

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10. *Tax Deeds—Seal—Interpretation of Statutes—Record—Agreement of Parties—Appeal and Error.*—The objection in this case that the sheriff did not affix his seal to a tax deed is cured by Pell's Revisal, sec. 949 (*a*), relating to all deeds executed prior to 1 January, 1895, and is also obviated in this case by an agreement amending the record, by the parties, that the seal was in fact affixed. *Board of Education v. Remick*, 562.

ARBITRATION AND AWARD. See Insurance.

1. *Nonwaiver—Interpretation of Contracts.*—The nonwaiver agreement in a policy of fire insurance which stipulates that the submission to arbitration and appraisement of the loss "shall not waive or invalidate any rights of either party to the agreement under the" policy, etc., does not affect the rights of the insured, after the company has refused to pay the amount of the award rendered, to bring his action within the sixty days. *Millinery Co. v. Insurance Co.*, 130.

2. *Arbitration and Award—Award, How Construed—Terms of Submission—Interpretation.*—When it can consistently and reasonably be done, the courts will construe everything in support of an award rendered strictly in pursuance and in uniformity with the submission, and which does not exceed its terms. *Ibid.*

ARBITRATION AND AWARD—*Continued.*

3. *Same—Intent—Certainty—Presumptions.*—An award must be certain and final as to all matters submitted, giving to the words employed their ordinary meaning, and it will be taken to be so unless the contrary appears on its face, every fair presumption being in favor of its validity, and it will be so construed as to put one consistent sense on all its terms, the certainty required being a certainty of a common intent. *Ibid.*

4. *Arbitration and Award—Award, How Construed—Intention—General Terms—Intent.*—An ambiguity appearing in an award should be construed in the way which will best coincide with the apparent intention of the arbitrators; and the courts will thus restrain the general terms thereof to apply to particular words in the submission, so as to connect the particular thing awarded therewith. *Ibid.*

5. *Arbitration and Award—Conclusion.*—An award of arbitrators must speak for itself; and it is not open to proof of any understanding or meaning of the arbitrators, different from the meaning to be gathered from its terms, and the duty of the arbitrators is best discharged by a simple announcement of their decision, or the result of their investigation, without giving any reason therefor. *Ibid.*

6. *Arbitration and Award—Interpretation—Definiteness—Inaccuracies—Bookkeeping.*—Ignorance of bookkeeping and ungrammatical expressions will not avoid an award otherwise regularly found; and in this action to recover damages caused by fire covered by a policy of insurance, which had been submitted to arbitration under a stipulation therein, the amount of the award, expressly stated, is upheld, though it appears that it was derived by subtracting a certain sum, placed in the wrong column of figures, from the total loss, without observing the mathematical forms in making the calculations. *Ibid.*

7. *Arbitration and Award—Statements in Award—Interpretation.*—The statement of the award under a fire insurance policy, passed upon in this case, that it was an "appraisal and determinor of values," is held to be a mere statement of the process by which the arbitrators came to their conclusion, and does not affect the award expressly found. *Ibid.*

ARGUMENTS. See Practice.

ASSESSMENTS. See Building and Loan Companies.

ASSIGNMENT OF ERROR. See Appeal and Error.

ASSUMPTION OF RISKS. See Master and Servant.

Assumption of Risks—Instructions—Issues—Master and Servant—Duty of Master—Rule of the Prudent Man.—A requested instruction upon the doctrine of assumption of risks is properly refused when no issue thereon has been submitted to the jury. The charge in this case is upheld, upon the duty of an employer to furnish a safe place to work and reasonably safe appliances, etc., and upon that of the employee to act under existing conditions within the rule of the reasonably prudent man. *Hamilton v. Lumber Co.*, 47.

ATTACHMENT.

1. *Process—Attachment—Interpretation of Statutes.*—The writ of attachment is an extraordinary writ in derogation of a common-law right, and the statutes under which they are allowed to issue must be strictly construed, and in favor of the party whose property is sought to be attached. *Carson v. Woodrow*, 143.

2. *Process—Attachment—Sheriff—Other Officer—Void Levy.*—A writ of attachment issuing out of the Superior Court on causes within its jurisdiction must be addressed, as required by the statute, to the sheriff of the county in which the property of the defendant may be found; and when it is addressed to any other process offcer a levy thereunder is invalid. Ibid.

3. *Appeal and Error—Order Vacating Attachment—Findings of Facts.*—The Superior Court judge is not required to set out the facts upon which he has vacated an attachment levied on defendant's property, unless the party appealing, and complaining of the ruling of law, requests him to find the facts necessary to give him the benefit of his exceptions. *Lumber Co. v. Buhmann*, 385.

4. *Appeal and Error—Order Vacating Attachment—Debtor's Possession—Undertaking—Interpretation of Statutes.*—When an attachment on the debtor's property has been vacated by the Superior Court judge, the defendant should not be required to give the undertaking under Revisal, secs. 774 and 775, to regain possession of the property. *Ibid.*

5. *Justices' Courts—Nonresidents—Attachment—Publication of Summons—Motions After Judgment—New Trial—Superior Court—Appeal and Error.*—Judgment having been rendered in proceedings in attachment, in a court of a justice of the peace, against a nonresident defendant, who thereafter promptly but unsuccessfully moved in that court for a rehearing upon affidavits setting forth a meritorious defense, the defendant appealed to the Superior Court, which granted the motion, and plaintiff appealed to the Supreme Court: *Held*, the only question presented is the correctness of the ruling on the motion to rehear. *Thompson v. Notion Co.*, 519.

6. *Appeal and Error—Attachment—Judgments—Presumptions.*—When in an action for malicious abuse of the process of the court in suing out a warrant of attachment, it appears that the creditor prosecuted the former action regularly and orderly in accordance with the statutory requirements, the judgment therein sustaining the attachment will be upheld on appeal if the allegations of the complaint or affidavit are sufficient, and it will be assumed that the court below found facts sufficient to sustain its judgment, when the record is silent regarding them. *Wright v. Harris*, 542.

7. *Process, Abuse—Attachment—Regular Proceedings—Ulterior Purpose—Motions—Laches—Estoppel—Burden of Proof.*—In an action for the wrongful abuse of process in suing out a warrant of attachment on the property of the debtor, it was made to appear that the proceedings in attachment were usual and regular, following the statutory methods prescribed, and there was no evidence tending to show that the creditor had any ulterior or wrongful purpose or intent in instituting the proceedings: *Held*, the remedy of the debtor was by motion to

ATTACHMENT—*Continued.*

vacate the attachment under our statute, and recover damages from the creditor and the surety on his bond; and for him to recover in an independent action for malicious prosecution, it is necessary for him to show the successful termination of the proceedings in attachment. The difference between maliciously suing out an attachment and the wrongful abuse of process, thereafter, pointed out and discussed by WALKER, J. *Ibid.*

8. *Attachment—Wrongful Levy — Judgment — Replevin — Limitation of Actions—Interpretation of Statutes.*—In an action to recover on the bond given by the creditor and his surety in attachment proceedings for a wrongful levy therein, the statute of limitations begins to run from the rendition of the judgment (Revisal, sec. 763), and not from the time the property was replevied, the recovery of the judgment in the former action being the condition authorizing the present suit and a vacation of the attachment. Revisal, sec. 786. *Smith v. Bonding Co.*, 574.

9. *Attachment—Damages—Wrongful Levy—Loss by Contract—Measure of Damages.*—One who had contracted to erect a building for another had his property seized under a wrongful levy issued in attachment upon the material he had provided for that purpose, which he replevied in two weeks time. It was shown that he could not have secured other material in that time: *Held*, under the circumstances of this case, the debtor did not delay unreasonably in securing the release on his property, and he was entitled to recover the damages he had thus sustained. *Ibid.*

ATTORNEY AND CLIENT.

1. *Attorney and Client—Jury—Improper Remarks—Prejudice—Appeal and Error.*—For improper remarks made by opposing counsel while addressing the jury to be held for reversible error on appeal, it must appear that they have prejudiced the objecting party. *Pigford v. R. R.*, 93.

2. *Process—Attachment—Attorney and Client.*—In order to the valid issuance of an attachment from the Superior Court, it is necessary that the requisite facts be shown to the court by an affidavit of prescribed form and substance (Revisal, sec. 758 *et seq.*); and when an attachment form in blank, including a form for the affidavit, has been signed by the clerk and delivered to the attorney of the party seeking the attachment, upon condition that he properly fill out the papers and give a sufficient bond, the writ and the levy thereunder are both void, though subsequently approved by the clerk. *Carson v. Woodrow*, 143.

3. *Attorney and Client—Principal and Agent—Consent Judgment—Scope of Authority.*—The consent of an attorney to a "consent judgment" which materially affects the rights of his client in the subject-matter of the controversy, given without the consent, expressed or implied, of his client, is not within the scope of the employment of the attorney, and is not binding upon the client. The principles relating to the scope of an attorney's agency in representing the interests of his client discussed by WALKER, J. *Bank v. Ewen*, 414.

ATTORNEY-GENERAL. See Actions.

BAILMENT. See Negligence.

Livery Stables—Bailee for Hire.—One who stables and feeds horses for others for pay is a bailee for hire. *Ashford v. Pittman*, 45.

BANKS.

Banks—Assets—Trusts and Trustees—Pooling Shares—Illegal Combination—Costs and Expenses.—The assets of a bank are a trust fund, primarily for its creditors and secondarily for its stockholders, and where the officers and directors thereof have entered into an illegal pooling of the stock to secure control of the bank, and money has been expended in the drafting of the illegal agreement and in an endeavor to maintain it in the courts, the bank being a mere nominal party to the action and not a party to the contract, it is unlawful for the directors and officers to charge up this expense to the bank, for it is their individual liability. *Bank v. Holderness*, 474.

BASEBALL. See Cities and Towns.

BILLS OF LADING. See Carriers of Goods.

BILLS AND NOTES.

1. *Negotiable Instruments—Due Course—Fraud—Burden of Proof.*—When the defense to an action brought by a holder upon a negotiable note acquired by him in due course, for value, before maturity, is that he had procured the note to be given to the payee by false and fraudulent representations made to the defendant, the burden is on the defendant to show that the transaction was fraudulent, and that the plaintiff knew of the infirmity of the paper at the time he acquired it. Revisal, sec. 2208. *Bank v. Brown*, 23.

2. *Suits—Notes—Beneficial Owner—Parties.*—An action may now be sustained by the beneficial owner of a note made to another for his use and benefit. *Norfleet v. Insurance Co.*, 327.

BLASTING. See Negligence.

BOND ISSUES. See Constitutional Law.

BROKER. See Principal and Agent.

BUILDING AND LOAN COMPANIES.

1. *Building and Loan Companies—Shareholder—Status.*—A holder of stock in a building and loan association must share in the losses as well as the profits of the concern, and is liable for duly authorized assessments to cover the losses of the corporation. *B. and L. Asso. v. Blalock*, 490.

2. *Same — Borrower—Mortgages—Cancellation—Assessments—Usury.*—A shareholder in a building and loan association, who has borrowed money from it and secured its payment by a mortgage on real property with his shares of stock as collateral, with provision both in his certificates and the mortgage for the payment of assessments, may not compel the cancellation of the mortgage upon the repayment of the principal sum and interest, unless he has also paid his assessment to meet a loss of the corporation; and the usury laws have no application. *Ibid.*

BURDEN OF PROOF. See Estoppel; Negligence; Nuisance; Presumptions; State's Lands.

1. *Mortgages—Fraud—Burden of Proof—Opening and Conclusion—Practice.*—The burden is upon the defendant, who has admitted giving a note and mortgage, to show that it was excessive and procured by plaintiff's fraud, when he relies upon this defense, with evidence tending to support it; and he has the opening and concluding arguments to the jury. *Elks v. Hemby*, 20.

2. *Master and Servant—Assumption of Risks—Contributing Negligence—Burden of Proof—Interpretation of Statutes.*—While there is a marked distinction between the doctrines of assumption of risks and contributory negligence, it is proper, in pertinent cases, to consider the application of the law relating to an assumption of risk under the issue of contributory negligence, with the burden of proof on the defendant pleading it. Revisal, sec. 483. *Pigford v. R. R.*, 93.

3. *Debtor and Creditor—Different Classes of Debt—Payment—Application Directed—Burden of Proof.*—The burden of proof is on the debtor to show that he has directed the application of a payment he has made to his creditor, to whom he owed both a secured and unsecured debt. *Stone v. Rich*, 161.

4. *Negligent Burning — Sparks from Engine—Dry Brush—Proximate Cause—Presumption—Burden of Proof.*—In this action for damages by fire alleged negligently to have been started by defendant lumber company on its own premises and communicated to plaintiff's land, instructions to the jury were correct, that if the defendant allowed combustible matter to accumulate on its land in such close proximity to its engine that it exposed adjacent property to unnecessary peril, and the fire was caused by sparks or coals from the engine, a *prima facie* case of negligence was made out, and they should determine, upon all the evidence, whether the combustible matter was fired by sparks from a negligently constructed or operated engine. The principles relating to the negligence of a railroad company in causing damage by fire originating either on or off of its right of way from a defective engine or one negligently operated, discussed by WALKER, J. *Aman v. Lumber Co.*, 369.

5. *State's Swamp Lands—Tax Deeds—Appraisement and Valuation—Subject to Taxation—Presumptions—Burden of Proof—Interpretation of Statutes.*—As to a tax deed for swamp lands, Revisal, sec. 4047, makes it presumptive evidence that the assessors valued and appraised the land therein conveyed, with the burden of proof to the contrary on the one setting up its invalidity; and further, by the provisions of Revisal, sec. 2909, it must be shown by him that either such property was not subject to taxation for the year or years named in the deed, or that the taxes had been paid before the sale, or that the property had been redeemed from the sale. *Board of Education v. Remick*, 562.

CANCELLATION. See Equity; Contracts; Mortgages.

CARRIERS OF GOODS.

1. *Carriers of Goods—Damaged Shipment—Duty of Consignee—Entire Loss.*—While ordinarily the consignee should accept a shipment of

CARRIERS OF GOODS—*Continued.*

goods damaged by the carrier's negligence, and minimize the loss so far as it can reasonably be done, the principle does not obtain when the loss is entire; and, in this case, the consignee was not required to accept a keg of molasses he had bought for his own use when by the delay of the carrier the molasses had soured and become worthless, and although the keg, an incident to the shipment, might, perhaps, have been worth 25 cents to a person desiring one.

2. *Carriers of Goods—Contract—Negligence—Exemption.*—A common carrier may not, by contract, absolve itself from the consequences of its own negligence in the transportation of the subject-matter of its bill of lading, or exempt itself from liability, partial or total, thereby caused. *Ibid.*

3. *Same—Live-stock Bill of Lading.*—A common carrier cannot, by fixing the valuation of a shipment of mules at not exceeding $100 for each animal in its live-stock bill of lading, limit recovery to that amount, as such would be an attempt to contract against its own negligence to that extent, and a provision to that effect in the bill of lading is void. *Jones v. R. R.*, 148 N. C., 449; *Winslow v. R. R.*, 151 N. C., 250, cited and overruled. *Ibid.*

4. *Same—Federal Questions—Common-law Liability—Statutes.*—An action brought in the State court, involving the construction of a live-stock bill of lading issued by a common carrier for the transportation of live stock from another State to a point in North Carolina, where the recovery is limited to $100 on each animal shipped, and wherein the recovery exceeds the amount stipulated for in the bill of lading, does not raise a Federal question, and will be governed by the decisions of our own courts as to the common-law doctrines applicable, or by any laws the Legislature may make relating thereto. *Ibid.*

5. *Contracts—Carriers of Goods—Bills of Lading.*—The execution of a bill of lading by the carrier to transport the property for the consideration expressed therein is a contract between the carrier and the shipper. *Mule Co. v. R. R.*, 215.

6. *Same—Public Duties.*—In addition to the contractual obligations as expressed by the executed bill of lading issued, the law imposes upon the common carrier other obligations and duties by reason of the privileges it has, as such, in the exercise of the right of eminent domain, which can only be conferred by law in consideration of public service, and by reason of its enjoying a virtual monopoly of the carriage of freight within certain distances. *Ibid.*

7. *Same.*—It is the duty of a common carrier, independent of contract, to transport safely and to deliver within a reasonable time the shipment for which it issues its bill of lading. *Ibid.*

8. *Same—Discrimination—Common Law.*—A recovery for injury to live stock caused by the negligence of the carrier in transporting a carload shipment from another State to a North Carolina point, under a live-stock bill of lading, exceeding the amount fixed therein as the value of each animal, is not a discrimination in favor of the plaintiff

CARRIERS OF GOODS—*Continued.*

or an interference with the Interstate Commerce Act, there being no express provision of the act in regulation of such matters, and nothing in abrogation of the common-law doctrine. *Ibid.*

9. *Same—United States Supreme Court—State's Decisions—Practice—Jurisdiction.*—The Supreme Court of the United States recognizes and follows the decisions of the State courts on questions involving the right of a common carrier to relieve itself, by contract, of the effects of its negligent acts in transporting stock, under its live-stock bill of lading, from a point beyond the State, when the action is brought to recover damages therefor in the State court, though otherwise in cases originating in the Federal jurisdiction. *Ibid.*

10. *Carriers of Goods—Interstate Commerce Acts—Live-stock Bill of Lading—Limited Liability—Negligence—Interpretation of Statutes.*—There being no express language in the act of Congress known as the Interstate Commerce Act abrogating the common-law right of a plaintiff to recover of the carrier the full amount of damages he may have sustained by reason of the defendant's negligence in a shipment of stock, under the carrier's live-stock bill of lading fixing the valuation of each animal, if there is any abrogation of the right, it must be by implication, and then only when it would render the act of Congress nugatory, which does not apply in cases of this character. *Ibid.*

11. *Interstate Commerce Acts — Commission—State's Laws—Incidental Matters.*—The mere fact that Congress has created the Interstate Commerce Commission and given to it a large measure of control over interstate commerce does not deprive the State of the right to enforce laws which may incidentally affect commerce, in the absence of action by Congress or rules and regulations of the Commission as to the particular matters to be inquired of. *Ibid.*

12. *Interstate Commerce Acts — Commission — Provisions—Negligence—Remedy—Common Law—Interpretation of Statutes.*—The act of Congress and the rules and regulations of the Commission are to compel the common carrier to the performance of its duties, and the rates prescribed are to afford the transportation of property safely and with reasonable care, and are not based upon the assumption that the carrier will not perform its duty; and in the absence of any provision for a remedy for the carrier's negligence, or for relieving it from the consequence of its negligence, there is no restruction upon the application of the common-law doctrine as held by the courts of the State. *Ibid.*

13. *Interstate Commerce Act—Carriers of Goods—Live-stock Bill of Lading—Limited Recovery—Actual Damages—Interpretation of Statutes.*—The right of action of a plaintiff to recover for the negligence of a common carrier an amount in excess of the valuation of a mule shipped in a car-load, and covered by a stipulation as to valuation of each animal, is preserved by the proviso of the act of Congress known as the Interstate Commerce Commission Act, as amended in 1906. *Ibid.*

CARRIERS OF GOODS—*Continued.*

14. *Carriers of Goods—Injury to Stock—Negligence—Evidence—Nonsuit.*—In an action for damages against a railroad company for the negligent injury to two mules in a car-load shipment, which resulted in their death, there was evidence tending to show that the mules were "tired and droopy" on their arrival at destination, and not in good condition; that they died on the night following the day of their receipt, were dissected, and their bodies were discovered to have been bruised, after removing the skin, and their internal organs in a state of congestion and decomposition. The shipment had been receipted for by the initial carrier as in good condition: *Held*, a motion to nonsuit was properly disallowed, and the issue as to defendant's negligence properly left to the jury. *Mule Co. v. R. R.*, 252.

15. *Carriers of Goods—Live-stock Bill of Lading—Owner's Acceptance—Delivering Carrier—Negligence.*—A common carrier may not make a valid contract which will have the effect of relieving it from liability; and irrespective of the ownership of the car, it cannot relieve itself from liability for damages to a car-load of live stock it has received from its connecting line, in good condition, but in an unsuitable car, and delivers them in bad condition, by reason of a requirement in the original bill of lading that the shipper must inspect the car and reject it if unsuitable. *Kime v. R. R.*, 457.

16. *Carriers of Goods—Live-stock Bill of Lading—Written Notice—Actual Notice.*—That the requirement that the written notice provided for in a carrier's live-stock bill of lading is not necessary under the circumstances of this case, see *s. c.*, 156 N. C., 451. *Ibid.*

17. *Express Companies—Carriers of Freight—Limitation as to Recovery—Interstate Commerce—Negligence.*—The stipulation in an express receipt providing that no recovery exceeding $50 for loss or damage to a shipment could be had, is invalid, and a recovery of a larger sum is not an interference with the act to regulate interstate commerce, upon the authority of *Mule Co. v. R. R.*, *ante*, 215. *Stehli v. Express Co.*, 493.

CARRIERS OF PASSENGERS.

1. *Carriers of Passengers—Negligence—Boarding Passengers—Starting of Train—Contributory Negligence—Evidence—Questions for Jury.*—Upon conflicting evidence, in an action against a railroad company for damages for the negligent killing of plaintiff's intestate, as to whether the defendant's passenger train suddenly moved forward at once after "All aboard!" had been called by the conductor and immediately after the signal for starting had been given, preventing, in the presence of the engineer and porter, the plaintiff's intestate from gaining a foothold on the steps of the car he was endeavoring to enter as a passenger, because of the speed of the train, in consequence of which he was knocked under the cars by a truck left there by an express company, and killed; or as to whether the intestate's death was attributable to his own negligent act in attempting to board the car of a moving train after having been warned not to do so, the question of defendant's actionable negligence is one for the determination of the jury. *Roberts v. R. R.*, 155 N. C., 79, cited as controlling. *Doles v. R. R.*, 318.

CARRIERS OF PASSENGERS—*Continued.*

2. *Railroads—Excursion Trains—Protection for Passengers—Anticipated Results.*—It is the duty of a railroad company to have a sufficient number of officers in charge of its train to preserve order, and it is held in this case that only two men, the conductor and the trainmaster, were not force sufficient for an excursion train of twelve or fourteen coaches, of both white and colored people, carried separately, when drinking and rowdyism thereon might reasonably have been anticipated. *Stanley v. R. R.*, 323.

3. *Railroads — Excursion Trains — Protection for Passengers — Police Powers—Interpretation of Statutes.*—It is no defense that those in charge of an excursion train of twelve or fourteen coaches leaving from a North Carolina city, and containing white and colored passengers, had no authority to arrest passengers who were rowdy and shooting pistols in the coaches, in an action for damages sustained from a pistol shot by one of the passengers, for under our statutes the railroad company had the right to swear in officers to take charge of the train. Revisal, secs. 2605, 2606, 3757 (b). *Ibid.*

CERTIORARI.

Appeal and Error—Certiorari—Laches—Procedure.—The plaintiff's motion for a *certiorari* having been disallowed at a former term of the Supreme Court without prejudice, for the purpose of allowing him to renew his motion after he had applied to the trial judge to correct the case in the particular set out in his petition: *Held*, the plaintiff should have again moved the court for the writ before the call of the district to which the case belonged, and it comes too late after argument and after the case has been submitted to the court for decision, which other business of the counsel, and their inadvertence to the time of calling the district, will not excuse. Supreme Court Rule 41. *Todd v. Mackie*, 352.

CITIES AND TOWNS.

1. *Cities and Towns—Charter Provisions—Damages—Written Demand—Actions—Interpretation of Statutes.*—The charter provisions of a town requiring that before an action shall be instituted against the city "upon any claim or demand whatsoever, of any kind or character," written notice shall first be presented to the board of aldermen, to be acted upon by them, etc.; and that "no action for damages of any character whatever, to either person or property, shall be instituted against the city unless, within ninety days after the happening or infliction of the injury complained of, the complainant, his executors or administrators, shall have given notice to the board of aldermen of such injury in writing," etc., are valid and enforcible as a salutary protection to the public against stale and fictitious claims, and to afford the city an early opportunity to investigate the claim while the evidence is fresh, so as to prevent fraud and imposition. *Pender v. Salisbury*, 363.

2. *Same—Reasonable Requirements.*—When it appears in an action against a city for damages for the negligent killing of plaintiff's intestate, that the plaintiff, as administrator, was afforded ample opportunity to comply with the charter provisions, requiring written

CITIES AND TOWNS—*Continued.*

notice to be given the board of aldermen of the claim, its nature, etc., within a certain time, in order to maintain an action thereon, recovery may not be had in the absence of his giving the required notice. *Ibid.*

4. *Cities and Towns—Governmental Functions—Ordinances—Liability.*—A corporation is not liable for a personal injury, resulting in death or otherwise, caused by either its failure to enact or enforce an ordinance solely relating to the exercise of a purely governmental function. *Goodwin v. Reidsville*, 411.

4. *Same—Baseball—Unsafe Customs—Streets—Nonsuit.*—The plaintiff's intestate died from an injury inflicted by being struck by a baseball while driving along a public street in the defendant town, and the basis of the action to recover damages against the defendant was its negligence in allowing its public streets to become unsafe for travel; and the evidence tended to show that, with the knowledge of the police officers of the town, it had been the custom of the boys for two years to collect on the street and play ball in the evenings, and the injury complained of resulted therefrom: *Held*, the negligence alleged was in the exercise of a governmental function, for which the city could not be held liable, and a judgment of nonsuit was properly allowed. *Ibid.*

5. *Same—Prior Statutes—Interpretation of Statutes.*—An act which has been regularly passed, upon separate days, with the "aye" and "no" note required by Article II, sec. 14, of the Constitution, authorizing the levying a tax for the purpose of working the public roads, cannot be construed in connection with an act passed for issuing bonds for road purposes, not passed as required by this section of the Constitution, so as to authorize a tax levy in excess of that limited by the Constitution. *Commissioners v. Commissioners*, 157 N. C., 514, cited and distinguished. *Pritchard v. Commissioners*, 476.

6. *Cities and Towns—Charter Powers—Taxation—Trades—Soda Fountains—General Law—Interpretation of Statutes.*—When the charter of an incorporated town gives it, in addition to the powers therein named, "all the power incident and usual to corporations of like character under the general law of the State," by section 2924 of the Revisal, the power is conferred upon it to "annually levy a tax on all trades, etc.," defined to be "any employment or business embarked in for gain or profit," which includes the operation of a soda fountain for that purpose; and a tax thereon of $5 per annum is upheld as valid, notwithstanding the Revenue Act of that year makes no provision for a tax of that character. *Drug Co. v. Lenoir*, 571.

CITIZENSHIP. See Pardons.

CLAIM AND DELIVERY. See Judgments.

COMPOUNDING A FELONY. See Contracts.

COMPROMISE.

Compromise—Admissions—Evidence.—A distinct admission of an independent fact during an attempt to compromise is admissible in evidence, though an offer made for the purpose of effecting a settlement is not. *Baynes v. Harris*, 307.

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COMPUTATION OF TIME. See Contracts.

CONSIDERATION. See Contracts.

CONSIGNOR AND CONSIGNEE. See Carriers of Goods.

CONSTITUTION OF NORTH CAROLINA.

ARTICLE

II, sec. 14. An act passed in accordance with this article of the Constitution, authorizing levy of tax for working public roads, is not construed in connection with an act passed for issuing bonds for road purposes, not in accordance with these constitutional requirements. *Pritchard v. Commissioners*, 476.

III, sec. 14. Construed with Article V, sec. 5, showing the purposes for which school property is held, governs the question of exemption from taxation. *Corporation Commission v. Construction Co.*, 582.

V, sec. 3. Legislature may not exempt bonds of drainage districts from taxation. *Commissioners v. Webb*, 594.

V, sec. 5. Whether school property should be exempt from taxation depends upon its purpose, and not how the title is held; the purposes must be exclusively for schools, without distinction between public and private; this article construed with Article III, sec. 14. *Corporation Commission v. Construction Co.*, 582.

V, sec. 5. Bonds of drainage districts may not be exempt from taxation by the Legislature. *Commissioners v. Webb*, 594.

V, sec. 9. Drainage district bonds may not be exempted from taxation by the Legislature. *Commissioners v. Webb*, 594.

X, sec. 5. Widow is not entitled to homestead as against heirs at law, when there are no creditors, but to dower. *Caudle v. Morris*, 168.

X, sec. 6. This article was not intended to free the right of a married woman from all legislative restriction in making a will. *Flanner v. Flanner*, 126.

CONSTITUTIONAL LAW. See Carriers of Goods.

1. *Wills—Married Women—After-born Child—Legislative Acts—Constitutional Law.*—The right of married women to dispose of their property by will is a conventional rather than an inherent right, and its regulation rests largely with the Legislature; Art. X, sec. 6, conferring upon married women the right to make a will, etc., "as if she were unmarried," was designed chiefly to remove the common-law restriction on married women in this respect, and was not intended to free such right from every and all legislative regulation. The act in question here is not in conflict with the constitutional provision. *Flanner v. Flanner*, 126.

2. *Cities and Towns—Bond Issues—Status—"Aye" and "No" Vote—Separate Readings—Constitutional Law.*—While the bonds issued by Orange County for road purposes under chapter 600, Public-Local Laws of 1911, are for necessary expenses, yet if the act was not passed in conformity with Const., Art. II, sec. 14, the county commissioners are not authorized to levy a tax in excess of the constitutional limitation with which to pay interest and provide for a sinking fund. *Analysis* of the constitutional requirements for the levying of taxes

CONSTITUTIONAL LAW—*Continued.*

by a county for necessary and other expenses by CLARK, C. J., under this article and under Article V, sec. 6, and Article VII, sec. 7. *Pritchard v. Commissioners*, 476.

3. *Tax Deeds—Evidence—Presumptions—Constitutional Law.*—The Legislature having the power to change the rules of evidence, Laws 1887, ch. 137, now Revisal, sec. 2909, changing the burden of proof to the one attacking a tax deed, to show that the recitations therein are not true, embraces tax deeds theretofore made. *Board of Education v. Remick*, 562.

4. *State's Lands—Tax Deeds—Presumptions—Interpretation of Statutes—Constitutional Law.*—Revisal, sec. 4047, making the recitations in a tax deed for swamp land *prima facie* true, is constitutional and valid. *Ibid.*

5. *Educational Corporations—Taxation—Exemption—Constitutional Law—Statutes.*—Article V, sec. 5, of our State Constitution authorizes the Legislature to exempt from taxation "property *held* for educational . . . purposes," and our statute, Laws 1911, ch. 50, sec. 71, provides that "all property used exclusively for educational purposes" shall be exempt from taxation, State and local: *Held*, that under our Constitution it is the use to which the property is devoted and to the extent of the interest so dedicated which should control, rather than the title or other tenure by which it is held, and its provisions are broad and comprehensive enough to uphold the legislative exemption as to all property used exclusively for educational purposes. *Corporation Commission v. Construction Co.*, 582.

6. *Educational Corporations — Taxation — Exemptions — Constitutional Law—Statutes—Interpretation.*—In interpreting the authority, our State Constitution, Article V, sec. 5, conferring upon the Legislature power to exempt property incorporated for educational purposes from taxation, reference may be made to Article III, sec. 14, declaring that "schools and the means of education shall be forever encouraged," which appears also in our State Constitution of 1776, and Revisal, sec. 71, exempting all property used exclusively for educational purposes, is constitutional in purview of both of these articles of the Constitution construed together. *Ibid.*

7. *Same.*—It is held in this case that the fact that an educational incorporation had gone for a long period of time without paying taxes unchallenged by both the legislative and executive departments of the Government is deserving of great weight by the court in construing Article V, sec. 5, and Article III, sec. 14, of our Constitution in connection and with reference to Laws 1911, ch. 50, sec. 71. *Ibid.*

CONTRACTS. See Carriers of Goods; Frauds; Courts; Insurance.

1. *Carriers of Goods—Contracts—Bill of Lading—Demand—Knowledge of Agent—Computation of Four-months Period.*—The clause in a carrier's bill of lading requiring that written demand for damages be made within four months after delivery of the shipment or within four months after the goods should have arrived, will not bar the consignee of his right to recover when it appears that the shipment

CONTRACTS—*Continued.*

arrived in a damaged condition, and all the facts and circumstances were fully known to the carrier's agent upon its arrival; and the time wherein the consignee was misled by the carrier's agent as to the time of the arrival of the goods will not be counted against the consignee in computing the four-months period stipulated for by the carrier in the bill of lading. *Wilkins v. R. R.*, 54.

2. *Contracts—Assignor and Assignee—Moneys Collected—Evidence—Nonsuit.*—In an action to recover, as assignee of certain organ leases, moneys alleged to have been collected and not accounted for, it is necessary for the plaintiff to show that the moneys had been collected subsequent to the time of the assignment, and in the absence of evidence to this effect, a judgment of nonsuit is properly allowed. *Mayo v. Dawson*, 76.

3. *Principal and Agent—General Agent—Unusual Contracts—Inquiry—Respondeat Superior.*—The principal is not bound by the acts of his general agent, unauthorized by him, so unusual and remarkable as to arouse the inquiry of a man of average business prudence as to whether the authority had actually been conferred; for third persons dealing with the agent may only assume that the agent's acts are authoritative when they are within the scope of the duties ordinarily conferred upon agencies of that character. *Stephens v. Lumber Co.*, 107.

4. *Same—Contracts to Become Witness—Employer and Employee—Continued Pay—Idleness.*—The local superintendent of a lumber company has no implied authority to bind the company to a contract, without its express consent or its knowledge of any facts or circumstances that would put it upon inquiry, to drop an employee from its pay roll, but continue to pay him a stipulated monthly salary for his idleness, for the reason that he was to be a witness for the company in a lawsuit, and it was considered undesirable that he should appear to be in the company's employment; for such a transaction is of a nature so unusual that the employee would be put upon inquiry to ascertain the actual authority conferred by the company on the superintendent to make a contract of that character. *Ibid.*

5. *Same—Indeterminate Period—Special Authority.*—A local station agent of a railroad company may not be presumed to have the authority to contract with a traveling troupe to furnish a baggage car for the hauling of its platforms, tents, etc., for an indeterminate period and at other stations of the company; and to recover damages for breach of contract made by an agent of this character for failure to furnish a baggage car at several stations beyond that of the alleged contract, special authority must be shown or it must appear that the contract has been in some way approved or ratified by the company. *Newberry v. R. R.*, 156.

6. *Deeds and Conveyances—Timber—Period for Cutting and Removing—Severed Timber—Personalty—Parol Contract.*—The timber on lands which had been cut but not removed from the land by a grantee in a deed for the timber thereon in the period allowed for its cutting

CONTRACTS—*Continued.*

and removal, is personal property, not requiring a written instrument, under the statute of frauds, to convey it; and a sale thereof by parol is sufficient to pass the title. *Lumber Co. v. Brown*, 281.

7. *Fraud — Deceit — Contracts—Damages—Right of Action—Conditions Precedent.*—In an action for deceit in the making of false representations inducing the plaintiff to exchange a mule for defendant's horse, the plaintiff may enforce his rights under the contract and at the same time maintain his action for deceit, without offering to return the benefits he may have received under the contract, as a condition precedent. *Field v. Brown*, 295.

8. *Contracts, Written—Vendor and Vendee—Principal and Agent—Parol Evidence—Technical Breach of Contract—Substantial Recovery.*—Upon an action for damages for breach of contract in the sale of a soda fountain, it appears that the plaintiff signed a written contract of purchase requiring that the trimmings of the fountain should be shaded green, and among others it contained the stipulation that "the sole authorized business of our agents is to solicit contracts on this printed form, and no agreement or representation will be recognized by us unless it is written hereon": *Held*, the plaintiff having accepted and used the fountain for several months, cannot maintain his action upon the ground that a certain part did not come up to the verbal representations of the vendor's selling agent; and, further, the fact that the trimmings of the fountain were white, instead of green, on the evidence presented, was only a technical breach of the contract, and did not afford a basis for a substantial recovery. *Simpson v. Green*, 301.

9. *Wagering Contract—"Cotton Futures"—Pleadings—Allegations of Answer—Burden of Proof—Evidence.*—In an action to recover moneys paid out, and commission, for the purchase of cotton by the plaintiffs to defendant's use, where the defense is set up, by verified answer, that the transaction was a gambling contract in "cotton futures," the burden is cast upon the plaintiffs to prove that the transaction was a lawful one, and that the parties intended actual delivery, not merely optional with either party (Revisal, secs. 1690, 1691), and the defendant's letter in this case, being the only evidence, promising payment and asking for indulgence, is insufficient. *Cobb v. Guthrie*, 313.

10. *Contracts—Illegal Consideration—In Pari Delicto.*—The principle that the courts will not lend their aid to the enforcement of illegal agreements, or entertain an action to recover money paid on property transferred thereunder, is not applicable when the party seeking the relief is not *in pari delicto*, as where he has been induced to enter into the agreement by fraud and undue influence of the other party. *Sykes v. Thompson*, 348.

11. *Contracts—Interpretation—Damages—Verdict—Facts Established—Issues—Answers—Subject-matter in Suit—Compromise—Notice.*—In an action to recover damages for a breach of contract to sell lands, it was found by the jury in response to the first and sixth issues, that the defendant contracted to sell the lands to the plaintiff if he should recover them by judgment or compromise of a suit pending

CONTRACTS—*Continued.*

between himself and another. The suit in that action terminated by the defendant in this action receiving $4,500, but it was contended by the plaintiff that that suit was prosecuted in good faith or in fact, but that the defendant in the present action received the sum of $4,500 for the sale of the land to the defendant in that suit under a pretended compromise. The court having charged the jury that the compromise must have been made in good faith, and by their findings upon the issues the fact of good faith having been established, it is *Held*, (1) by the contract established between the parties the plaintiff cannot recover damages for a breach of defendant's contract to sell the land, as it was only operative in the event the defendant recovered the land contracted for, his right to compromise existing under the conflict established; (2) there being no stipulation in the contract established requiring that the defendant submit to the plaintiff any matter of compromise arising in the pending suit, the defendant's failure to do so cannot create a liability to the plaintiff for the damages sought; (3) it was unnecessary for the jury to have answered the other issues in this case, relating to the plaintiff's readiness and ability, etc., to pay for the land, tender, etc.; these questions becoming immaterial by the answers to the other issues. *Todd v. Mackie*, 352.

12. *Contracts—Lands—Selection—ownership.*—One who is put into possession of a 50-acre tract of land under a parol agreement that he is to have 12 acres thereof to be by him selected, is not the owner of the 12 acres until it is selected and conveyed to him. *Hurley v. Ray*, 376.

13. *Contracts—Indemnity—Sureties—Beneficiaries.*—The beneficiaries of an indemnity contract ordinarily can recover, though not named therein, when it appears by express stipulation or by reasonable intendment that their rights and interests were contemplated and being provided for. *Supply Co. v. Lumber Co.*, 428.

14. *Same—Material Men.*—A contract and bond signed by the contractor and his surety expressly agreeing, among other things, to pay the owner of the building "for all labor and material supplied for the erection of the building and to save the owner harmless from any and all claims or liens" which might arise out of contracts made by him (the contractor) with material furnishers and laborers, etc., the bond further stipulating "that the said contractor shall faithfully perform and carry out said contract according to the true intent and meaning thereof," clearly contemplates that the contractor shall pay the material men and laborers, and constitute such claimants the beneficiaries of the contract and bond. *Ibid.*

15. *Contracts, Written—Parol Evidence—Vendor and Vendee—Delivery—Implication—Harmless Error.*—When a contract for the sale of goods is put in writing which does not express the entire agreement, the oral part may be proved by parol, when not a variance or contradiction of the writing; and the writing being silent as to the time of delivery, the law implies that it shall be in reasonable and apt time. In this case it is immaterial whether there was an additional parol contract to pay a larger commission on sales amounting to a specified quantity, as it was not contended that this quantity had been sold by the defendant. *Ober V. Katzenstein*, 439.

CONTRACTS—*Continued.*

16. *Contracts—Consideration—Concurrent Duties—Breach—Readiness and Ability of Performance.*—When a contract has concurrent stipulations to be performed by the parties as the consideration to support it, it is necessary, in order for one of the parties to recover damages arising from the breach thereof by the other, to prove his readiness and ability to fulfill his part thereof. *Supply Co. v. Roofing Co.*, 443.

17. *Same—Principal and Agent—Sales Agent.*—In an action by a sales agent against his principal for damages arising from the latter's failure to supply the goods contracted by him to be furnished, it appeared that the plaintiff had agreed to sell a certain quantity of goods per annum, and in consideration thereof the defendant was to manufacture and furnish that amount; that neither the plaintiff sold, nor could the defendant have furnished, the amount contracted for. The defendant having set up a counterclaim for damages arising from the plaintiff's default under the contract sued on, it is *Held*, that a nonsuit as to the plaintiff was properly granted, and that the defendant could not recover on his counterclaim, as neither could show readiness and ability to comply with the stipulations that had been agreed upon by each to perform. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See Verdict; Master and Servant; Negligence.

1. *Instructions—Contributory Negligence—Pleadings—Facts at Issue.*—In an action for damages for the alleged negligent killing of plaintiff's intestate, who was employed as a brakeman on defendant's logging train, the neglience complained of was the failure of the defendant to furnish proper cars over which the intestate was required to pass to uncouple them. The defendant pleaded contributory negligence, alleging that the intestate's act of negligence occurred after he had performed this duty, by placing himself in an unnecessarily dangerous position on one of the cars while the train was in motion: *Held*, the plaintiff's requested instruction upon the theory that the intestate was killed while uncoupling the cars was properly refused, the contributory negligence alleged being the act of the intestate occurring thereafter. *Hamilton v. Lumber Co.*, 47.

2. *Master and Servant—Dangerous Work—Relative Duties—Rule of Prudent Man—Negligence—Contributory Negligence—Assumption of Risks.*—In measuring the extent of the master's duty to the servant in furnishing safe methods, reasonable assistance, etc., for the latter to do dangerous work entrusted to him, the jury should consider their situation and opportunities, their comparative ability to know and realize the attendant perils and dangers, and all matters pertinent to the principal question of negligence and its proximity to the injury inflicted, under the rule of the prudent man. *Pigford v.* R. R., 93.

3. *Master and Servant—Dangerous Work—Insufficient Help—Simple Appliances—Contributory Negligence—Assumption of Risks.*—The plaintiff was injured while employed by the defendant to help load a gondola car with iron rail. There was evidence tending to show that the rails had been crooked or twisted in a wreck, so as to make them more difficult to handle in loading, and that plaintiff asked his su-

CONTRIBUTORY NEGLIGENCE—*Continued.*

pervisor or superior officer for more help, and was told to go ahead and do the best he could with the help which had been furnished; that the plaintiff was injured in consequence by the turning of a crooked rail while he was loading it: *Held*, it was not necessary that the work should have been of a complicated character for the jury to find the defendant negligent under the evidence in this case. *Ibid.*

4. *Railroads—Damages by Fire—Contributory Negligence—Pleadings.*—In an action for damages to plaintiff's lands from a fire alleged to have negligently been caused by a spark from a passing locomotive of defendant, it is necessary for the defendant to allege, if the defense is available, that the injury thereto was proximately caused by the intervening and independent negligence of the plaintiff in having failed to put it out. *Hardy v. Lumber Co.*, 113.

5. *Railroads—Damages by Fire—Contributory Negligence—Anticipated Consequences—Instructions—Special Requests—Objections and Exceptions—Appeal and Error.*—While in this action to recover damages for the alleged negligent setting fire to and burning over the plaintiff's land, caused by a spark from defendant railroad company's passing locomotive, the court may correctly have instructed the jury to find whether, in the exercise of care, the defendant could reasonably have foreseen that the injury complained of would be the natural and probable consequence of its negligence, the fire having been communicated to plaintiff's land from burning over the intervening lands of others, objection should have been taken by requesting proper prayers embracing these matters and the refusal of his Honor to give them. *Ibid.*

6. *Federal Employers' Liability Act—State Courts—Contributory Negligence—Procedure—Interpretation of Statutes.*—The Federal Employers' Liability Act, in so far as it undertakes to regulate and provide for fixing responsibility as to the defendant's negligence, is not dissimilar to the provisions of the Revisal, sec. 2624, the chief difference being upon the issues of contributory negligence and assumption of risk; and as the Federal act makes no specific regulations as to the methods by which the fact of contributory negligence should be established, when the action is brought in the State court, the procedure should conform as near as may be to that of the State law applicable, including the "character of action, the order and manner of trial, the rules of pleading and evidence, etc." *Fleming v. R. R.*, 196.

7. *Same—Partial Defenses—Diminution of Damages—Pleadings.*—While matters in diminution of damages are not required to be specially pleaded under our statutes, except in cases of libel and slander (Revisal, sec. 502), but may be made available under the general issue, in view of the requirement of the Federal Employers' Liability Act, that the fact of contributory negligence should in some way be established, and that procedure for that purpose has been defined and approved under numerous decisions of our Court construing the State statutes controlling the question, the fact of contributory negligence, as referred to in the Federal statute, should be considered and

CONTRIBUTORY NEGLIGENCE—*Continued.*

treated as a partial defense, coming within the terms of the local law, and to make same available it must be set up in the answer and proved as the State statute requires. Revisal, sec. 483. *Ibid.*

8. *Railroads—Excursion Trains—Protection for Passengers—Negligence —Questions for Jury—Contributory Negligence.*—In an action for damages against a railroad company sustained by the plaintiff from being shot by another passenger on an excursion train of twelve or fourteen coaches containing both white and colored people, there was evidence tending to show that the railroad company had only the conductor and the trainmaster to preserve order; that several colored passengers had been drinking and had an acquaintance of the plaintiff down on the platform of a coach where the coaches for white and colored people came together, beating him, and in endeavoring to save his acquaintance, the plaintiff was pulling him from the place of assault into the coach for white people, when he, in turn, was assaulted, and one of the negroes shot him through the body. The conductor had replied that he had no authority to arrest people when requested to repress the shooting and rowdyism which had been going on in the "colored" coaches, but neither he nor the trainmaster were near when the plaintiff was shot: *Held*, sufficient to go to the jury upon the issue of defendant's negligence, and that the plaintiff was not barred of his recovery upon the issue of contributory negligence. *Stanly v. R. R.*, 323.

9. *Railroads—Contributory Negligence—Evidence—Nonsuit.*—In an action to recover damages for a personal injury, it appeared from the plaintiff's evidence that the defendant construction company was engaged in constructing for its co-defendant, a railroad company, a cut under the track of another railroad company for the purpose of crossing beneath it, at right angles, which was deep in the center where it passed, extending in each direction a considerable distance; that with full knowledge and appreciation of the danger, the plaintiff, on a dark night, attempted to walk the exposed sills over the cut, when it was too dark for him to see them, when he could safely have used a roadway about a quarter of a mile distant, and fell through a space left open between the sills, to his injury: *Held*, upon his own evidence, the contributory negligence of the plaintiff barred his recovery, and a motion to nonsuit upon the evidence should have been allowed. *Thompson v. Construction Co.*, 390.

CONTROVERSY WITHOUT ACTION. See Courts.

CORPORATIONS. See Building and Loan Companies.

1. *Corporations—Receivers—Parties—Insurance, Fire—Suits in Twelve Months.*—The receiver of an insolvent corporation may sue in the name of the corporation or in his individual capacity as receiver, and when he has instituted an action against an insurance company, in the name of the corporation, for loss by fire within the twelve months stipulated in the policy, and thereafter joins in the suit as receiver, he does not change the nature of the suit by becoming a party; and in any event this provision of the policy is fully met. *Millinery Co. v. Insurance Co.*, 130.

CORPORATIONS—*Continued.*

2. *Electric Corporations—Eminent Domain—Several Exercises of Power —Interpretation of Statutes.*—The power of eminent domain conferred on electric public-service corporations by the statutes, Revisal, secs. 1570-7 inclusive, and sec. 2575 *et seq.*, is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. *Power Co. v. Wissler*, 269.

3. *Electric Corporations—Eminent Domain—"Reasonable Necessity"— Bad Faith—Oppression—Power of Courts—Interpretation of Statutes.* —While any person affected by a petition of an electric public-service corporation in condemnation proceedings may "answer the petition and show cause against granting the same, and may disprove any of the facts alleged in it" (Revisal, sec. 2584), and while the rights, privileges, and easements to be acquired by such companies must be "reasonably necessary" for the conduct of their business, and this reasonable necessity may in its ultimate phases become a judicial question, a perusal of the entire statute discloses that the extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of fact tending to show bad faith on the part of the companies or an oppressive or manifest abuse of their discretion. *Love v. R. R.*, 81 N. C., 434, cited and distinguished. *Ibid.*

4. *Corporations—Rights of Way—Definition—Surface Boundaries—Obstructions—Preservation of Lines—Interpretation of Statutes.*—While ordinarily and in its proper acceptation the "right of way" is understood to be an easement in the lands of another attaching to some specific portion of the lands, defined and ascertainable by specific surface boundaries, the doctrine may not be so limited under the construction of the provisions of our statutes applicable to electric public-service corporations as to confine them to a right of way delimited by surface boundaries, and it may be extended to the cutting or removal of trees or obstructions outside of the boundaries when required for the reasonable preservation and protection of their lines and other property. Revisal, secs. 1572, 1574, 2575, 2576. *Ibid.*

5. *Foreign Corporations—Domesticating Act—Failure to File Charter —Contracts—Consideration.*—Failure of a foreign corporation to become domesticated by filing a copy of its charter with the Secretary of State does not invalidate an express or implied contract made with it. *Ober v. Katzenstein*, 439.

6. *Corporations—Stockholders—Unpaid Capital—Directors—Trusts and Trustees—Insolvency—Debtor and Creditor.*—The capital stock of a corporation, including unpaid indebtedness for stock issued and held by the stockholders, shall, if required, be considered a trust fund for the creditors; and, under ordinary conditions, persons having business dealings with the companies have a right to suppose that this capital stock has been paid in, in money or money's worth; and in case of insolvency, any unpaid balance, by proper proceedings, may be made available to the extent required for the settlement of outstanding claims. *Whitlock v. Alexander*, 465.

CORPORATIONS—*Continued.*

7. *Corporations — Purchase of Property — Directors — Valuation — Good Faith—Fraud—Stockholders' Liability.*—By express provision of our statute, Revisal, secs. 1160 and 1161, the holders of certificates of stock issued by a corporation for the legitimate purchase of property with which to conduct its business are not liable for any further call or payment of the shares by reason of the purchase, in the absence of actual fraud in the valuation, the judgment of the directors being conclusive as to the value of the property thus purchased. *Ibid.*

8. *Same—Patent Rights—Questions for Jury.*—For the purpose of acquiring certain patent rights for use in its business, a corporation, by resolution of the board of directors, valued the patents at a certain amount and issued common stock therefor, with a certain amount of preferred stock for financing the business. After the insolvency of the corporation had been adjudicated, the receivers brought suit against a holder of said stock, who defended the action upon the ground that it was fully paid and no assessment was due thereon. There was conflicting evidence as to whether the patent right was a valuable asset sufficiently to justify the price, and as to whether the insolvency of the corporation resulted from bad management or other causes, and it is *Held*, the patents should be considered as property, and the evidence raised a question for the jury upon the issue as to fraud on the part of the directors in fixing the value of the patents thus acquired. *Ibid.*

9. *Corporations—Receivers—Principal and Agent—Dual Agency.*—When certain patent rights have been acquired by a corporation, used in its business, and are still held and dealt with as part of its assets, the acquisition and purchase may not be assailed by receivers in insolvency proceedings on the ground that the agent of the patentee acted without his authority in making the sale, or that he was acting as agent of both parties, the patentee having made no claim thereto. *Ibid.*

10. *Corporations—Solvency—Stock Dividends—Earnings.*—Stock dividends may be declared by a solvent corporation from its profits, where the total amount of the stock is kept within the charter limits and the profits have really been earned. *Ibid.*

11. *Same—Debtor and Creditor—Notice.*—The issuance of paid-up stock as a dividend cannot be attacked by an existent creditor, nor by one who has notice of the facts, since it withdraws nothing from the corporation or in any way depletes its assets. *Ibid.*

12. *Same—Insolvency—Stockholders' Liability.*—Such issuance in other respects, however, is regarded as an increase of the capital stock, and as to subsequent creditors the holder may be held accountable very much on the principle which obtains in reference to stock of original issue. *Ibid.*

13. *Same—Stockholders—Overvaluation—Fraud—Evidence—Questions for Jury.*—The rule requiring that stock dividends shall be issued by the directors of a corporation in "good faith" does not refer the matter absolutely to the action of the directorate or other managing agents

of the company, for they are required to act with good sense and reasonable business judgment; and if this character of stock has been issued upon an excessive overvaluation of the corporation's property, or by an excessive and entirely unwarranted estimate of the profits or the unearned increment, and at the time the corporation was embarrassed with debt, and the stockholders have taken the stock dividends with notice or knowledge of all the circumstances, this would be actual fraud, and, upon conflicting evidence, the issue should be determined by the jury, in an action brought by the receivers to hold the stockholders liable for the unpaid debts of the concern. *Ibid.*

14. *Corporations—Insolvency—Receivers—Stockholders—Debtor and Creditor—Counterclaim.*—A stockholder in an insolvent corporation who is sued by its receiver for payment of assessment upon his stock may not set up by way of counterclaim a debt alleged to be due him by the corporation, as the receiver and the stockholder do not claim in the same right, the receiver claiming for the creditors of the corporation; and the defendant is only entitled to offset against the company such dividends as he may be entitled to in the distribution of the assets among the shareholders. *Ibid.*

15. *Corporations—Insolvency—Directors—Advantage—Debtor and Creditor —Trusts and Trustees — Notes — Indorsers — Payment — Collateral Bonds.*—The principle that the directors of a corporation stand in a fiduciary relation to it, and may not, in case of its insolvency, hold to themselves a preference or advantage obtained or attempted over other creditors or more meritorious claimants, does not apply to instances where the directors had been indorsers on the corporation note to a bank, which had become insistent for payment, and the defendant directors issued bonds secured by mortgage on the corporation's assets, purchased them, and with the bonds as collateral to their individual note, obtained the money and with it satisfied the corporation's note on which they had been indorsers, under an agreement to that effect with the bank. *Whitlock v. Alexander*, 479.

16. *Same—Repudiation—Advantage.*—When the note of an insolvent corporation has been paid by its directors, who had indorsed it, by giving their personal note to the bank with bonds secured by a mortgage on the corporate assets, issued to take up the corporation's note, and which they had by agreement bought for the purpose, under a pressing demand of the bank for payment, the corporation or its receivers will not be allowed to accept the proceeds of the transaction and repudiate the stipulation attaching to it. *Ibid.*

17. *Educational Corporations—Taxation—Exemption—Constitutional Law —Statutes.*—Article V, sec. 5, of our State Constitution authorizes the Legislature to exempt from taxation "property *held* for educational . . . purposes," and our statute, Laws 1911, ch. 50, sec. 71, provides that "all property used exclusively for educational purposes shall be exempt from taxation, State and local": *Held*, that under our Constitution it is the use to which the property is devoted and to the extent of the interest so dedicated which should control, rather than the title or other tenure by which it is held, and its provisions are

CORPORATIONS—*Continued.*

broad and comprehensive enough to uphold the legislative exemption as to all property used exclusively for educational purposes. *Corporation Commission v. Construction Co.*, 582.

18. *Educational Corporations—Taxation—Exemptions—Personal Profit—Statutes—Interpretation.*—The provisions of Article V, sec. 5, of our State Constitution and those of Laws 1911, ch. 50, sec. 71, make no distinction between public and private educational corporations, or between institutions which are in part conducted for the personal profit of the owner and those which are run on a salary basis, using any profits which may arise in the extension of the work. *Ibid.*

19. *Educational Corporations—Taxation—Exemptions—Constitutional Law—Statutes—Interpretation.*—In interpreting the authority, our State Constitution, Article V, sec. 5, conferring upon the Legislature power to exempt property incorporated for educational purposes from taxation, reference may be made to Article III, sec. 14, declaring that "schools and the means of education shall be forever encouraged," which appears also in our State Constitution of 1776, and Revisal, sec. 71, exempting all property used exclusively for educational purposes, is constitutional in purview of both of these articles of the Constitution construed together. *Ibid.*

20. *Same.*—It is held in this case that the fact that an educational incorporation had gone for a long period of time without paying taxes unchallenged by both the legislative and executive departments of the Government is deserving of great weight by the court in construing Article V, sec. 5, and Article III, sec. 14, of our Constitution in connection and with reference to Laws 1911, ch. 50, sec. 71. *Ibid.*

COSTS. See Partition.

COUNTERCLAIM. See Corporations.

COUNTY COMMISSIONERS.

1. *County Commissioners—Equity—Injunction—School Districts—Petition of Freeholders—Conditions Precedent—Taxation.*—As a condition precedent to the action of the board of county commissioners in forming special school districts and submitting to the vote of the people the question of levying the tax under the provisions of chapter 135, sec. 1, Public Laws 1911, and chapter 525, Public Laws 1909, amending Revisal, sec. 4115, the "petition of one-fourth of the freeholders within the proposed school district, indorsed by the county board of education," etc., must first be presented. This is a prerequisite made by the statute to the exercise of the authority conferred on the board of county commissioners, and is necessary to confer jurisdiction on them, and it may be shown, in proceedings to enjoin the county commissioners from levying the tax, that the petition upon which they were assuming to act was not in fact signed by the required number of the freeholders in the proposed district. *Gill v. Commissioners*, 176.

2. *County Commissioners—School Districts—"Freeholders"—Words and Phrases—Woman Suffrage—Interpretation of Statutes.*—The word "freeholders," used in chapter 135, sec. 1, Public Laws of 1911, amend-

COUNTY COMMISSIONERS—*Continued.*

ing Revisal, sec. 4115, as to who are required to sign the petition for the laying off special school districts and levying a tax therein, should not be construed by itself, but in the light of proper and relevant circumstances, such as that under the common law of England a freehold estate was held by a freeman, and the feudal duties thereof were not performed by women; that the former qualification under our Constitution that a Senator should be the owner of a freehold in 50 acres of land did not make a woman eligible for the position, requiring that a freeman, excluding woman, should be seized thereof, and thus understood in political matters, excluding woman from suffrage; that under our statutes the word "freeholder," as describing qualifications of appraisers, commissioners, and a special class of jurors (Revisal, secs. 2122, 2685, 2686, 5202, and others), excludes females; that the construction placed by the other legal advisers of the department has consistently for years been that the meaning of the word "freeholders," used in this connection, excluded women, of which the Legislature was doubtless aware and made no statutory change or correction; and *Held*, that if the petition be not signed by the required per cent of the freeholders in the proposed district, excluding the ownership of lands by women, infants, nonresidents, etc., it is not a complinace with the requisites of the statute: *Held further*, the interpretation of the word "freeholders" as used by the statute should not be confined to the quantity of estate held in the land. *Ibid.*

COURTS. See Injunction; Questions for Jury.

1. *Equity and Law—Deeds and Conveyances—Mortgages—Fraud—Damages—Election.*—Under the equitable jurisdiction of our courts, where actions at law and suits in equity are administered in the same tribunal the plaintiff may elect to sue for the value of lands or his equity of redemption therein, alleged to have been obtained by fraud, or to cancel deeds and mortgages or transactions which culminate in the alleged fraudulent acquisition of the title. *Pritchard v. Smith*, 79.

2. *Attorney and Client — Jury — Improper Remarks—Prejudice—Appeal and Error.*—For improper remarks made by opposing counsel while addressing the jury to be held for reversible error on appeal, it must appear that they have prejudiced the objecting party. *Pigford v. R. R.*, 93.

3. *Debtor and Creditor—Application of Payment—Application by the Law.*—In this case, it appearing that the debtor owed his creditor both a secured and unsecured debt, and made a payment without directing its application at the time, except by entry on his own books subsequently brought to the creditor's attention and objected to by him, and that the application was made at the time of commencing this action, it is *Held* that the law applied the payment to the unsecured debt. *Stone v. Rich*, 161.

4. *Federal Employers' Liability Act—State Courts—Contributory Negligence—Procedure—Interpretation of Statutes.*—The Federal Employers' Liability Act, in so far as it undertakes to regulate and provide for fixing responsibility as to the defendant's negligence, is not dissimilar to the provisions of the Revisal, sec. 2624, the chief differ-

COURTS—*Continued.*

ence being upon the issues of contributory negligence and assumption of risk; and as the Federal act makes no specific regulations as to the methods by which the fact of contributory negligence should be established, when the action is brought in the State court, the procedure should conform as near as may be to that of the State law applicable, including the "character of action, the order and manner of trial, the rules of pleading and evidence, etc." *Fleming v. R. R.*, 196.

5. *Cities and Towns—Public Nuisance—Sawmills—Courts—Void Ordinances—Injunctions—Remedy at Law.*—An ordinance declaring the operation of a sawmill within its limits to be a nuisance, which in fact is not one, does not deprive the court of its authority to pass upon the question; and it appearing in this case that the mill in question, the erection of which is sought to be enjoined, would not be a nuisance *per se*, and it not appearing that it would be one in fact, but that the ordinance was passed at the instance of the complaining party to prevent competition, it is held that the injunction should not issue, and that the party be left to his action for damages at law, should it hereafter appear that he has sustained any. *Berger v. Smith*, 205.

6. *Carrier of Goods—Negligence—Expert Evidence—Questions of Fact—Assignment of Claim.*—In an action against a common carrier for damages for the negligent injury to two mules in a car-load shipment, resulting in their death, testimony of an expert veterinarian, who had made a *post-mortem* examination and found them bruised and in a bad condition internally, that, from the examination, in his "opinion the mules had been jammed up in the car," is incompetent as an expression of an opinion as to a fact of which he had no personal knowledge and which was involved directly in the issue. *Summerlin v. R. R.*, 133 N. C., 551, cited and approved. As to whether the plaintiff can recover for one of the mules sold to another and replaced by him, without evidence that the cause of action had been assigned, *quœre*. *Mule Co. v. R. R.*, 252.

7. *Electric Corporations—Eminent Domain—"Reasonable Necessity"—Bad Faith—Oppression—Power of Courts—Interpretation of Statutes.*—While any person affected by a petition of an electric public-service corporation in condemnation proceedings may "answer the petition and show cause against granting the same, and may disprove any of the facts alleged in it" (Revisal, sec. 2584), and while the rights, privileges, and easements to be acquired by such companies must be "reasonably necessary" for the conduct of their business, and this reasonable necessity may in its ultimate phases become a judicial question, a perusal of the entire statute discloses that the extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of fact tending to show bad faith on the part of the companies or an oppressive or manifest abuse of their discretion. *Love v. R. R.*, 81 N. C., 434, cited and distinguished. *Power Co. v. Wissler*, 269.

8. *Executors and Administrators—Wills—Assets—Legacies—Procedure—Clerk—Judgments—Appeal and Error.*—A petition may be entered before a clerk of the Superior Court for the recovery of a legacy

COURTS—*Continued.*

and prosecuted as in other cases of special proceeding (Revisal, sec. 144); but before a recovery may be had it is necessary that the executor should have assented to the legacy, or admitted assets in his hands, or it is proved that assets had come into his hands applicable to the claim, or that they should have been acquired by him and held in the proper performance of the duties incident to the position of executor; and upon failure of the devisee to thus establish assets in the hands of the executor, a judgment entered in his favor by the clerk is reversible error. *York v. McCall*, 276.

9. *Appeal and Error — Pleadings — Definiteness — Motion — Demurrer—Amendments—Discretion of Court—Practice.*—On this appeal from a judgment sustaining a demurrer to the complaint, it being held that the defendant's remedy was by motion to make the complaint more definite, the judgment of the Superior Court is reversed without prejudice to the right of the plaintiff to plead *de novo*, or of the defendant to move for a more definite statement of a cause of action, if so advised, both matters to be addressed to the discretion of the lower court. *Womack v. Carter*, 286.

10. *Courts—Jurisdiction—Pleadings—Damages Alleged—Part Recovery.*—When the complaint states a cause of action for deceit and false warranty, alleged in good faith, in such sum as will confer jurisdiction upon the Superior Court that court does not lose its jurisdiction thus acquired by failure of the plaintiff to prove the damages alleged in its entirety; and, *Held*, in this case, that if the lower court was correct in holding that no damages for deceit in the sale of a horse could be recovered, yet the recovery upon the warranty alone in a sum less than that necessary to be alleged to confer jurisdiction would not oust the jurisdiction acquired by the court. *Field v. Brown*, 295.

11. *Executors and Administrators—Sale of Lands for Assets—Offer—Acceptance—Different Lands—Orders Set Aside—Procedure.*—In proceedings to sell lands to make assets to pay debts of the deceased, an offer was made to purchase a part of the lands, ten acres, definitely describing them, at a certain price, whereupon the clerk ordered a private sale, by a commissioner appointed by him, at the price offered, and a fee simple deed to be made "after said land has been set apart": *Held*, the order of the clerk was not an acceptance of the offer to buy the lands described by metes and bounds, and was not binding upon the estate, and that the proposed purchaser had acquired no rights thereunder to demand the delivery of the deed; and further, that the action of the court was not erroneous in setting aside this order and directing that the lands set apart be sold publicly, according to law. *Faust v. Kuykendall*, 332.

12. *Contracts—Courts—Interpretation.*—The courts can only interpret a contract lawfully entered into between parties legally and mentally competent to make it. *Penn v. Insurance Co.*, 399.

13. *Consent Judgments—Fraud—Absence of Consent—Power of Court.*—A court has the power to open or vacate a judgment which appears

COURTS—*Continued.*

to have been entered by consent or agreement of the parties, on adequate grounds, *e. g.*, fraud or mistake, or the real absence of consent, if so found. *Bank v. McEwen*, 415.

14. *Justices' Courts—Nonresidents—Service by Publication—Judgments—Motions—New Trial—Interpretation of Statutes.*—The provisions of Revisal, sec. 449, which permits a nonresident defendant, upon whom personal service has not been made, to defend an action after judgment has been rendered therein, under certain prescribed conditions, are construed with reference to other sections of the Code of Civil Procedure, and thus considered with sections 448 and 430, it appears that they are made to apply to actions in the Superior Court. *Thompson v. Notion Co.*, 519.

15. *Same—Appeal—Superior Courts—Trial de Novo—Practice.*—The sections of Revisal regulating procedure before justices of the peace, being particularly sections 1473, 1474, 1475, which make the general provisions of the chapter applicable, do not confer on a nonresident defendant the right to a rehearing, or, which is the same thing, a new trial, in the justice's court after judgment, upon failure of personal service and a good defense shown; and the remedy is that given by Revisal, sec. 1491, providing for an appeal, so that the action may be heard *de novo* in the Superior Court, where he will be permitted to interpose his defense. *Ibid.*

16. *Controversy Without Action—Courts—Jurisdiction.*—The submission of a controversy without action under Revisal, sec. 803, must be to a court of competent jurisdiction over the subject-matter; and as the Superior Court has no jurisdiction over an action to recover a town tax of $5 paid to an incorporated town under written protest, an action therefor in that court should be dismissed. *Drug Co. v. Lenoir*, 571.

17. *Insurance—Contracts — Corroborative Evidence — Declarations — Justice's Court—Harmless Error.*—Where the declarations of an insurance agent are competent as corroborative of the testimony of the plaintiff as to fraud in the procurement of the policy of life insurance, and as to the intent of the agent in making them, it is admissible to show, in the same action on appeal to the Superior Court, that the agent had testified in the magistrate's court to certain facts; and if error was committed in admitting these declarations, it was cured by the agent's testimony to the same effect in the Superior Court. *Insurance Co. v. Knight*, 592.

CREDITORS. See Debt, Action of.

CROPPER. See Mortgages.

CUSTOMS. See Cities and Towns.

DAMAGES. See Evidence.

1. *Railroads—Damage by Fire—Right of Way—Evidence—Questions for Jury.*—Testimony of a witness that the fire alleged to have caused the damages to plaintiff's lands through the defendant's negligence in the operation of its train over a foul or inflammable right of way, was

DAMAGES—*Continued.*

seen on defendant's right of way and track, is evidence sufficient upon the question as to whether the defendant owned the right of way where the fire occurred. *Hardy v. Lumber Co.*, 113.

2. *Process, Abuse of—Damages—Malice—Evidence—Punitive Damages—Burden of Proof.*—While in an action for damages for the wrongful abuse of process of the court in suing out a warrant of attachment it is necessary to show malice, the absence of probable cause is evidence of malice, to support a recovery for actual damages; but, in order to recover punitive damages, express and not merely technical malice must be shown. *Wright v. Harris*, 542.

DAMAGE BY FIRE. See Negligence.

DEBT.

1. *Debtor and Creditor—Different Classes of Debt—Application of Payment.*—When a payment is made by a debtor to his creditor, who holds both a secured and unsecured debt against him, the debtor must direct the application of the payment either before or at the time of making it; upon his failure to do so, the creditor may make the application within a reasonable time, and upon his not doing so, the law will make the application to the unsecured debt. *Stone v. Rich*, 161.

2. *Same—Notice to Creditor—Book Entries.*—The debtor who owes his creditor both a secured and unsecured debt must signify to the creditor in some manner his intention as to how a payment made to him must be applied, and an entry on the debtor's book showing the application of the payment is insufficient unless it is shown to have been brought to the creditor's attention at the time of the payment. *Ibid.*

3. *Same—Application by the Law.*—In this case, it appearing that the debtor owed his creditor both a secured and unsecured debt, and made a payment without directing its application at the time, except by entry on his own books subsequently brought to the creditor's attention and objected to by him, and that the application was made at the time of commencing this action, it is *Held* that the law applied the payment to the unsecured debt. *Ibid.*

4. *Debtor and Creditor—Different Classes of Debt—Payment—Application Directed—Burden of Proof.*—The burden of proof is on the debtor to show that he has directed the application of a payment he has made to his creditor, to whom he owed both a secured and unsecured debt. *Ibid.*

5. *Appeal and Error—Debtor and Creditor—Application of Payment—Judgment—Merits—Right of Appeal.*—It appearing in this case that the plaintiff owed the defendant two debts, one of them secured and one unsecured, and made a payment under such circumstances that the law would apply it to the unsecured claim, but which was erroneously applied by the judgment of the lower court to the secured claim, and judgment dismissing the action against defendant was entered, it is *Held*, that the defendant's appeal would lie upon the merits of

DEBT—*Continued.*

the case so as to relieve the plaintiff from the effect of the judgment applying the payment upon his secured debt, and that as that part of the judgment below dismissing the action against the defendant was proper, the judgment is modified and the action is dismissed. *Ibid.*

6. *Debtor and Creditor — Judgments — Liens—Different County—Homesteads — Registration — Appraisers' Returns — Judgment Rolls.*—A creditor obtained judgment and had it sent to another county and laid off the debtor's homestead, and the appraisers' report was found in the latter county in the clerk's office, in a metallic filing case, labeled "Homesteads." Thereafter the homesteader conveyed a part of the homestead lands: *Held,* (1) his vendee acquired title subject to the lien of the judgment; (2) the judgment having originally been obtained in another county, the appraisers' returns could not have been found in the judgment rolls, and were properly filed in the county wherein the homestead was laid off; (3) the registration of the homestead is unnecessary unless the exemption is made on the debtor's petition. *Crouch v. Crouch,* 447.

DEBTOR AND CREDITOR. See Executor and Administrator; Corporations.

DECEIT. See Frauds.

DECLARATIONS. See Evidence.

DEEDS AND CONVEYANCES. See Limitation of Actions.

1. *Deeds and Conveyances—Easements—Appurtenant to Lands—Rights of Way.*—When a deed to lands also conveys to the grantee and his heirs and assigns a right of ingress and egress of a specified width over the remaining part of the owner's land to a street, the easement thus conveyed is appurtenant to the land, not in gross, and inures only to the grantee, his heirs and assigns, as owners and occupants of the lands conveyed. *Wood v. Woodley,* 17.

2. *Deeds and Conveyances—Interpretation—Intent.*—In construing a deed to lands, form must yield to substance, and the intent of the parties should be ascertained as embodied in the deed, giving effect to each and every part thereof if it can be done by any fair and reasonable construction. *Baggett v. Jackson,* 26.

3. *Deeds and Conveyances—Interpretation—Life Estates—Reservation in Deed.*—In a deed to lands only a remainder passes to the grantee, by the grantor and his wife therein using the expression, "We do except our lifetime on said lands." *Ibid.*

4. *Deeds and Conveyances—Infants—Voidable Deeds—Reasonable Time—Affirmance.*—A deed to lands made by an infant is voidable only and not void, and he is held to his election to affirm or disaffirm the conveyance within a reasonable time after becoming of age; and it is held in this case that three years is a reasonable time within which he must act. *Weeks v. Wilkins,* 134 N. C., 521, cited and applied. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

5. *Deeds and Conveyances—Probate in Another State—Female Probate Officer—Comity of Laws.*—When it appears from the probate of a deed in the chain of title of a party to the action claiming the lands in dispute, that it was probated before "Delia Sadler, Notary Public," in another State, the position cannot be maintained that the probate is fatally defective, being taken by a woman, if such were made to appear, for it will be assumed that the notary was rightfully appointed in the State in which the deed was probated, and her act will be recognized as valid here. *Nicholson v. Lumber Co.*, 33.

6. *Deeds and Conveyances—Clauses Irreconcilable—Intent—Interpretation.*—While a subsequent clause in a conveyance of land which is irreconcilable with a former clause therein will generally be set aside, the principle is in subordination to another one, that the intent of the grantor as embodied in the entire instrument will control in its construction, and each and every part thereof must be given effect if it can fairly and reasonably be done. *Midgett v. Meekins*, 42.

7. *Contracts to Convey Lands—Judgments—Appeal and Error—Rents and Profits—Accounting—Interest.*—When a contract to convey lands requires of the grantee, as a part of the consideration, that he shall pay off an outstanding mortgage on the lands, amounting to $5,000, and $1,000 in cash to the mortgagor, and it has been so decreed by the Superior Court and affirmed by the Supreme Court, an order rendered at a subsequent term of the Superior Court that the $6,000 be paid into the office of the clerk of the Superior Court and thereupon grantor's deed to the land be delivered by the clerk to the grantee, is erroneous; and on the second appeal it is further *Held*, (1) that as the vendee had failed to comply with the terms of his contract, he was not entitled to an accounting by the vendor, in possession, of the rents and profits; (2) that under the judgment first rendered the vendee was obligated to discharge the mortgage indebtedness, including interest thereon, and therefore the vendor should not be held accountable for the interest thereon. *Bateman v. Hopkins*, 59.

8. *Contracts to Convey Lands—Pleadings—Judgments—Merger.*—In an action to enforce specific performance of a contract to convey lands, it was alleged in the complaint, and denied in the answer, that the plaintiff was "at all times ready, willing, and able to perform the contract on his part"; and by the defendant, which was denied by plaintiff, that he had not executed the contract sued on. It was established by the verdict and judgment that the contract had been made, but that there were certain conditions in the contract forming a material part of the consideration, which the plaintiff had not performed: *Held*, the issue raised by the pleadings had merged in the judgment. *Ibid.*

9. *Equity and Law—Deeds and Conveyances—Mortgages—Fraud—Damages—Election.*—Under the equitable jurisdiction of our courts, where actions at law and suits in equity are administered in the same tribunal, the plaintiff may elect to sue for the value of lands or his equity of redemption therein, alleged to have been obtained by fraud,

DEEDS AND CONVEYANCES—*Continued.*

or to cancel deeds and mortgages or transactions which culminate in the alleged fraudulent acquisition of the title. *Pritchard v. Smith*, 79.

10. *Deeds and Conveyances—Contracts—Consideration—Profits to Grantor —Breach — Equity — Improvements — Charge on Lands — Personal Charge—Reservation of Life Estate.*—Upon default by the grantee of lands under a deed made to him in consideration of his keeping and cultivating the fields conveyed, reserving a life estate in the grantor and giving the yield of the lands to him, the deed to be "null and void" if the grantor becomes dissatisfied, in which event the grantee is "to have pay for what he has done on the property": *Held*, (1) the grantor should recover the lands, with a reasonable rental value for the time of the grantee's possession under the contract; (2) the grantee is entitled to recover the increased value of the lands caused by the improvements made thereon by him as a charge upon the lands, and to recover the reasonable value of the work or labor done, as a personal charge against the grantor, under an implied promise to pay, and also whatever payment he may have made in part performance of his contract; (3) that while the deed is construed (*Midgett v. Meekins*, *ante*, 42) to reserve a life estate in the grantor, it does not affect the merits of this case, as the lands have reverted to him upon the breach of contract by the grantee. *Jones v. Sandlin*, 150.

11. *Homestead—Determinable Interest—Deeds and Conveyances.*—A homestead interest in lands is a determinable exemption, and not an estate in land, which determines upon its being conveyed by the homesteader. *Caudle v. Morris*, 168.

12. *Deeds and Conveyances—County of Registration.*—Generally, a deed to land must be registered in the county where the land it conveys is situated. Revisal, sec. 980. *Weston v. Lumber Co.*, 263.

13. *Same—Probate and Registration—Validating Acts—Repeal—Interpretation of Statutes.*—Whether section 3867 of the Code and section 5453 of the Revisal repeal the provisions of the Laws of 1858-9, ch. 18, and of the Revised Code, ch. 37, sec. 29, which validate certain void and defective probates and registrations of conveyances of lands in the wrong county, *quære*. *Ibid.*

14. *Deeds and Conveyances—Probate—Registration—Wrong County—Interpretation of Statutes.*—Section 1009 of the Revisal expressly refers to and validates the probate and registration of conveyances in one county of land situated in another, which have been taken by the courts of pleas and quarter sessions, and such probates and registrations come within the letter as well as the spirit of the act. *Ibid.*

15. *Same.*—Section 988 of the Revisal should be construed with reference to chapter 18, Laws of 1858-9, from which it was taken, and applies by implication to conveyances of lands. *Ibid.*

16. *Same—Repeal—Exceptions.*—The Code, sec. 3867, and Revisal, sec. 5453, provides that the respective clauses therein shall not "affect any act done, or any right accruing, accrued, or established," in

their repeal of former public laws, or laws of a general nature. Hence the provisions of chapter 18, Acts of 1858-9, and of the Revised Code, sec. 29, validating the registration in the right county, by certified copy of a deed which had been registered in the wrong county in the manner specified, have not been repealed; and, if otherwise, registration in like manner could be made under section 1599 of the Revisal. *Ibid.*

17. *Deeds and Conveyances — Probate—Registration—Wrong County—Remedial Acts—Interpretation of Statutes.*—Statutes intended to correct and remedy errors of registration and of probate of deeds to lands in the wrong county are highly remedial and should be liberally construed, so as to embrace all cases clearly within their scope, and is a proper exercise of legislative power, favored by the courts. *Ibid.*

18. *Deeds and Conveyances—Standing Timber—Period for Cutting and Removing—Reverter.*—The timber on lands conveyed, and not cut and removed within the period for those purposes specified in the deed, belongs to the grantor therein. *Lumber Co. v. Brown*, 281.

19. *Deeds and Conveyances—Equity—Reformation—Material Mistake.*—When, without indication of fraud or imposition, a deed to lands is sought to be reformed for mistake, upon the ground that more timber had been bought than that contained in the boundaries described, the misapprehension of the grantee, alone, is insufficient, for the mistake must be mutual to both parties for the application of the equitable doctrine of reformation. *Baynes v. Harris*, 307.

20. *Contracts—Lands—Selection—Ownership.*—One who is put into possession of a 50-acre tract of land under a parol agreement that he is to have 12 acres thereof to be by him selected, is not the owner of the 12 acres until it is selected and conveyed to him. *Hurley v. Ray*, 376.

21. *Deeds and Conveyances—Wills—Mental Capacity—Evidence—Fraud—Undue Influence—Transaction with Deceased—Interpretation of Statutes.*—In an action to set aside a deed or will on the ground of mental incapacity of the maker or testator at the time of their execution, it is competent for a witness, after testifying as to his opinion that the maker or testator was mentally incompetent at the time of the execution of the deed or will, to further testify as to such communications or conversations he had had with him upon which his opinion was founded; and as to such the provisions of Revisal, sec. 1631, prohibiting evidence of transactions with a deceased person, do not apply. *Rakestraw v. Pratt*, 436.

22. *Deeds and Conveyances—Wills—Mental Capacity—Undue Influence—Evidence—Questions for Jury—Appeal and Error.*—The testatrix made her will devising all of her property to one of her daughters and twenty days thereafter executed her deed for the same purpose. At the time of making the will and the deed the testatrix was nearly 84 years of age. A witness, one of her daughters, testified that in her opinion the testatrix was mentally incompetent at the time, and further testified that she was with her mother the day after the will was made, and her mind was very weak and she did not recognize

DEEDS AND CONVEYANCES—*Continued.*

her; told her she had not made a will, and the devisee remarked that it was "all a story about the will," which the testatrix did not contradict: *Held*, (1) the execution of the deed being twenty days after the execution of the will, if the fact is accepted by the jury that the testatrix could not remember a day after she made the will that she had done so, it would, under the evidence of this case, be a relevant circumstance as to the intelligent execution of the deed; (2) and if it were established that the testatrix had sufficient mental capacity to make both these instruments, then the assertion of the devisee, in her presence, that the making of the will was "all a story," which was not denied by her, is some evidence on the issue of undue influence; (3) the exclusion of this evidence, in this case, is reversible error. *Ibid.*

23. *Tax Deeds—Recitations Sufficient.*—The recitations in a tax deed of swamp lands made by the sheriff to the Governor in 1799, that no person listed the lands for taxes; that it was advertised in the newspapers agreeable to law and was sold pursuant to such advertisement, a fair offer was made to any person to pay the taxes, but no one offered to do so, and the same was struck off to the Governor and his successors in office, are sufficient to justify the levy and sale of the lands for taxes, and the deed is not inoperative and void on that account. *Board of Education v. Remick*, 562.

24. *Tax Deeds—Recitations—Prima Facie Evidence—Presumptions—Interpretation of Statutes.*—Since chapter 137, Laws 1887, now Revisal, sec. 2909, the recitals in a tax deed are *prima facie* true, and the burden of proof is on the one seeking to establish the contrary. *Ibid.*

25. *Same—Constitutional Law.*—The Legislature having the power to change the rules of evidence, Laws 1887, ch. 137, now Revisal, sec. 2909, changing the burden of proof to the one attacking a tax deed, to show that the recitations therein are not true; embraces tax deeds theretofore made. *Ibid.*

26. *Tax Deeds—Recitations—Listing for Taxes—Sufficiency—Interpretation of Statutes.*—A tax deed made by the sheriff to the Governor in 1799, among other things, recited that "the land was not given in by any person or persons whatever for the payment of taxes thereof," and it is *Held*, that this made the land liable to taxation under Laws 1782 (Iredell's Statutes, ch. VII, sec. 6, p. 430), and the objection to the deed, that it does not state that the land had not become "liable to be sold for taxes," is untenable. *Ibid.*

27. *State's Swamp Lands—Tax Deeds—Appraisement and Valuation—Subject to Taxation—Presumptions—Burden of Proof—Interpretation of Statutes.*—As to a tax deed for swamp lands, Revisal, sec. 4047, makes it presumptive evidence that the assessors valued and appraised the land therein conveyed, with the burden of proof to the contrary on the one setting up its invalidity; and further, by the provisions of Revisal, sec. 2909, it must be shown by him that either such property was not subject to taxation for the year or years named in the deed, or that the taxes had been paid before the sale, or that the property had been redeemed from the sale. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

28. *State's Lands—Tax Deeds—Presumptions—Interpretation of Statutes—Constitutional Law.*—Revisal, sec. 4047, making the recitations in a tax deed for swamp lands *prima facie* true, is constitutional and valid. *Ibid.*

29. *Tax Deeds—Seal—Interpretation of Statutes—Record—Agreement of Parties—Appeal and Error.*—The objection in this case that the sheriff did not affix his seal to a tax deed is cured by Pell's Revisal, sec. 949 (*a*), relating to all deeds executed prior to 1 January, 1895, and is also obviated in this case by an agreement amending the record, by the parties, that the seal was in fact affixed. *Ibid.*

30. *Tax Deeds—Description—Parol Evidence—State's Lands—Grants.*—The tax deed for the lands in question is held, in this case, not too indefinite in its description of the lands, it referring to a grant from the State which identified them sufficiently, and they could also be identified by parol evidence; but as the tax deed was made to the Governor, and the lands were originally granted by the State, if the description in the grant were too indefinite, the title would have remained in the State. *Ibid.*

DEFENSES. See Actions.

DEMANDS. See Cities and Towns.

DEMURRER.

1. *Pleadings—Several Statements—Same Cause—Judgments—Demurrer.*—When the complaint in an action to recover rent alleges, in the three several ways, that a certain amount was due the plaintiff, denominating them as several causes of action, so that it clearly appears, beyond any doubt, that the amount specified in each so-called cause of action was for the same rent, and the plaintiff is entitled to recover on two of his "causes of action," or counts, defendant's demurrer to those causes alone is bad. *Womack v. Carter*, 286.

2. *Pleadings—Action for Rents—Lands—Description—Definiteness—Motions—Demurrer.*—In an action to recover rents for plaintiff's lands alleged to have been wrongfully in defendant's possession and collected by the defendant from his lessees, it is not necessary that the lands be described with the particularity required when title is in dispute, or as in an action of trespass, and if the defendant had been uncertain of the nature of the charge against him, he should have moved the court, in its discretion, for a more definite and certain statement of the cause of action (Revisal, sec. 496), which would probably be granted, if made in good faith. The description of the lands as belonging to plaintiff, in a certain county, which defendant took into his possession at a specified time, *Held*, sufficient. *Ibid.*

3. *Pleadings—Cause of Action—Interpretation—Sufficient as a Whole—Demurrer.*—When a cause of action is stated in three several ways, which taken together are sufficient, a demurrer against one of these statements is bad, though taken alone it is insufficient; for a complaint cannot be thus overthrown unless it is wholly insufficient, or fatally defective as a whole. *Ibid.*

DEMURRER—*Continued.*

4. *Appeal and Error — Pleadings — Definiteness — Motion — Demurrer— Amendments—Discretion of Court—Practice.*—On this appeal from a judgment sustaining a demurrer to the complaint, it being held that the defendant's remedy was by motion to make the complaint more definite, the judgment of the Superior Court is reversed without prejudice to the right of the plaintiff to plead *de novo*, or of the defendant to move for a more definite settlement of a cause of action, if so advised, both matters to be addressed to the discretion of the lower court. *Ibid.*

5. *Contracts—Pleadings—Compounding a Felony—Demurrer.*—The plaintiff alleges that the defendant had been the prosecuting witness in a criminal action against his sons, charged with obtaining from the defendant a certain sum of money under false pretenses; that the sons were then absent from home, and the plaintiff, to stop the prosecution, paid the money to the defendant, under his false and fraudulent representations that the charges in the indictment were true; that the plaintiff was totally unaware of the matters stated in the indictment, and afterwards found them to be false. *Quœre*, as to whether the complaint, in this case, sets forth, as a basis of plaintiff's cause of action, an illegal agreement to suppress a criminal prosecution with sufficient definiteness; but if it does, it is *Held*, that the plaintiff and defendant were not *in pari delicto*, and a demurrer was bad. *Sykes v. Thompson*, 348.

6. *Contracts—Indemnity—Pleadings—Demurrer.*—An action brought for materials furnished in the erection of a building, which were to be paid for by the contractor and which were bought by him therefor and therein used, which sets out a contract and bond signed with a surety, which clearly contemplates that the contractor shall pay the material men and laborers and constitute them the beneficiaries under the contract and bond, states a good cause of action against the surety, and a demurrer thereto is bad. *Supply Co. v. Lumber Co.*, 428.

7. *Same—Loss or Damage.*—When a contract and bond of indemnity given by a contractor to the owner of a building to be erected, which was signed by the surety, provides, in addition to saving the owner harmless, for some definite thing, which has not been complied with, as in this instance, to pay for the material used in the building, it is not necessary to allege, in order to maintain an action against the surety, that the owner has suffered pecuniary loss by reason of the contractor's default therein. *Ibid.*

DESCENT AND DISTRIBUTION.

1. *Wills—After-born Child—Descent and Distribution—Intent—Interpretation of Statutes.*—Revisal, sec. 3145, providing that when children are born "after the making of the parent's will" and the parent die without making provision for them, they "shall be entitled to such share and proportion of such parent's estate as if he or she had died intestate," etc., is construed as not intending to control a parent as to the provision he should make for the child, but to apply when by inadvertence or mistake the after-born child has not been provided

DESCENT AND DISTRIBUTION—*Continued.*

for; and unless the omission was intentional, or provision is made for the child, either under the will or some settlement or provision ultra, the after-born child takes his share, and the statute applies whether there was one or more children. *Flanner v. Flanner*, 126.

2. *Wills—Interpretation—Intent—Conversion—Realty—Descent and Distribution—Interpretation of Statutes.*—A testator devised lands to his three sons, the rents to be used for their benefit till the youngest became twenty-one years of age, then the lands to be sold for cash and divided between them. The devisees died intestate, without wife or child, before the youngest became of age: *Held*, the intent of the testator controlling, there was not, under the terms of the will, a conversion of the lands into personalty as of the death of the testator, but the lands remained realty to descend to the heirs at law of the blood of the testator. Revisal, sec. 1556, Rule 4. *Elliott v. Loftin*, 361.

DESCRIPTION. See Mortgages.

DIRECTORS. See Corporations.

DISCOVERY. See Practice.

DISCRETION. See Courts.

DIVORCE. See Marriage and Divorce.

DOMESTICATING ACT. See Corporations.

DOWER. See Partition.

Homesteads—Widows—Heirs at Law—Dower.—A widow is not entitled to homestead in the lands of her deceased husband against the heirs at law, when there are no creditors, but only to dower. N. C. Constitution, Art. X, sec. 5. *Caudle v. Morris*, 168.

DRAINAGE DISTRICTS.

Drainage Districts—Bond Issues—Taxation—Exemptions—Constitutional Law.—Drainage districts are not regarded as municipal corporations in purview of the Constitution, Article V, sec. 5, and a legislative act exempting their bonds from taxation violates the uniform rule as to taxation required by Article V, sec. 3, and by Article V, sec. 9, and hence such an act is unconstitutional. *Commissioners v. Webb*, 594.

DUE COURSE. See Bills and Notes.

EASEMENTS.

1. *Deeds and Conveyances—Easements—Appurtenant to Lands—Rights of Way.*—When a deed to lands also conveys to the grantee and his heirs and assigns a right of ingress and egress of a specified width over the remaining part of the owner's land to a street, the easement thus conveyed is appurtenant to the land, not in gross, and inures only to the grantee, his heirs and assigns, as owners and occupants of the lands conveyed. *Wood v. Woodley*, 17.

EASEMENTS—*Continued.*

2. *Electric Corporations—Eminent Domain—Several Exercises of Power —Interpretation of Statutes.*—The power of eminent domain conferred on electric public-service corporations by the statutes, Revisal, secs. 1570-7 inclusive, and sec. 2575 *et seq.*, is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. *Power Co. v. Wissler*, 269.

3. *Electric Corporations—Eminent Domain—"Reasonable Necessity"— Bad Faith—Oppression—Power of Courts—Interpretation of Statutes.*—While any person affected by a petition of an electric public-service corporation in condemnation proceedings may "answer the petition and show cause against granting the same, and may disprove any of the facts alleged in it" (Revisal, sec. 2584), and while the rights, privileges, and easements to be acquired by such companies must be "reasonably necessary" for the conduct of their business, and this reasonable necessity may in its ultimate phases become a judicial question, a perusal of the entire statute discloses that the extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of fact tending to show bad faith on the part of the companies or an oppressive or manifest abuse of their discretion. *Love v. R. R.*, 81 N. C., 434, cited and distinguished. *Ibid.*

4. *Corporations — Rights of Way — Definition—Surface Boundaries—Obstructions—Preservation of Lines—Interpretation of Statutes.*— While ordinarily and in its proper acceptation the "right of way" is understood to be an easement in the lands of another attaching to some specific portion of the lands, defined and ascertainable by specific surface boundaries, the doctrine may not be so limited under the construction of the provisions of our statutes applicable to electric public-service corporations as to confine them to a right of way delimited by surface boundaries, and it may be extended to the cutting or removal of trees or obstructions outside of the boundaries when required for the reasonable preservation and protection of their lines and other property. Revisal, secs. 1572, 1574, 2575, 2576. *Ibid.*

EDUCATION. See Taxation.

ELECTION. See Frauds, 9; Courts.

ELECTRIC CORPORATIONS. See Corporations; Street Railroads.

EMINENT DOMAIN. See Corporations.

EMPLOYER AND EMPLOYEE. See Master and Servant.

ENTIRETIES. See Estates.

EQUITY. See Injunctions; Frauds, 10; Judgments.

1. *Deeds and Conveyances—Mortgages—Fraud—Usury—Issues—Equity— Cancellation—Decrees.*—The vendee of lands, an ignorant man, applied to plaintiff for the loan of $1,900 to complete his purchase, and,

EQUITY—*Continued.*

with evidence to the contrary, there was evidence tending to show that plaintiff took a mortgage on the land to secure the loan, with an excess of $1,100, making the amount of the mortgage debt $3,000; that thereafter it was agreed that defendant's vendor should convey the lands to the plaintiff, who was to receive back the mortgage for the $3,000, and defendants went into the possession of the lands; that thereafter plaintiffs declined to make the arrangements unless the mortgage was executed for $3,800, which was given, and when the note it secured fell due the plaintiff began proceedings to foreclose, and a temporary injunction was issued. As to whether the second transaction was a resale of the land for $3,800, secured by a mortgage: *Held*, (1) Issues were properly submitted: Was the real transaction a purchase of the lands by defendant from the original vendor with a loan of money from the plaintiff for their payment, and as to the amount and interest of the loan? (2) A decree was proper, upon affirmative findings to the issues, that the payment of the sum found to be due would be a full satisfaction of the mortgage debt and declaring the cancellation of the excess. (3) Evidence was competent to show the circumstances under which plaintiff acquired his deed, and the understanding of the parties at the time. *Elks v. Hemby*, 20.

2. *Deeds and Conveyances—Mortgagee—Purchaser—Equity—Reimbursement—Charge on Lands.*—Having taken a mortgage on certain lands, the mortgagee became aware of an outstanding prior mortgage on them, and bought the lands from the purchaser at the sale under the first mortgage: *Held*, the purchaser under the second mortgage did not acquire an absolute title to the lands, but only an equity to be reimbursed for his expenditures, charging the lands for its payment in preference to the trusts expressed in the mortgage. *Pritchard v. Smith*, 79.

3. *Same—Innocent Purchaser.*—A mortgagee taking subject to and with knowledge of a prior mortgage on lands received from the mortgagor a fee-simple deed upon the consideration expressed in the mortgage, and thereafter took another deed from the purchaser at a sale under the first mortgage, the total sum expended being much less than the real value of the land. The *locus in quo* having come into the hands of an innocent purchaser for value: *Held*, equity and law being administered and enforced in the same tribunal under our statute, the heirs at law of the mortgagor may recover a money judgment for the loss caused by the mortgagee's fraud, ascertained upon the equitable principles of deducting all proper items expended by the mortgagee in acquiring his liens on the lands. *Ibid.*

4. *Judicial Sales—Judgments—Irregularities—Third Person—Intervening Rights—Equity.*—The devisees of the remainder in lands sues to recover the lands devised to them. The testator died insolvent in 1865, and his executors brought proceedings in 1868 to sell the testator's lands to make assets to pay his debts, and the lands in controversy were bought by the one under whom defendant deraigns his title: *Held*, in this case, no meritorious defense to the proceedings in which the sale of the lands was decreed is set up, which were regu-

EQUITY—*Continued.*

lar upon their face, but only a defect in the service of infant defendants therein; and that no equitable purpose would be subserved in setting aside the decree of sale. *Harris v. Bennett*, 339.

5. *Corporations—Insolvent—Directors—Debtor and Creditor—General Assets—Mortgage—Equity—Cancellation.*—The directors of an insolvent corporation having issued bonds secured by a mortgage on its assets to take up the corporate note on which they were indorsers, and having bought the bonds and given their personal note with the bonds as collateral, and taken up the old note, for the payment of which the creditor was pressing: it is *Held*, (1) that the moneys received from the sale of the bonds to the directors were never general assets of the corporation, and, in the absence of bad faith, could not be recovered by the corporation; (2) that the only relief the corporation is entitled to is the cancellation of the mortgage; (3) the directors are general creditors of the corporation according to the amount of their respective claims. *Whitlock v. Alexander*, 479.

EQUITY AND LAW. See Courts.

ESTATES.

1. *Partition—Life Estate—Remaindermen—Actual Division—Interpretation of Statutes.*—Revisal, sec. 2508, provides, among other things, that "The existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common shall be deemed seized and possessed as if no life estate existed. But this shall not interfere with the possession of the estate": *Held*, that by the change in the terms from "a sale for partition" to the "purposes of partition," with the cautionary provision that it shall not interfere with the possession of the life tenant, it is construed to include actual partition by the remaindermen, as well as sale for division by them. *Baggett v. Jackson*, 26.

3. *Deeds and Conveyances—Intent—Estates—Limitations—Reverter.*—A conveyance to the grantor's wife "and her heirs" of certain described lands, with habendum "to her and her heirs as long as she lives and remains a widow after my death, and at her death or remarriage" to the children of the grantor who have "been or may hereafter be born to her," etc., with provision that should the wife predecease the grantor, the property to revert to him: *Held*, the clauses in the deed were reconcilable, and it was the intent of the grantor that his wife, remaining unmarried, and living after his death, should hold a life estate in the lands, remainder to the children in fee; and in the event of the grantor living longer than his wife, the lands would revert to him in fee. *Midgett v. Meekins*, 42.

ESTIMATES. See Evidence.

ESTOPPEL. See Judgments, 28.

1. *Homestead—Widow—Deeds and Conveyances—Pleadings—Evidence—Judgments—Estoppel.*—A widow cannot maintain her claim for a homestead in the lands of her deceased husband against the heirs at

ESTOPPEL—*Continued.*

law when it appears that she has conveyed it by deed to another, and in an action by the heirs at law to recover the lands in possession of the widow's grantee the latter cannot successfully claim the homestead by virtue of his deed, when he has made no such claim in his answer, and has put his whole title in issue, which was decided adversely to him. It was his duty to set up every claim he had to the land, and is precluded as to those he might have set up, but did not. *Caudle v. Morris*, 168.

2. *Partition—Parties—Estoppel—State's Lands—Grants—Vacant and Unappropriated—Titles.*—J. and his wife were parties to proceedings to partition certain lands, and it appeared by the petition that A. died in 1847, seized and possessed of the lands, and that the wife of J., and others, were his children and heirs at law, and as such were tenants in common thereof. Partition was made and finally adjudicated in 1849: *Held*, that J. and those claiming under him were estopped to deny that A. was the owner of the lands in 1847, and that as the lands were not vacant or unappropriated in 1850, any grant that J. may have obtained at that time from the State to the lands were invalid to pass title to anyone claiming thereunder. *Owen v. Needham*, 381.

3. *Process, Abuse—Attachment—Regular Proceedings—Ulterior Purpose—Motions—Laches—Estoppel—Burden of Proof.*—In an action for wrongful abuse of process in suing out a warrant of attachment on the property of the debtor, it was made to appear that the proceedings in attachment were usual and regular, following the statutory methods prescribed, and there was no evidence tending to show that the creditor had any ulterior or wrongful purpose or intent in instituting the proceedings: *Held*, the remedy of the debtor was by motion to vacate the attachment under our statute, and recover damages from the creditor and the surety on his bond; and for him to recover in an independent action for malicious prosecution, it is necessary for him to show the successful termination of the proceedings in attachment. The difference between maliciously suing out an attachment and the wrongful abuse of process, thereafter, pointed out and discussed by WALKER, J. *Wright v. Harris*, 542.

EVIDENCE. See Frauds; Nuisance; Questions for Jury; State's Lands.

1. *Negligence—Employer and Employee—Evidence—Nonsuit.*—The rules of a railroad company prohibiting passengers from riding on freight trains should be put in evidence to bar a recovery for the wrongful death of one so riding. There being evidence in this case that the rule had been waived by custom, a judgment of nonsuit entered by reason of the rule is not sustained. *Whitehurst v. R. R.*, 1.

2. *Deeds and Conveyances—Identity of Grantor—Correspondence—Handwriting—Evidence.*—In a controversy involving title to lands, wherein a deed from Mrs. D., the grandchild and heir at law of W., was relied on in the chain of title of a party, there was testimony tending to show that W. was dead and all of his children had died without descendants, except L., who married T., who died leaving two children, one of whom died and the other married D., who lived in Waco,

EVIDENCE—*Continued.*

Texas; that the witness had received several letters from Mrs. D. from Texas, about this land, which was correctly located in the boundaries of the disputed deed from her: *Held*, (1) evidence sufficient to be submitted to the jury that the conveyance was made by Mrs. D., the grandchild and heir at law of W.; (2) testimony of the witness that he had received and answered letters from Mr. D. concerning the lands, though he did not know of her husband except from the letters and had never seen her write, was competent under the attendant circumstances. *Nicholson v. Lumber Co.*, 33..

3. *Deeds and Conveyances—Variation of Magnetic Needle—Instructions—Appeal and Error.*—In an action involving title to disputed lands, an exception that the charge of the court ignored or disregarded evidence tending to show that a proper allowance for the variation of the magnetic needle would have given the land a somewhat different placing, cannot be sustained, it appearing that this theoretical variation was controlled to some extent by an old and marked line, without anything of record to show that the location would have been varied, and, further, that his Honor charged that the course should "be determined by the lines of the grant and the proper variation for the difference in time." *Ibid.*

4. *Witnesses—Evidence—Harmless Error—Appeal and Error.*—A statement of a witness, that in his opinion sparks from the burning stump would not have carried 44 yards to plaintiff's land where the fire originated, will not in this case be held for reversible error: (1) Because the statement went beyond the import of the question asked, and there was no motion to strike it out. (2) Because the witness necessarily nullified the statement or rendered it harmless by immediately saying he had seen sparks from such stumps carry that far. *Caton v. Toler*, 104.

5. *Railroads—Damages by Fire—Right of Way—Evidence—Questions for Jury.*—Testimony of a witness that the fire, alleged to have caused the damages to plaintiff's lands through the defendant's negligence in the operation of its train over a foul or inflammable right of way, was seen on defendant's right of way and track, is evidence sufficient upon the question as to whether the defendant owned the right of way where the fire occurred. *Hardy v. Lumber Co.*, 113.

6. *Arbitration and Award—Matters Submitted—Parol Evidence.*—Parol evidence is competent to show what matters submitted to the arbitrators were considered by them in making their award. *Millinery Co. v. Insurance Co.*, 130.

7. *Railroads — Principal and Agent — Local Agent—Contracts—Special Cars—Special Authority—Evidence.*—In an action brought by a traveling troupe to recover from a railroad company damages alleged to have been caused by a breach of contract, made with the defendant's local agent, to furnish a baggage car indeterminately beyond his home station, it is competent for the defendant to show the want of authority of the agent to make a contract of that character. *Newberry v. R. R.*, 156.

EVIDENCE—*Continued.*

8. *Debtor and Creditor—Notice to Creditor—Book Entries.*—The debtor who owes his creditor both a secured and unsecured debt must signify to the creditor in some manner his intention as to how a payment made to him must be applied, and an entry on the debtor's book showing the application of the payment is insufficient unless it is shown to have been brought to the creditor's attention at the time of the payment. *Stone v. Rich*, 161.

9. *Same—Application by the Law.*—In this case, it appearing that the debtor owed his creditor both a secured and unsecured debt, and made a payment without directing its application at the time, except by entry on his own books subsequently brought to the creditor's attention and objected to by him, and that the application was made at the time of commencing this action, it is *Held* that the law applied the payment to the unsecured debt. *Ibid.*

10. *Carriers of Goods—Negligence—Expert Evidence—Questions of Fact—Assignment of Claim.*—In an action against a common carrier for damages for the negligent injury to two mules in car-load shipment, resulting in their death, testimony of an expert veterinarian, who had made a *post-mortem* examination and found them bruised and in a bad condition internally, that, from the examination, in his "opinion the mules had been jammed up in the car," is incompetent as an expression of an opinion as to a fact of which he had no personal knowledge and which was involved directly in the issue. *Summerlin v. R. R.*, 133 N. C., 551, cited and approved. As to whether the plaintiff can recover for one of the mules sold to another and replaced by him, without evidence that the cause of action had been assigned, *quære. Ibid. Mule Co. v. R. R.*, 252.

11. *Fraud—Deceit—Scienter—Evidence.*—In an action of deceit in making false representations which induced the plaintiff to exchange his mule for defendant's horse, there was evidence tending to show that the defendant made the false representations that the horse was sound of body and limb, without defect, and was gentle, safe, and was an "all-round" good horse, suitable to the plaintiff's needs, etc., which were calculated, intended to, and did deceive: *Held*, the evidence is sufficient to prove the defendant's *scienter. Fields v. Brown*, 295.

12. *Principal and Agent—Broker—Evidence—Questions for Jury.*—In an action to recover the difference in value of cotton, on the ground that it had not come up to specifications, alleged to have been bought of the defendant through his broker, there was evidence tending to show that the transaction was made with the alleged broker as an individual transaction, as purchaser of the cotton from the defendant, and as vendor of the plaintiff: *Held*, that evidence tending to show that the alleged broker received a commission on the sale, *i. e.*, that he was allowed a percentage on the invoice price of the defendant, cannot be held as a matter of law to constitute the one selling the cotton to the plaintiff the defendant's broker; but under the conflicting evidence an issue of fact is raised for the determination of the jury. *Latham v. Field*, 335.

EVIDENCE—*Continued.*

13. *Evidence Excluded—Previous Testimony—Substance—Harmless Error.*—The exclusion of testimony not held for error in this case, it appearing that the witness had already testified, in substance, to the same thing. *Aman v. Lumber Co.*, 369.

14. *Evidence, Corroborative—Declarations of Parties.*—A party to an action may prove his own declarations, which are consistent with his own evidence, and made before the trial, as corroborative evidence. *Allred v. Kirkman*, 392.

15. *Corporations—Subscriptions to Stock—Fraud—Evidence—Receivers.*—In an action by the receivers of an insolvent corporation to compel the payment of a subscription to stock issued for property acquired by the corporation for the conduct of the business, evidence tending to show a grossly excessive valuation of the property by the directors, knowingly made, is strong evidence of fraud, and may be conclusive thereof. *Whitlock v. Alexander*, 465.

16. *Corporations — Insolvency — Receivers—Shareholders—Valuation—Directors—Minute-book—Resolutions—Omissions—Evidence.*—In an action by the receivers of an insolvent corporation to require the holder of stock issued for certain patent rights, which the corporation had acquired for the conduct of its business, to pay in the value of his stock, the defendant claimed that the directors of the corporation had, in good faith, fixed the value of the patents and that no assessment was due on the stock issued therefor: *Held*, while a transaction of this character should be pursuant to corporate action, it would not be rendered invalid because it was, by inadvertence, omitted from the minutes of the proceedings. *Ibid.*

17. *Process, Abuse of—Damages—Malice—Evidence—Punitive Damages—Burden of Proof.*—While in an action for damages for the wrongful abuse of process of the court in suing out a warrant of attachment it is necessary to show malice, the absence of probable cause is evidence of malice, to support a recovery for actual damages; but, in order to recover punitive damages, express and not merely technical malice must be shown. *Wright v. Harris*, 542.

18. *Attachment — Damages — Judgment — Probable Cause—Evidence—Instructions.*—When the debtor, in an attachment proceeding, has successfully defended the suit to judgment, and brings his action to recover damages on the creditor's bond therein, the latter's requested prayer, in the present suit, that the plaintiff has failed to show probable cause, is properly denied. *Smith v. Bonding Co.*, 574.

19. *Evidence—Conflicting—Questions for Jury.*—Where there is conflicting and competent evidence upon whether a premium note was given for a policy of life insurance induced by false and fraudulent representations of the insurance agent made at the time the note was delivered, it presents an issue of fact, upon which the finding of the jury is conclusive. *Insurance Co. v. Knight*, 592.

20. *Insurance — Contracts — Principal and Agent—Fraud—Corroborative Evidence—Intent—Statements Made to Others.*—Where the validity of a life insurance policy is attacked for the false and fraudulent

EVIDENCE—*Continued.*

representations of the agent, as thus inducing the contract, it is competent to show, in corroboration of the plaintiff's evidence, that the agent sold only one kind of policy, and by others that he made the same representations to them as an inducement to insure; and also as evidence of the intent of the agent in making the representations to the plaintiff. *Ibid.*

21. *Insurance — Contracts — Corroborative Evidence — Declarations—Justice's Court—Harmless Error.*—Where the declarations of an insurance agent are competent as corroborative of the testimony of the plaintiff as to fraud in the procurement of the policy of life insurance, and as to the intent of the agent in making them, it is admissible to show, in the same action on appeal to the Superior Court, that the agent had testified in the magistrate's court to certain facts; and if error was committed in admitting these declarations, it was cured by the agent's testimony to the same effect in the Superior Court. *Ibid.*

22. *Evidence—Questions for Jury.*—Upon a rehearing of this case it is held that the rules of law heretofore laid down are correct; but upon reconsidering the facts, the majority of the Court hold the evidence sufficient to be submitted to the jury. *Peele v. Powell*, 601.

EVIDENCE, PAROL. See Contracts.

EXECUTORS AND ADMINISTRATORS.

1. *Negligence—Personal Injuries—Wrongful Death—Executors and Administrators—Abatement of Action.*—It is competent for an administrator of a deceased person, whose death was caused by a personal injury, negligently inflicted, to bring an action for damages for the wrongful death, though the deceased, in his lifetime, had brought his action for damages for the personal injuries inflicted by the same alleged negligent act. *Whitehurst v. R. R.*, 1.

2. *Executors and Administrators—Devises—Parties—Nonsuit.*—An action should be brought by the executor to recover moneys alleged to have been collected and not accounted for by the defendant to the deceased on certain piano leases, and an action by the devisee of these leases in his own name cannot be sustained. *Mayo v. Dawson*, 76.

3. *Executors and Administrators—Demonstrative Legacies—Payment—General Assets.*—A legacy payable from the rents and profits of certain lands belonging to the estate of the deceased, and then under certain contingencies payable by the executor out of certain other lands, is a demonstrative legacy, and, in case of both sources failing, is payable out of the general assets of the estate. *York v. McCall*, 276.

4. *Executors and Administrators—Receivers—Payment of Legacies—Jurisdiction—Courts.*—Ordinarily the appointment of a receiver must be made by the judge and not by the clerk, for the latter has no power to make the appointment unless it is given in express terms by statute, or is necessarily incident to the powers conferred upon him; and the appointment of a receiver to take charge of property of an intestate, in which the executor is personally interested, and pay over the rents and profits to a specific legatee, as directed in the will, is for the judge to do, and is void if it is attempted by the clerk. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

5. *Executors and Administrators—Sale of Lands for Assets—Offer—Acceptance—Different Lands—Orders Set Aside—Procedure.*—In proceedings to sell lands to make assets to pay debts of the deceased, an offer was made to purchase a part of the lands, ten acres, definitely describing them, at a certain price, whereupon the clerk ordered a private sale, by a commissioner appointed by him, at the price offered, and a fee-simple deed to be made "after said land has been set apart": *Held*, the order of the clerk was not an acceptance of the offer to buy the lands described by metes and bounds, and was not binding upon the estate, and that the proposed purchaser had acquired no rights thereunder to demand the delivery of the deed; and further, that the action of the court was not erroneous in setting aside this order and directing that the lands set apart be sold publicly, according to law. *Foust v. Kuykendall*, 332.

EXECUTION. See Judgments.

EXPERT EVIDENCE. See Evidence.

EXPRESS COMPANIES. See Carriers of Goods.

FEDERAL QUESTIONS. See Statutes.

FRAUDS. See Corporations.

1. *Deeds and Conveyances—Mortgages—Fraud—Usury—Issues—Equity—Cancellation—Decrees.*—The vendee of lands, an ignorant man, applied to plaintiff for the loan of $1,900 to complete his purchase, and, with evidence to the contrary, there was evidence tending to show that plaintiff took a mortgage on the land to secure the loan, with an excess of $1,100, making the amount of the mortgage debt $3,000; that thereafter it was agreed that defendant's vendor should convey the lands to the plaintiff, who was to receive back the mortgage for the $3,000, and defendants went into possession of the lands; that thereafter plaintiffs declined to make the arrangements unless the mortgage was executed for $3,800, which was given, and when the note it secured fell due the plaintiff began proceedings to foreclose, and a temporary injunction was issued. As to whether the second transaction was a resale of the land for $3,800, secured by a mortgage: *Held*, (1) Issues were properly submitted: Was the real transaction a purchase of the lands by defendant from the original vendor with a loan of money from the plaintiff for their payment, and as to the amount and interest of the loan? (2) A decree was proper, upon affirmative findings to the issues, that the payment of the sum found to be due would be a full satisfaction of the mortgage debt and declaring the cancellation of the excess. (3) Evidence was compepetent to show the circumstances under which plaintiff acquired his deed, and the understanding of the parties at the time. *Elks v. Hemby*, 20.

2. *Deeds and Conveyances—Mortgages—Fraud—Burden of Proof—Opening and Conclusion—Practice.*—The burden is upon the defendant, who has admitted giving a note and mortgage, to show that it was

FRAUDS—*Continued.*

excessive and procured by plaintiff's fraud, when he relies upon this defense, with evidence tending to support it; and he has the opening and concluding arguments to the jury. *Ibid.*

3. *Same—Evidence—Questions of Law—Principal and Agent.*—The defendant having been requested with glowing representations to purchase shares of stock in an insurance company, sought information from the cashier of the plaintiff bank as to the value of the shares, and was truthfully informed by him that he, himself, had purchased some of these shares, and told of other prominent people who had likewise done so. The defendant purchased some of the shares, and gave his negotiable note therefor, which was subsequently purchased by plaintiff bank, in due course, for value, and before maturity. In plaintiff's action upon the note, the defense was interposed that the defendant had been induced to purchase the shares and give the note upon the plaintiff's fraudulent misrepresentations. The burden of proof being upon the defendant, it is *Held*, that the evidence was insufficient to show fraud on plaintiff's part, or on the part of its cashier. *Bank v. Brown*, 23.

4. *Marriage and Divorce—Former Marriage—Living Wife—Judgment—Fraud and Collusion—Procedure.*—A decree in the Superior Court, declaring the defendant's marriage with a former wife void *ab initio*, duly entered subsequently to the ceremony with the plaintiff, who is suing for divorce on the ground that the defendant had a living wife at that time, establishes the fact that the defendant was single at the time of the second marriage sought to be annulled, and cannot be attacked unless impeached by direct proceedings for fraud and collusion. *Taylor v. White*, 38.

5. *Deeds and Conveyances—Mortgagee—Fraud—Presumptions—Burden of Proof.*—In this case it is *Held*, that the holder of a note secured by mortgage on lands having procured, under certain conditions, a deed absolute to the lands from the mortgagor, it raises a presumption of fraud against him, to be considered by the jury with other facts and circumstances in evidence bearing upon the transaction, with the burden upon him to rebut it. *Pritchard v. Smith*, 79.

6. *Deeds and Conveyances—Mortgages—Fraud—Series of Transactions—Inadequate Price—Values—Evidence.*—When there is a series of transactions in acquiring mortgages and deeds to lands tending to show fraud in the procurement of the title to lands in dispute, it is competent to consider all of them in order to arrive at the intent of the party thus charged with the fraud, and to determine the true nature of the transaction; and the real value of the land, in connection with the price paid, is also competent. *Ibid.*

7. *Fraud—Deceit—Pleadings—Parties—Possession—Claim to Property.*—In an action to recover possession of a mule taken in exchange for a horse, and for damages for deceit and false warranty as to the horse, a demurrer of a co-defendant on the ground that his name appeared only in the title, without allegation as to him, should not be sustained when it is alleged in the complaint that the defendants were in joint possession of the mule, and appeared that both had replevied

FRAUDS—*Continued.*

the mule, and given the bond required by statute, it being evidence against the party demurring, not only as to his possession, but as to his claim to the property. *Fields v. Brown*, 295.

8. *Fraud — Deceit — Contract — Election — Affirmance—Damages—Procedure.*—One who has fraudulently been induced to enter into a contract may elect to repudiate the contract and render back what he may have received under it, and recover what he may have parted with, or its value; or he may affirm the contract, keeping whatever property or advantage he may have derived under it, and recover in an action of deceit the damages caused him by the fraud. *Ibid.*

9. *Same—Equity—Rescission.*—While, as a rule, a party to a contract induced by fraud may not elect to rescind it and recover damages for the fraud, the rule is based upon a perfect rescission of the contract, where the defrauded party has sustained no damages except those he may have actually paid thereunder; and it has no application where he may not thus be placed in *statu quo*, as where he has suffered damages which the rescission and the damages based thereon cannot repair. *Ibid.*

10. *Fraud—Deceit—Contract—Replevin—Consistent Causes of Action.*—An action for deceit in the making of false representations inducing plaintiff to exchange a mule with defendant for a horse is not necessarily inconsistent with a previous replevin to recover the mule. *Ibid.*

11. *Appeal and Error—Objections and Exceptions—Fraud—Motions—Independent Actions.*—In this case, it appearing that the parties have elected to place the matters involved upon their real merits, without regard to mere form, the Supreme Court has decided the case accordingly; and whether it should have been upon motion or an independent action, no exception or point having been made, *quære. Bank v. McEwen*, 414.

FRAUDS, STATUTE OF. See Statute of Frauds.

"FUTURES." See Contracts.

GOVERNORS. See Pardons.

GOVERNMENTAL FUNCTIONS. See Cities and Towns.

GRANTS. See State's Lands.

GUARDIAN AD LITEM.

1. *Infants—Parties—Appearance—Guardian Ad Litem—Process—Service—Interpretation of Statutes.*—When it appears from the record that certain infant parties to the suit were represented by a guardian *ad litem*, and that their interests had been fully protected, the judgment entered therein will not be set aside upon the ground that the infants had not been personally served with summons and no order had been made appointing a guardian *ad litem* when the rights of innocent parties have intervened, the omission to serve the infants with process being cured by Revisal, sec. 441. *Harris v. Bennett*, 339.

GUARDIAN AD LITEM—*Continued.*

2. *Infants — Guardian Ad Litem—Presumptions—Irregularities—Motion in Cause—Procedure.*—When it appears from the record that infant parties to a cause had been represented by a guardian *ad litem*, who was recognized as such by the court in proceedings to judgment therein, the authority of the guardian to represent the infants cannot be attacked in an independent action, but only by motion in the original cause, for irregularity. *Ibid.*

HARMLESS ERROR.

1. *Evidence—Cross-examination—Harmless Error.*—The erroneous admission of evidence on direct examination is held not to be prejudicial when it appears that on cross-examination the witness was asked substantially the same question and gave substantially the same answer. *Hamilton v. Lumber Co.*, 47.

2. *Witnesses—Evidence—Harmless Error—Appeal and Error.*—A statement of a witness, that in his opinion sparks from the burning stump would not have carried 44 yards to plaintiff's land where fire originated, will not in this case be held for reversible error: (1) Because the statement went beyond the import of the question asked, and there was no motion to strike it out. (2) Because the witness necessarily nullified the statement or rendered it harmless by immediately saying he had seen sparks from such stumps carry that far. *Caton v. Toler*, 104.

3. *Evidence Excluded—Previous Testimony—Substance—Harmless Error.*—The exclusion of testimony not held for error in this case, it appearing that the witness had already testified, in substance, to the same thing. *Aman v. Lumber Co.*, 369.

4. *Insurance — Contracts — Corroborative Evidence — Declarations—Justice's Court—Harmless Error.*—Where the declarations of an insurance agent are competent as corroborative of the testimony of the plaintiff as to fraud in the procurement of the policy of life insurance, and as to the intent of the agent in making them, it is admissible to show, in the same action on appeal to the Superior Court, that the agent had testified in the magistrate's court to certain facts; and if error was committed in admitting these declarations, it was cured by the agent's testimony to the same effect in the Superior Court. *Insurance Co. v. Knight*, 592.

HOMESTEAD.

1. *Homestead—Pleading—Burden of Proof.*—In an action for the possession of lands, involving title, the defendant must, by proper averment in his answer, assert his right to a homestead therein, should he desire to claim one, and prove that he is entitled to it. *Caudle v. Morris*, 168.

2. *Homestead—Executors and Administrators—Lands—Sale to Make Assets—Creditors—Evidence.*—In an action for the possession of lands, involving title, wherein the plaintiffs claimed as heirs at law of the deceased owner, a deed from a commissioner to sell the lands was introduced which referred to a proceeding to make real estate assets, to which the plaintiffs were not parties, and was spoken of in the

HOMESTEAD—*Continued.*

charge as a proceeding for partition of the lands. The administrator of the deceased was examined in the present action and failed to testify that the decedent's personal property was insufficient to pay his debts; in the record, after the case on appeal, it is stated that the proceedings allotting the lands to the widow of deceased were introduced, but they were not in the record, and it does not appear whether they were *ex parte* or instituted by creditors: *Held*, not to be a scintilla of evidence that the deceased owed any debts that his personal estate was not sufficient to pay. *Ibid.*

3. *Homesteads—Widows—Heirs at Law—Dower.*—A widow is not entitled to homestead in the lands of her deceased husband against the heirs at law, when there are no creditors, but only to dower. N. C. Constitution, Art. X, sec. 5. *Ibid.*

4. *Homestead—Determinable Interest—Deeds and Conveyances.*—A homestead interest in lands is a determinable exemption, and not an estate in land, which determines upon its being conveyed by the homesteader. *Ibid.*

5. *Debtor and Creditor—Judgments—Liens—Different County—Homesteads — Registration — Appraisers' Returns — Judgment Rolls.* — A creditor obtained judgment and had it sent to another county and laid off the debtor's homestead, and the appraisers' report was found in the latter county in the clerk's office, in a metallic filing case, labeled "Homesteads." Thereafter the homesteader conveyed a part of the homestead lands: *Held*, (1) his vendee acquired title subject to the lien of the judgment; (2) the judgment having originally been obtained in another county, the appraisers' returns could not have been found in the judgment rolls, and were properly filed in the county wherein the homestead was laid off; (3) the registration of the homestead is unnecessary unless the exemption is made on the debtor's petition. *Crouch v. Crouch*, 447.

6. *Homestead—Conveyance—Interpretation of Statutes—Limitation of Actions—Adverse Possession.*—The act of 1905, now Revisal, sec. 686, providing that a homestead exemption cease upon its being conveyed by the homesteader, by express terms is not retroactive, and the vendee cannot acquire title under color until seven years adverse possession since 1905. It is further *Held*, that the ten-years statute in this case had not run against the lien of the judgment. *Ibid.*

HUSBAND AND WIFE.

1. *Deeds and Conveyances—Husband and Wife—Entireties—Jus Accrescendi.*—Under a conveyance of land in fee to husband and wife, they take by entireties, with the right of survivorship, and during their lives the lands are not subject to the debts of either, except with the consent of both properly given. *Bank v. Ewen*, 414.

2. *Husband and Wife—Negligence—Loss of Wife's Services—Recovery by Wife—Judgments—Estoppel of Husband.*—When a husband has joined in an action with his wife to recover damages for a personal injury to them both, arising from the same negligent act, and his counsel withdraws all claim for damages for him, and the action is success-

HUSBAND AND WIFE—*Continued.*

fully prosecuted to recover damages for the wife's injuries inflicted on her, including damages arising for a loss or material impairment of her capacity for labor, particularly of a permanent nature, he, by thus prosecuting and acquiescing in the action of his wife, will be deemed to renounce in her favor his right to recover for the loss of her services, and the judgment will estop him from any further demand thereof. *Price v. Electric Co.*, 450.

ILLEGAL CONSIDERATION. See Contracts.

IMPROPER REMARKS. See Courts.

INDEPENDENT CONTRACTOR. See Statutes.

INFANTS. See Deeds and Conveyances; Guardian *Ad Litem;* Judgments.

INJUNCTION.

1. *Deeds and Conveyances—Easements in Gross—Injunction.*—One who is not the owner of lands appurtenant to which a right of way has been conveyed, and claims under a deed purporting to convey the right in gross, and intends presently to use and enjoy it, may be restrained from doing so. *Wood v. Woodley*, 17.

2. *Power of Courts.*—When an injunction is sought to the main relief of declaring the invalidity of taxes proposed to be levied by the county commissioners for a special school district, laid out in accordance with the provisions of chapter 135, sec. 1, Public Laws of 1911, amending Revisal, sec. 4115, upon the ground that the requisite number of freeholders of the district had not signed the petition, the courts may inquire into the legality of the proposed action of the board in levying the tax, in direct proceedings, and in proper instances afford the relief applied for, so that the *status quo* may be preserved until the rights of the parties are finally determined. *Ibid. Gill v. Commissioners*, 176.

3. *Injunction—Ministerial Duties—Statutory Observance.*—While the courts will not restrain a municipal official in the exercise of a discretionary power conferred on him by statute, they will restrain him when he assumes to act in a manner not contemplated by the statute. *Ibid.*

4. *County Commissioners—School Districts—Taxation—Injunction—Appeal and Error—Superior Court—Incorrect Ruling—Correct Result—Different Matters—Court's Investigation—Reversal—Procedure.*—In this cause for an injunction against the action of the board of county commissioners in creating a special school district and submitting to the vote of the people the question of a tax levy under the provisions of chapter 135, sec. 1, Public Laws of 1911, amending section 4115 of the Revisal, the Superior Court judge granted the restraining order to the hearing, erroneously ruling that women were "freeholders" within the meaning of the act. The question of whether the proposition submitted received a majority of the votes cast being also involved, the Supreme Court would affirm the granting of the order, though based on the wrong ruling, except that it appears from the

INJUNCTION—*Continued.*

examination of the allegations of the respective parties that there was no real or serious dispute as to the result of the figures and admissions that the proposition received the approval of a majority of the qualified voters; and therefore the judgment of the lower court continuing the injunction to the final hearing is reversed, without prejudice to the plaintiff to renew his motion therefor upon new or additional facts showing his right to it. *Ibid.*

5. *Appeal and Error—County Commissioners—School Districts—Taxation—Injunction—Interlocutory Order—Substantial Rights—Fragmentary Appeals.*—In this action an injunction was asked restraining the county commissioners from ordering a levy of taxes in a special school district laid off under the provisions of chapter 355, Public Laws of 1911, and chapter 525, Public Laws of 1909, amending sec. 4115 of the Revisal, which involved two propositions: (1) the invalidity of the petition conferring jurisdiction; (2) the question as to whether a sufficient number of the qualified voters had voted in favor of the question submitted to them. Upon the first proposition it is ascertained that no jurisdiction was conferred, and in the second, that a sufficient number of the qualified voters had voted favorably: *Held*, the order appealed from was interlocutory, affected a substantial right, and the appeal taken was not objectionable as fragmentary. Revisal, sec. 587. *Ibid.*

6. *Injunction—Nuisance—Sawmills—Evidence—Burden of Proof.*—The operation of a sawmill is not a nuisance *per se*, and the erection of one will not be enjoined unless it be proved by the complaining party that it will be, in fact, a nuisance under the particular circumstances of the case. *Berger v. Smith*, 205.

7. *Injunctions—Nuisance—Sawmills—Cities and Towns—Ordinances—Evidence—Bona Fides.*—In proceedings to enjoin the erection of a sawmill on lands adjoining those of plaintiff, whereon he resided, upon the alleged ground that its operation would affect the comfort of the plaintiff's family and the value of his property, it is competent to show that the plaintiff had operated a cotton gin nearer to his residence than the proposed mill would be, and that he had procured an ordinance prohibiting other sawmills from being built within the corporate limits of the town, wherein he operated one, upon the question as to whether the plaintiff was actually apprehensive of the injury, or whether the ordinance was passed in his interest and at his instance to destroy competition. *Ibid.*

IN PARI DELICTO. See Contracts.

INSOLVENCY. See Corporations.

INSTRUCTIONS.

1. *Deeds and Conveyances—Variation of Magnetic Needle—Instructions—Appeal and Error.*—In an action involving title to disputed lands, an exception that the charge of the court ignored or disregarded evidence tending to show that a proper allowance for the variation of the magnetic needle would have given the land a somewhat different

INSTRUCTIONS—*Continued.*

placing, cannot be sustained, it appearing that this theoretical variation was controlled to some extent by an old and marked line, without anything of record to show that the location would have been varied, and, further, that his Honor charged that the course should "be determined by the lines of the grant and the proper variation for the difference in time." *Nicholson v. Lumber Co.*, 33.

2. *Assumption of Risks—Instructions—Issues—Master and Servant—Duty of Master—Rule of the Prudent Man.*—A requested instruction upon the doctrine of assumption of risks is properly refused when no issue thereon has been submitted to the jury. The charge in this case is upheld, upon the duty of an employer to furnish a safe place to work and reasonably safe appliances, etc., and upon that of the employee to act under existing conditions within the rule of the reasonably prudent man. *Hamilton v. Lumber Co.*, 47.

3. *Railroads—Damages by Fire—Contributory Negligence—Anticipated Consequences—Instructions—Special Requests—Objections and Exceptions—Appeal and Error.*—While in this action to recover damages for the alleged negligent setting fire to and burning over the plaintiff's land, caused by a spark from defendant railroad company's passing locomotive, the court may correctly have instructed the jury to find whether, in the exercise of care, the defendant could reasonably have foreseen that the injury complained of would be the natural and probable consequence of its negligence, the fire having been communicated to plaintiff's land from burning over the intervening lands of others, objection should have been taken by requesting proper prayers embracing these matters and the refusal of his Honor to give them. *Hardy v. Lumber Co.*, 113.

4. *Instructions—Charge as a Whole—Appeal and Error.*—When a charge construed as a whole is correct, and it appears that the jury must have understood it, it will not be held for reversible error that disconnected parts are objectionable. *Aman v. Lumber Co.*, 369.

5. *Instructions—Alternate Theories—Appeal and Error—Special Requests for Instructions—Procedure.*—The failure of the trial judge to charge the jury upon alternate theory correctly stated and arising upon the evidence in the case does not necessarily render the charge incorrect, and no reversible error will be held on appeal for the mere failure of the judge to charge the alternate theory in the absence of a special instruction asked and refused. *Penn v. Insurance Co.*, 399.

6. *Instructions—Construed as a Whole—Appeal and Error.*—The charge of the trial judge to the jury should be construed as one connected whole, and not in detached portions, and it will not be held for error when, thus considered, the meaning of the charge clearly appears, and the jury could not have been misled. *Ibid.*

7. *Divorce—Adultery—Disposition and Opportunity—Instructions—Appeal and Error.*—In an action for divorce on the ground of adultery, under conflicting evidence it is error for the judge to charge the jury that if the adulterous disposition of the parties is shown, and it appears that there was an opportunity to commit the offense, these

INSTRUCTIONS—*Continued.*

facts are sufficient to establish the adultery; for such would be an invasion by the judge of the province of the jury, unless construing the charge as a whole it could readily be seen that the jury were not thereby misled. *Burroughs v. Burroughs*, 515.

8. *Street Cars—Electricity—Negligence—Proximate Cause—Instructions*—There being conflicting evidence in this case as to whether the plaintiff, while engaged in his duties as defendant's conductor on its electric street cars, in helping to replace a derailed car, received the injury complained of by the negligence of the motorman in turning on the electric current, seeing the danger to the plaintiff, or whether it was the plaintiff's negligence in permitting the trolley pole to remain on the wire while performing his work: *Held*, the question of proximate cause was one for the jury, and a prayer for special instruction which made the issue as to contributory negligence depend upon the jury's finding as to whether the plaintiff disobeyed instructions in leaving the trolley pole on the wire while using the switch rod, if the injury would not otherwise have occurred, is erroneous, as it leaves out of consideration that the plaintiff, under the circumstances, may have safely done his work had not the electricity been negligently turned on. *Dellinger v. Electric Railway*, 529.

9. *Attachment—Damages—Judgment—Probable Cause—Evidence—Instructions.*—When the debtor, in attachment proceedings, has successfully defended the suit to judgment, and brings his action to recover damages on the creditor's bond therein, the latter's requested prayer, in the present suit, that the plaintiff has failed to show probable cause, is properly denied. *Smith v. Bonding Co.*, 574.

INSURANCE.

1. *Insurance, Fire—Arbitration and Award—Policy Stipulations—Suit in Sixty Days—Denial of Liability—Effect.*—The stipulations in a fire insurance policy that "the loss shall not be payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of loss herein required have been received by this company, including an award by appraisers when appraisal has been required," do not apply to the right of the insured to bring his action within that time when, after the award has been made, the insurance company through its adjuster has denied the company's liability, erroneously claiming that the award was too indefinite to admit of the insurer's liability thereunder. *Millinery Co. v. Insurance Co.*, 130.

2. *Notes—Contracts—Interpretation—Agreement as to Collateral—Insurance, Life—Notes—Accounts—Application of Proceeds of Security.*—The proceeds of a policy of life insurance which had been hypothecated by the deceased at a bank, as collateral for a note for borrowed money, with the further agreement "that any excess of collateral upon this note shall be applicable to such other note or claim" held by the bank against the borrower, etc., is by the terms of the contract, expressed or implied, applicable to the payment of insurance premiums collected by a firm of which the deceased had been a member, as agents for the bank, and which had not been paid over to it; and to the payment of a note made to the cashier of a bank for its use

INSURANCE—*Continued.*

and benefit and being for money loaned by the bank to the deceased. *Bank v. Scott*, 123 N. C., 540, cited and applied. *Norfeet v. Insurance Co.*, 327.

3. *Insurance — Policy Contract — Interpretation—Accident—Independent Cause.*—A policy of accident insurance creating a liability on the part of the insurer for injuries sustained by the insured "directly and independently of all other causes, through external, accidental, and violent means," is lawful and enforcible by the insurer in accordance with its terms. *Penn v. Insurance Co.*, 399.

4. *Same—Instructions.*—In an action to recover under an accident insurance policy for the loss of eyesight whereunder the insurer was liable for injuries sustained by the insured "directly and independently of all other causes, through external, accidental, and violent means," there was evidence tending to show that the plaintiff's eyesight was lost by reason of an old cataract existing before the accident, as well as that the accident had caused the loss of vision. The court charged the jury that if they found by the greater weight of the evidence that the plaintiff's loss of his eyesight was caused directly and independently of all other causes, through external, accidental, and violent means, to answer for the plaintiff; but otherwise if the accident operated in connection with another cause: *Held*, the charge was correct and not objectionable on the ground that it would deny a recovery in a case where there was a former malady and an accident, and the latter directly produced the injury as the efficient cause thereof, though the malady itself would have resulted in the same injury, at a later time. *Ibid.*

5. *Insurance—Policy Contracts—Interpretation—Accidents—Independent Cause—Definitions—Liability.*—In construing a policy of accident insurance against injuries sustained by the insured "directly and independently of all other causes, through external, accidental, and violent means," it is *Held*, (1) When an accident causes a diseased condition which, together with the accident, resulted in the injury or death complained of, the accident alone is to be considered the cause of the injury or death; (2) when at the time of the accident the insured was suffering from some disease, but the disease had no causal connection with the injury or death resulting from the accident, the accident is to be considered as the sole cause; (3) When at the time of the accident, there is an existing disease which, coöperating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause, or as the cause independent of all other causes. *Ibid.*

6. *Insurance—Policy Contracts—Interpretation—Accidents—Independent Cause—Proximate Cause—Causal Connection.*—When the loss under a policy of accident insurance is made, by its terms, to depend upon injury or death "resulting from accident, independent of all other

INSURANCE—*Continued.*

causes," the rule of proximate and remote causes cannot be applied, the question being, upon an issue of fact presented, whether the disease with which the insured was suffering at the time of the accident had causal connection with the injury inflicted by the accident. *Ibid.*

7. *Insurance—Contracts—Fraud—Parol Evidence.*—Testimony of representations of an insurance agent falsely and fraudulently made, which would, if established, vitiate a policy of life insurance, is not governed by the rule of evidence that the written policy may not be varied by parol testimony. *Insurance Co. v. Knight*, 592.

8. *Insurance—Contracts—Principal and Agent—Fraud—Corroborative Evidence—Intent—Statements Made to Others.*—Where the validity of a life insurance policy is attacked for the false and fraudulent representations of the agent, as thus inducing the contract, it is competent to show, in corroboration of the plaintiff's evidence, that the agent sold only one kind of policy, and by others that he made the same representations to them as an inducement to insure; and also as evidence of the intent of the agent in making the representations to the plaintiff. *Ibid.*

9. *Insurance, Life—Premium Notes—Maturity—Possession of Insurer—Nonpayment—Evidence.*—In an action to recover upon a life insurance policy, the defendant produced, in its possession, and put in evidence a promissory note, past maturity, signed by the deceased insured, which expressed upon its face that if it was not paid at maturity the policy was void: *Held*, competent, as tending to corroborate the evidence of the defendant that the note had not left its possession, and tending to show that payment had not been made by the deceased, and that the defendant had not waived the payment. *Sexton v. Insurance Co.*, 596.

10. *Insurance, Life—Premium Notes—Renewals—Nonpayment—Evidence.*—A premium note given for the policy sued on in this case, in the possession of the defendant after maturity, and containing the provision that the policy would be void in the event the note was not paid, is *Held* to be a renewal of a note of like character, formerly given, and not a payment thereof, and, without more, no evidence that the premium had been paid so as to keep the policy in force. *Ibid.*

11. *Insurance, Life—Policy—Loan Value—Extended Insurance.*—Upon the maturity of a policy of insurance with provision as to a loan value and the extension of the insurance after several yearly premiums have been paid, the administrator of the deceased may not claim the extension, when the loan value, which carries the insurance, has been made available by the deceased by borrowing the full amount. *Ibid.*

INTERSTATE COMMERCE. See Statutes, Carriers of Goods.

ISSUES. See Equity.

1. *Issues—Answer Conclusive—Second Issue—Evidence—Harmless Error.*—When the jury by their answer to the first issue have determined the action, evidence on the second issue, erroneously excluded, is harmless error. *Allred v. Kirkman*, 392.

2. *Judgments Nunc Pro Tunc—Questions for Jury—Issues of Fact—Questions of Fact.*—In this case it is *Held*, that the judge of the Superior Court did not commit error in refusing to submit to the jury the evidence upon which he refused to correct a former order of the court. Upon the distinction between issues of fact and questions of fact, *Heilig v. Stokes*, 63 N. C., 612; *Keener v. Finger*, 70 N. C., 42, cited and approved. *Creed v. Marshall*, 394.

JOINT TORT FEASORS. See Tort.

JUDGMENTS. See Frauds; Process; Motions.

1. *Marriage and Divorce—Former Marriage—Voidable—Living Wife—Compulsion—Assent—Judgment.*—In proceedings for divorce it appeared that the plaintiff was compelled to marry the defendant against his will; that the marriage was void, and that he had never lived with her as her husband after the alleged marriage, and a decree was entered declaring the marriage null and void *ab initio: Held*, though the marriage was at first only voidable, he had not ratified it, and it was therefore void *ab initio* by the decree; or by the act of the party without the necessity for the decree of nullity, by his not giving his subsequent assent. *Taylor v. White*, 38.

2. *Contracts to Convey Lands—Judgments—Appeal and Error—Rents and Profit—Accounting—Interest.*—When a contract to convey lands requires of the grantee, as a part of the consideration, that he shall pay off an outstanding mortgage on the lands, amounting to $5,000, and $1,000 in cash to the mortgagor, and it has been so decreed by the Superior Court and affirmed by the Supreme Court, an order rendered at a subsequent term of the Superior Court that the $6,000 be paid into the office of the clerk of the Superior Court and thereupon grantor's deed to the land be delivered by the clerk to the grantee, is erroneous; and on the second appeal it is further *Held*, (1) that as the vendee had failed to comply with the terms of his contract, he was not entitled to an accounting by the vendor, in possession, of the rents and profits; (2) that under the judgment first rendered the vendee was obligated to discharge the mortgage indebtedness, including interest thereon, and therefore the vendor should not be held accountable for the interest thereon. *Bateman v. Hopkins*, 59.

3. *Appeal and Error—Judgments—Collateral Attack.*—When, in an action for the specific performance of a contract to convey lands, it has been decreed that the plaintiff comply with his part of the contract by relieving the defendant's land from the outstanding lien of a mortgage thereon, the plaintiff cannot for the first time on appeal show by affidavit that the mortgage secured several notes, payable by installments, the last of which had not matured, when no such matter was stated in the record; and the judgment may not be thus attacked collaterally. *Ibid.*

JUDGMENTS—*Continued.*

4. *Contracts to Convey Lands—Pleadings—Judgments—Merger.*—In an action to enforce specific performance of a contract to convey lands, it was alleged in the complaint, and denied in the answer, that the plaintiff was "at all times ready, willing, and able to perform the contract on his part"; and by the defendant, which was denied by plaintiff, that he had not executed the contract sued on. It was established by the verdict and judgment that the contract had been made, but that there were certain conditions in the contract forming a material part of the consideration, which the plaintiff had not performed: *Held*, the issue raised by the pleadings had merged in the judgment. *Ibid.*

5. *Arbitration and Award—Total Loss—Damaged Goods—Judgments—Harmless Error—Appeal and Error.*—It appearing that the loss covered by a fire insurance policy is total, damaged goods awarded to the plaintiff were of no value, and a deduction of $257 made by the court from the amount awarded to the plaintiff, found by the arbitrators to whom the matter was submitted, is in defendant's favor, of which it cannot complain as error. *Millinery Co. v. Insurance Co.*, 130.

6. *Actions — Several Causes — Judgments — Modification — Appeal and Error.*—When there are two causes of action alleged which are severable and distinct, and error has been committed by the trial court as to one, which necessitates a new trial, but no error has been committed as to the other, the judgment on appeal will be modified to the extent only of granting a new trial in the cause wherein the error was committed. *Newberry v. R. R.*, 156.

7. *Appeal and Error—Debtor and Creditor—Application of Payment—Judgment—Merits—Right of Appeal.*—It appearing in this case that the plaintiff owed the defendant two debts, one of them secured and one unsecured, and made a payment under such circumstances that the law would apply it to the unsecured claim, but which was erroneously applied by the judgment of the lower court to the secured claim, and judgment dismissing the action against defendant was entered, it is *Held*, that the defendant's appeal would lie upon the merits of the case so as to relieve the plaintiff from the effect of the judgment applying the payment upon his unsecured debt, and that as that part of the judgment below dismissing the action against the defendant was proper, the judgment is modified and the action is dismissed. *Stone v. Rich*, 161.

8. *Homestead—Widow—Deeds and Conveyances—Pleadings—Evidence—Judgments—Estoppel.*—A widow cannot maintain her claim for a homestead in the lands of her deceased husband against the heirs at law when it appears that she has conveyed it by deed to another, and in an action by the heirs at law to recover the lands in possession of the widow's grantee the latter cannot successfully claim the homestead by virtue of his deed, when he has made no such claim in his answer, and has put his whole title in issue, which was decided adversely to him. It was his duty to set up every claim he had to the land, and is precluded as to those he might have set up, but did not. *Caudle v. Morris*, 168.

JUDGMENTS—*Continued.*

9. *Executors and Administrators—Wills—Assets—Legacies—Procedure—Clerk—Judgments—Appeal and Error.*—A petition may be entered before the clerk of the Superior Court for the recovery of a legacy and prosecuted as in other cases of special proceeding (Revisal, sec. 144); but before a recovery may be had it is necessary that the executor should have assented to the legacy, or admitted assets in his hands, or it is proved that assets had come into his hands applicable to the claim, or that they should have been acquired by him and held in the proper performance of the duties incident to the position of executor; and upon failure of the devisee to thus establish assets in the hands of the executor, a judgment entered in his favor by the clerk is reversible error. *York v. McCall*, 276.

10. *Pleadings—Several Statements—Same Cause—Judgments—Demurrer.*—When the complaint in an action to recover rent alleges, in the three several ways, that a certain amount was due the plaintiff, denominating them as several causes of action, so that it clearly appears, beyond any doubt, that the amount specified in each so-called cause of action was for the same rent, and the plaintiff is entitled to recover on two of his "causes of action," or counts, defendant's demurrer to those causes alone is bad. *Womack v. Carter*, 286.

11. *Infants—Judgments—Irregularities—Innocent Third Person—Intervening Rights.*—The courts will not vacate an irregular judgment against an infant as of course, and it will not do so when it appears of record, or otherwise, that the infant has suffered no substantial wrong, and the rights of innocent third parties, who have purchased for value and without notice, have intervened and will be prejudiced. *Harris v. Bennett*, 339.

12. *Judicial Sales—Judgments—Irregularities—Third Person—Intervening Rights—Equity.*—The devisees of the remainder in lands sue to recover the lands devised to them. The testator died insolvent in 1865, and his executors brought proceedings in 1868 to sell the testator's lands to make assets to pay his debts, and the lands in controversy were bought by the one under whom defendant deraigns his title: *Held*, in this case, no meritorious defense to the proceedings in which the sale of the lands was decreed is set up, which were regular upon their face, but only a defect in the service of infant defendants therein; and that no equitable purpose would be subserved in setting aside the decree of sale. *Ibid.*

13. *Infants — Guardian Ad Litem—Presumptions—Irregularities—Motion in Cause—Procedure.*—When it appears from the record that infant parties to a cause had been represented by a guardian *ad litem*, who was recognized as such by the court in proceedings to judgment therein, the authority of the guardian to represent the infants cannot be attacked in an independent action, but only by motion in the original cause, for irregularity. *Ibid.*

14. *Pleadings—Judgment Non Obstante—Practice.*—In this case, there being no matter set up in avoidance of the cause of action alleged, a judgment *non obstante veredicto* could not have been granted. *Todd v. Mackie*, 352.

JUDGMENTS—*Continued.*

15. *Judgments Nunc Pro Tunc—Motions—Procedure.*—The Superior Court judge, at a subsequent term to an affirmance on appeal of a judgment theretofore rendered in the case, entered an order imposing conditions upon which the execution should not issue thereunder, therein providing that his order may be revoked at any time, after notice. At a subsequent term, after notice, he revoked the order, and on a second appeal it is *Held*, that the proceedings should be treated as a motion in the cause to amend the judgment first rendered and affirmed. *Creed v. Marshall*, 394.

16. *Judgments Nunc Pro Tunc — Corrections — Inadvertence — Clerical Errors.*—A judgment *nunc pro tunc* cannot be entered for the purpose of correcting errors or omissions of the court in a former judgment rendered in the cause, except where the former judgment fails, through inadvertence, or in consequence of clerical errors, to be what at the time it was intended to be. *Ibid.*

17. *Same—Evidence—Findings Conclusive—Appeal and Error.*—The judge of the Superior Court is the sole judge of the weight and credibility of the evidence, in rendering a judgment *nunc pro tunc* correcting, or refusing to correct, errors or omissions in a former judgment; and his findings thereon are conclusive, and not reviewable on appeal, when the record does not disclose that he failed to find any material fact or any fact which he ought to have found from the evidence adduced. *Ibid.*

18. *Consent Judgments—Agreement—Void in Toto—Equity.*—When it is made to appear that a judgment purporting to be a consent judgment had been entered in a cause, but was not, in fact, consented to by one of the parties, it is error for the court to set so much of it aside as is injurious to the one whose consent had not been obtained, and proceed to adjust the matter by decree which attempts to observe the equities between the parties. *Bank v. McEwen*, 414.

19. *Claim and Delivery—Judgment—Interest—Questions for Jury—Interpretation of Statutes—Practice.*—Under a contract reserving title in the seller, the plaintiff brought claim and delivery proceedings for a balance due on the purchase price and interest, and the defendant denied plaintiff's title, alleged a want of consideration, and claimed damages arising from a breach of warranty. The jury found that defendant owed the plaintiff $840 on his outstanding notes given for the purchase, and that he had been damaged by breach of plaintiff's warranty in a certain amount: *Held*, in proceedings of this character, interest is not allowed as a matter of law, and upon the jury's finding, the defendant was only chargeable with interest on the $840 from the date of the judgment. If the trial court had been in doubt as to verdict's bearing interest on the notes, he should have referred the matter back to the jury. Revisal, 552. *Fountain Co. v. Schell*, 529.

20. *Attachment — Damages — Judgment — Probable Cause—Evidence—Instructions.*—When the debtor, in attachment proceedings, has successfully defended the suit to judgment, and brings his action to recover damages on the creditor's bond therein, the latter's requested prayer, in the present suit, that the plaintiff has failed to show probable cause, is properly denied. *Smith v. Bonding Co.*, 574.

JUDICIAL SALES. See Estates.

JURISDICTION. See Courts; Process.

JUS ACCRESCENDI. See Estates.

LACHES. See Judgments; Estoppel; Appeal and Error.

LANDLORD AND TENANT.

Leases, Written — Contracts — Breach — Measure of Damages — Lessee's Services—Evidence.—The plaintiff leased the defendant certain farming lands for the purpose of cultivation by written agreement, and in the contract agreed to furnish a certain amount of guano, and failed or refused to furnish the guano, and entered upon the leased premises and rented it to another for the crop year covered by the defendant's lease: *Held*, (1) the defendant could recover upon the plaintiff's breach of contract; (2) it was competent for the defendant to introduce the written lease in evidence, and prove the value of his services rendered thereunder, as an element of damages. *Seawell v. Person*, 291.

LEASES. See Landlord and Tenant.

LEVY. See Process.

LEVY, WRONGFUL. See Attachment.

LEX LOCI. See Contracts.

LIMITATION OF ACTIONS.

1. *Judgments — Irregularities — Remaindermen — Parties—Limitation of Action—Laches.*—While the statute of limitations will not begin to run against an action by the remainderman to recover possession of lands until after the death of the life tenant, this principle does not apply to proceedings to avoid a judgment entered against his interest, to which he was either a party or apparently a party; for in such instances he may institute his action at any reasonable time within which laches may not be imputed to him. *Harris v. Bennett*, 339.

2. *Limitation of Actions—Judgments—Liens—Homesteader in Possession —Adverse Possession—Deeds and Conveyances—Color.*—In order to plead the statute of limitations against a judgment lien, the vendee of lands embraced in a homestead may show that the allotment was invalid; but, in this case, the vendee having bought subject to the judgment and been in possession for twenty years, any irregularity in the allotment could only be taken advantage of by the judgment creditor. *Crouch v. Crouch*, 447.

3. *Homestead—Conveyance—Interpretation of Statutes—Limitation of Actions—Adverse Possession.*—The act of 1905, now Revisal, sec. 686, providing that a homestead exemption cease upon its being conveyed by the homesteader, by express terms is not retroactive, and the vendee cannot acquire title under color until seven years adverse possession since 1905. It is further *Held*, that the ten-years statute in this case had not run against the lien of the judgment. *Ibid.*

LIVE STOCK. See Carriers of Goods.

LOGGING. See Railroads.

MAGNETIC NEEDLES. See Evidence.

MARRIED WOMEN. See Wills.

MARRIAGE AND DIVORCE.

1. *Marriage and Divorce—Prior Marriage—Living Wife.*—An action brought to annul a marriage on the ground that the defendant had a living wife at the time is not technically one for divorce, though in a general way it comes under that heading to the extent that alimony *pendente lite* may be allowed. *Taylor v. White*, 38.

2. *Same—Suits—Statutory Affidavits—Interpretation of Statutes.*—An action for an annulment of marriage upon the ground that the husband had a living wife at the time will not be dismissed for the failure of the plaintiff to make the affidavit prescribed by Revisal, sec. 1563, that the facts "must have existed to the plaintiff's knowledge at least six months prior to the filing of the complaint," or for "failure to file a petition for divorce within ninety days after the expiration of that time," the reasons for these provisions not applying to a void marriage. *Ibid.*

3. *Marriage and Divorce—Children, Legitimate—Interpretation of Statutes.*—The children of a marriage which subsequently has been decreed as annulled are made legitimate by our statute. Revisal, sec. 1569. *Ibid.*

4. *Divorce—Adultery—Circumstantial Evidence—Questions for Jury.*—In an action for divorce on the ground of adultery of the wife, the act of adultery is not required to be proved by direct or positive evidence, but it may be established by circumstantial evidence, which is sufficient to establish it if it produce conviction in the minds of the jury by a preponderance of the evidence. *Burroughs v. Burroughs*, 515.

MEASURE OF DAMAGES.

1. *Leases, Written—Contracts—Breach—Measure of Damages—Lessee's Services—Evidence.*—The plaintiff leased the defendant certain farming lands for the purpose of cultivation by written agreement, and in the contract agreed to furnish a certain amount of guano, and failed or refused to furnish the guano, and entered upon the leased premises and rented it to another for the crop year covered by the defendant's lease: *Held*, (1) the defendant could recover upon the plaintiff's breach of contract; (2) it was competent for the defendant to introduce the written lease in evidence, and prove the value of his services rendered thereunder, as an element of damages. *Seawell v. Person*, 291.

2. *Contracts — Interpretation — Monthly Estimates — Final Estimates—Measure of Damages—Evidence—Quantum Valebat.*—In an action to recover upon a written contract to construct and repair a public road, it thereunder appeared that payments to the plaintiff were to be made, from month to month, upon the certificate of the defendant's engineer as to the amount and value of the work performed by the

MEASURE OF DAMAGES—*Continued.*

plaintiff within the month, deducting 10 per cent until the final completion and acceptance of the entire work, when the percentage so retained and the balance due, as then estimated and certified by the engineer for the whole work, should be paid, expressly providing that in making the final estimate the engineer should not be bound by the preceding estimates and certificates which were to be given by him monthly, but that they were to be considered as "approximate to the final estimate." The defendant annulled the contract before completion, as it had a right to do according to its provisions, and in the plaintiff's action to recover for the balance due, it is *Held*, the measure of its damages was the reasonable value of the work done that had not been received in the monthly payments, the monthly estimates by the very terms of the contract not being conclusive, but only to be received as evidence of the value of all the work which the plaintiff had done. *Construction Co. v. Commissioners*, 303.

3. *Contracts—Vendor and Vendee—Fertilizer—Option of Cancellation—Measure of Damages.*—In an action to recover the balance of the purchase price of tobacco fertilizer sold under a contract making it optional with the plaintiff to cancel the order, it is held, on defendant's counter claim for damages for the failure of plaintiff to deliver the goods, that recovery could only be had for damages accrued up to the time of the plaintiff's notice that he would exercise his option—in this case, the cost of preparing the plant-bed and for the higher priced labor employed and held by the defendant in readiness, and the profits on fertilizer actually sold by him, as contemplated by the parties, caused by his inability to substitute others, owing to the late date of cancellation; and not for the loss of crop incident to the option exercised under the contract by the plaintiff. *Ober v. Katzenstein*, 439.

4. *Contracts—Bond for Performance—Collateral Matters—Liquidated Damages—Penalty—Measure of Damages.*—Where a stipulated sum is wholly collateral to the object of the contract sued on, and was evidently inserted merely as a security for its performance, it will not be allowed to control the amount of the recovery as liquidated damages or as a penalty beyond which a recovery can be had, when the action is brought upon the contract which the bond was given to sceure. *Rhyme v. Rhyme*, 559.

5. *Attachment—Damages—Wrongful Levy—Expenses—Measure of Damages.*—In an action to recover on an attachment bond for the wrongful levy therein, damages may be awarded for the reasonable expense the plaintiff has incurred in procuring the undertaking he had given to obtain the release of the property attached. *Smith v. Bonding Co.*, 574.

6. *Same—Traveling Expenses—Time.*—Damages may not be recovered in an action for a wrongful levy in attachment for railroad and traveling expenses, and the value of the plaintiff's time in procuring the release of his property. *Ibid.*

MENTAL INCAPACITY. See Wills.

MERGER. See Judgments.

MISJOINDER. See Parties.

MORTGAGES. See Frauds.

1. *Deeds and Conveyances—Mortgages—Fraud—Usury—Issues—Equity—Cancellation—Decrees.*—The vendee of lands, an ignorant man, applied to plaintiff for the loan of $1,900 to complete his purchase, and, with evidence to the contrary, there was evidence tending to show that plaintiff took a mortgage on the land to secure the loan, with an excess of $1,100, making the amount of the mortgage debt $3,000; that thereafter it was agreed that defendant's vendor should convey the lands to the plaintiff, who was to receive back the mortgage for the $3,000, and defendants went into the possession of the lands; that thereafter plaintiffs declined to make the arrangements unless the mortgage was executed for $3,800, which was given, and when the note it secured fell due the plaintiff began proceedings to foreclose, and a temporary injunction was issued. As to whether the second transaction was a resale of the land for $3,800, secured by a mortgage: *Held*, (1) Issues were properly submitted: Was the real transaction a purchase of the lands by defendant from the original vendor with a loan of money from the plaintiff for their payment, and as to the amount and interest of the loan? (2) A decree was proper, upon affirmative findings to the issues, that the payment of the sum found to be due would be a full satisfaction of the mortgage debt and declaring the cancellation of the excess. (3) Evidence was competent to show the circumstances under which plaintiff acquired his deed, and the understanding of the parties at the time. *Elks v. Hemby*, 20.

2. *Deeds and Conveyances—Mortgages—Fraud—Burden of Proof—Opening and Conclusion—Practice.*—The burden is upon the defendant, who has admitted giving a note and mortgage, to show that it was excessive and procured by plaintiffs' fraud, when he relies upon this defense, with evidence tending to support it; and he has the opening and concluding arguments to the jury. *Ibid.*

3. *Deeds and Conveyances — Mortgagee—Fraud—Presumptions—Burden of Proof.*—In this case it is *Held*, that the holder of a note secured by mortgage on lands having procured, under certain conditions, a deed absolute to the lands from the mortgagor, it raises a presumption of fraud against him, to be considered by the jury with other facts and circumstances in evidence bearing upon the transaction, with the burden upon him to rebut it. *Pritchard v. Smith*, 79.

4. *Deeds and Conveyances—Mortgagee—Purchaser—Equity—Reimbursement—Charge on Lands.*—Having taken a mortgage on certain lands, the mortgagee became aware of an outstanding prior mortgage on them, and bought the lands from the purchaser at the sale under the first mortgage: *Held*, the purchaser under the second mortgage did not acquire an absolute title to the lands, but only an equity to be reimbursed for his expenditures, charging the lands for its payment in preference to the trusts expressed in the mortgage. *Ibid.*

5. *Same—Innocent Purchaser.*—A mortgage taking subject to and with knowledge of a prior mortgage on lands received from the morgagor a fee-simple deed upon the consideration expressed in the mortgage,

MORTGAGES—*Continued.*

and thereafter took another deed from the purchaser at a sale under the first mortgage, the total sum expended being much less than the real value of the land. The *locus in quo* having come into the hands of an innocent purchaser for value: *Held*, equity and law being administered and enforced in the same tribunal under our statute, the heirs at law of the mortgagor may recover a money judgment for the loss caused by the mortgagee's fraud, ascertained upon the equitable principles of deducting all proper items expended by the mortgagee in acquiring his liens on the lands. *Ibid.*

6. *Mortgages—Maturity—Seizure by Mortgagee — Expenses—Damages.*— One who has sold a mule and secured the purchase price by a chattel mortgage thereon is not entitled to recover his expenses in keeping the mule which he has seized before the maturity of the mortgage. *Seawell v. Person*, 291.

7. *Mortgages — Cropper — Lands Designated—Insufficiency.*—In order to constitute a valid mortgage on a crop, the land upon which the crop is to be cultivated must be designated, and when the mortgage describes certain lands and provides that the mortgage also covers the crop on "any other lands the mortgagor may cultivate," it is effective as to the lands described and void as to the other crops in the absence of other and more definite description. *Hurley v. Ray*, 376.

8. *Mortgages—Cropper—The Crop Applicable.*—Only the crops to be cultivated next after the execution of a mortgage may be included in the mortgage of crop to be raised on the lands designated. *Ibid.*

9. *Mortgages—Cropper—Land Designated—Any Other Crop Cultivated—Words and Phrases.*—In a mortgage on crops on lands, the expression, "any other crops he (the lessor) may tend," is held to be substantially the same as if expressed, "any other crops he may cultivate." *Ibid.*

10. *Mortgages—Cropper—Lands Designated—Other Lands—Description.*— In a mortgage on crops to be grown on lands, the lands were designated as those whereon the mortgagor resided, and on any other lands he may tend, and on 25 acres joining certain other and designated owners. There was evidence tending to show that the mortgagor cultivated crops on the lands whereon he resided, and in an action by the mortagee for the crops, it is *Held*, that it was competent for the plaintiff to show that the crops were cultivated by the defendant on the home place and on the 25-acre tract; and it was for the jury to determine as to the intention of the parties to include them in the mortgage. *Ibid.*

11. *Mortgages—Cropper—Lands Designated— Ownership — False Description.*—The mere fact that a mortgagor of crops to be cultivated on certain designated lands described himself as the owner thereof, when he was not in fact the owner, will not of itself defeat the right of the mortgagee to recover the crops grown on the lands. *Ibid.*

12. *Corporations — Insolvent— Directors— Debtor and Creditor— General Assets—Mortgage—Equity—Cancellation.*—The directors of an insolvent corporation having issued bonds secured by a mortgage on

MORTGAGES—*Continued.*

its assets to take up the corporate note on which they were indorsers, and having bought the bonds and given their personal note with the bonds as collateral, and taken up the old note, for the payment of which the creditor was pressing: *Held*, (1) that the moneys received from the sale of the bonds to the directors were never general assets of the corporation, and, in the absence of bad faith, could not be recovered by the corporation; (2) that the only relief the corporation is entitled to is the cancellation of the mortgage; (3) the directors are general creditors of the corporation according to the amount of their respective claims. *Whitlock v. Alexander*, 479.

13. *Building and Loan Companies—Shareholders—Borrower—Mortgages—Cancellation—Assessments—Usury.*—A shareholder in a building and loan association, who has borrowed money from it and secured its payment by a mortgage on real property with his shares of stock as collateral, with provision both in his certificates and the mortgage for the payment of assessments, may not compel the cancellation of the mortgage upon the repayment of the principal sum and interest, unless he has also paid his assessment to meet a loss of the corporation; and the usury laws have no application. *Building and Loan Assn. v. Blalock*, 490.

MOTIONS.

1. *Appeal and Error—Erroneous Judgments—Motion to Dismiss.*—The plaintiff, in an action to enforce specific performance of a contract to convey lands, paid the money into court upon a decree entered in the Superior Court under a misconception of an adjudication by the Supreme Court on a former appeal, affirming the judgment rendered in the lower court: *Held*, a motion by defendant to dismiss the cause on the ground that the plaintiff had not complied with the former judgment of the Superior Court will be denied. *Bateman v. Hopkins*, 59.

2. *Justice's Courts—Nonresidents—Service by Publication—Judgments—Motions—New Trial—Interpretation of Statutes.*—The provisions of Revisal, sec. 449, which permits a nonresident defendant, upon whom personal service has not been made, to defend an action after judgment has been rendered therein, under certain prescribed conditions, are construed with reference to other sections of the Code of Civil Procedure, and thus considered with sections 448 and 430, it appears that they are made to apply to actions in the Superior Court. *Thompson v. Notion Co.*, 519.

3. *Process, Abuse—Attachment—Regular Proceedings—Ulterior Purpose—Motions—Laches—Estoppel—Burden of Proof.*—In an action for the wrongful abuse of process in suing out a warrant of attachment on the property of the debtor, it was made to appear that the proceedings in attachment were usual and regular, following the statutory methods prescribed, and there was no evidence tending to show that the creditor had any ulterior or wrongful purpose or intent in instituting the proceedings: *Held*, the remedy of the debtor was by motion to vacate the attachment under our statute, and recover damages from the creditor and the surety on his bond; and for him

MOTIONS—*Continued.*

to recover in an independent action for malicious prosecution, it is necessary for him to show the successful termination of the proceedings in attachment. The difference between maliciously suing out an attachment and the wrongful abuse of process, thereafter, pointed out and discussed by WALKER, J. *Wright v. Harris*, 545.

4. *Actions—Parties—Misjoinder of Parties—Motions—Practice—Principal and Surety.*—An action will not be dismissed for a misjoinder of parties where the plaintiff is suing, in the same action, the principal and surety on an attachment bond. The remedy is by motion to have the causes divided, especially in this case, where a nonsuit has been taken as to the principal, and the further prosecution of the action is against the surety on his bond. *Patterson v. Power Co.*, 574.

NEGLIGENCE. See Verdict; Master and Servant.

1. *Railroads—Freight Trains—Passengers—Rule of Employer—Rule of Company—Conduct—Waiver.*—When there is evidence tending to show that the plaintiff's intestate, an employee, was negligently killed while riding on defendant railroad company's freight train, a rule of the company prohibiting passengers from riding on a train of that kind will not bar a recovery when it is shown that the rule had been violated so frequently and so openly, and for such a length of time, that the employers could, with exercise of ordinary care, have known that it was not observed. *Whitehurst v. R. R.*, 1.

2. *Railroads—Negligent Killing—Circumstantial Evidence—Presumptions—Nonsuit.*—Upon the trial of defendant railroad company for the negligent killing of plaintiff's intestate by a passing train, the plaintiff relied on circumstantial evidence tending to show that deceased, staggering and acting like a drunken man, about dark, was seen alive for the last time, going to defendant's track, where several trains passed during the night, and about 7 o'clock the following morning was found dead, in a sitting position on the end of a crosstie, without sign that the body had been dragged or mangled, and without wounds, excepting two in the back of his head; that he could have been seen in time to have stopped the train. There was no evidence of failure to sound the whistle or ring the bell: *Held*, no presumption of the defendant's negligence arose from the killing of the deceased, if it was caused by defendant's train, but if in sitting position, that the engineer had a right to presume that he would get off the sill up to the last minute, and avoid the danger; and the burden of proof being on the plaintiff to show that the position of his intestate was such as to lead a man of ordinary prudence, in charge of the train, to believe he was unconscious and helpless, in the absence of evidence, a nonsuit was properly entered; and, *Held further*, the fact that the intestate was found with his head resting on his arm between the cross-ties, lower than his body, was insufficient, as such posture would likely result if he had been hit by a passing train. *Holder v. R. R.*, 3.

3. *Same—Damages by Fire—Evidence—Negligence—Rule of Prudent Man—Questions for Jury.*—In an action to recover damages from the defendant, engaged in keeping a stable for keeping and feeding

NEGLIGENCE—*Continued.*

horses of others for pay, there was evidence tending to show that the defendant built a large fire on his premises, around a pot for heating water for killing hogs, within 30 feet from the stable wherein he kept the horses of plaintiff and others, wherein was stored a large quantity of hay and other combustible matter, when a strong wind was blowing from the fire in the direction of the stables, so that sparks could easily have been thus carried there; that there was no other fire around or near the stables; that the defendant immediately left the fire at the pot burning and unprotected, and a short while thereafter the stables caught and were destroyed, including the plaintiff's horse: *Held*, (1) though the evidence was circumstantial, it was sufficient to be submitted to the jury upon the question of the defendant's actionable negligence; (2) should the jury find that the fire at the pot was the cause of plaintiff's loss, it would be for them to determine whether, under the facts and circumstances of the case, a man of ordinary prudence would have built such a fire at the place, and left it there unprotected. *Ashford v. Pittman*, 45.

4. *Master and Servant—Dangerous Work—Sufficient Help—Contributory Negligence—Assumption of Risks.*—A servant is not barred of his recovery against the master, in his action to recover damages for an injury negligently inflicted, because he continues to do the dangerous work which occasioned the injury, unless the danger of his doing so is so obvious and imminent that he therein fails to exercise that degree of care for his own safety that he should have done under the rule of the prudent man. *Pigford v. R. R.*, 93.

5. *Master and Servant—Dangerous Work—Master's Negligence—Assumption of Risks—Proximate Cause.*—When a servant is injured within the scope of his dangerous employment by a negligent act of the master in not furnishing him sufficient and competent assistance, and the master's negligence is the proximate cause of the injury inflicted, the servant is not held to have assumed the risk of the master's negligent act; and his action is not barred unless his own negligence contributed to the injury as the proximate cause. Revisal, sec. 2646. *Ibid.*

6. *Negligence—Fire Damage—Rule of Prudent Man—Interpretation of Statutes.*—In this action for damages for the alleged negligent burning of plaintiff's land by the defendant, Revisal, sec. 3346, in reference to setting fire to woodland, does not apply (*Averitt v. Murrell*, 49 N. C., 322), and the rule of care required of the defendant to prevent the escape of the fire from his own land to that of plaintiff is the ordinary care that a reasonable and prudent person would have exercised under the existing or similar circumstances. *Caton v. Toler*, 104.

7. *Railroads—Damages by Fire—Unusual Results—Negligence—Presumptions—Peculiar Knowledge—Burden of Proof.*—In an action for damages against a railroad company for the burning over of the plaintiff's lands, caused by a spark from a passing locomotive, negligence is deducible from evidence tending to show that the fire would not have occurred if the locomotive had been properly equipped and run over a right of way in a proper condition; and the burden is upon

NEGLIGENCE—*Continued.*

the defendant to show the exercise of reasonable care in the operation of the locomotive, as it was under the defendant's control, and its condition was a matter peculiarly within its knowledge. *Hardy v. Lumber Co.*, 113.

8. *Railroads—Damages by Fire—Spark Arrester—Foul Right of Way—Negligence—Two Causes—Evidence—Questions for Jury.*—When in an action for damages against a railroad company for the burning over of the plaintiff's land caused by a spark from a passing locomotive, there is evidence that the fire originated from a live spark that fell from the locomotive, that the track and right of way were foul with dry stubble, it is sufficient for the jury to find, upon the issue of negligence, that the fire occurred either on a foul right of way, or that it was caused by a defective locomotive, for it does not require two acts of negligence to make a wrong. *Ibid.*

9. *Negligence—Damages—Proximate Cause—Independent Cause—Continuity—Result—Questions for Jury.*—The proximate cause of damages negligently inflicted is that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which it would not have occurred, and it is a question for the jury when the evidence is conflicting. *Ibid.*

10. *Carriers of Goods—Contract—Negligence—Exemption.*—A common carrier may not, by contract, absolve itself from the consequences of its own negligence in the transportation of the subject-matter of its bill of lading, or exempt itself from liability, partial or total, thereby caused. *Mule Co. v. R. R.*, 215.

11. *Same—Live-stock Bill of Lading.*—A common carrier cannot, by fixing the valuation of a shipment of mules at not exceeding $100 for each animal, in its live-stock bill of lading, limit recovery to that amount, as such would be an attempt to contract against its own negligence to that extent, and a provision to that effect in the bill of lading is void. *Jones v. R. R.*, 148 N. C., 449; *Winslow v. R. R.*, 151 N. C., 250, cited and overruled. *Ibid.*

12. *Same—Federal Questions—Common-law Liability—Statutes.*—An action brought in the State court, involving the construction of a live-stock bill of lading issued by a common carrier for the transportation of live stock from another State to a point in North Carolina, where the recovery is limited to $100 on each animal shipped, and wherein the recovery exceeds the amount stipulated for in the bill of lading, does not raise a Federal question, and will be governed by the decisions of our own courts as to the common-law doctrines applicable, or by any laws the Legislature may make relating thereto. *Ibid.*

13. *Same—Discrimination—Common Law.*—A recovery for injury to live stock caused by the negligence of the carrier in transporting a carload shipment from another State to a North Carolina point, under a live-stock bill of lading, exceeding the amount fixed therein as the value of each animal, is not a discrimination in favor of the plaintiff or an interference with the Interstate Commerce Act, there being no express provision of the act in regulation of such matters, and nothing in abrogation of the common-law doctrine. *Ibid.*

NEGLIGENCE—*Continued.*

14. *Same—United States Supreme Court—State's Decisions—Practice—Jurisdiction.*—The Supreme Court of the United States recognizes and follows the decisions of the State courts on questions involving the right of a common carrier to relieve itself, by contract, of the effects of its negligent acts in transporting stock, under its live-stock bill of lading, from a point beyond the State, when the action is brought to recover damages therefor in the State court, though otherwise in cases originating in the Federal jurisdiction. *Ibid.*

15. *Carriers of Goods—Interstate Commerce Acts—Live-stock Bill of Lading—Limited Liability—Negligence—Interpretation of Statutes.*—There being no express language in the act of Congress known as the Interstate Commerce Act abrogating the common-law right of a plaintiff to recover of the carrier the full amount of damages he may have sustained by reason of the defendant's negligence in a shipment of stock, under the carrier's live-stock bill of lading fixing the valuation of each animal, if there is any abrogation of the right, it must be by implication, and then only when it would render the act of Congress nugatory, which does not apply in cases of this character. *Ibid.*

16. *Carriers of Goods—Negligence—Expert Evidence—Questions of Fact—Assignment of Claim.*—In an action against a common carrier for damages for the negligent injury to two mules in a car-load shipment, resulting in their death, testimony of an expert veterinarian who had made a *post-mortem* examination and found them bruised and in a bad condition internally; that, from the examination, in his "opinion the mules had been jammed up in the car," is incompetent as an expression of an opinion as to a fact of which he had no personal knowledge and which was involved directly in the issue. *Summerlin v. R. R.*, 133 N. C., 551, cited and approved. As to whether the plaintiff can recover for one of the mules sold to another and replaced by him, without evidence that the cause of action had been assigned, *quœre. Mule Co. v. R. R.*, 252.

17. *Railroads—Negligence—Fires—Wrongful Death—Contributory Negligence—Apprehension of Loss—Evidence—Questions for Jury.*—In an action against a railroad company for damages for the negligent killing of plaintiff's intestate, the court may not hold as a matter of law that the plaintiff's action is barred by the contributory negligence of the intestate, when the evidence tends to show that the intestate was burned to death while endeavoring to extinguish an extensive fire caused by negligence in the operation of the defendant's locomotive, on lands adjoining her own, and it appears that she had reasonable apprehension that it would spread to her own lands and destroy her dwelling thereon situated; and in this case it is held that evidence is sufficient to be submitted to the jury on the issue as to contributory negligence. *McKay v. R. R.*, 260.

18. *Master and Servant—Negligence—Safe Place to Work—Night Work—Lights—Blasting—Evidence—Questions for Jury.—Nonsuit.*—In an action for damages for personal injuries negligently inflicted, there was evidence tending to show that the plaintiff was required to work,

NEGLIGENCE.—*Continued.*

on a dark, cloudy night, in digging holes, for the defendant power company for the erection of electric towers, about 6 or 7 feet deep, where blasting was being done; and while the plaintiff was digging in one of these holes he was told by defendant's foreman to "come out of the hole," as blasting was then to be done in two others; that the plaintiff at once came out of the hole he was digging, but the foreman, with the other men, had run away with the only lantern there, leaving him in darkness, so that in running from the place of danger he fell across a sill which had been left over the opening of a hole, to his injury: *Held*, it being the duty of the defendant to have provided the plaintiff with a safe place to get away from the hole, its failure to supply a light, under the circumstances, was actionable negligence; and under the conflicting evidence in this case, it presented a question for the determination of the jury; and a judgment of nonsuit was erroneous. *Kelly v. Power Co.*, 283.

19. *Railroads—Crossings—Signals—Negligence — Look and Listen — Contributory Negligence—Evidence—Nonsuit—Questions for Jury.*—In an action for damages against a railroad company for the negligent killing of plaintiff's intestate by the defendant's train while crossing its track on a public road in a buggy with another, there was evidence tending to show that, before attempting to cross the track, the intestate stopped, looked, and listened, and did not see or hear the approaching train until the horses were on it; and that there was an obstruction to the view which rendered it impossible to sooner see the train; that the intestate could have been seen by the engineer on the train a distance of 300 or 400 feet, and conflicting evidence as to whether the usual signals for the crossing had been given by those in charge of the locomotive: *Held*, a charge by the court, under this evidence, that the plaintiff's cause of action was barred by the contributory negligence of the intestate, would be an expression of opinion by the court upon the question as to whether the intestate had exercised the care required of him under the circumstances, which is prohibited by the statute. Revisal, sec. 535. *Cooper v. R. R.*, 140 N. C., 209. *Mays v. R. R.*, 119 N. C., 758, cited and approved. *Osborne v. R. R.*, 309.

20. *Telegraphs—Negligence—Delay in Delivery—Evidence.*—In an action for damages for the negligent delay in the delivery of a telegram by a telegraph company, a delay in the delivery of four hours from one point in the State to another, about one hundred miles apart, is some evidence of negligence. *Poe v. Telegraph Co.*, 315.

21. *Carriers of Passengers—Negligence—Dominant Cause—Joint Tort Feasors—Indemnity—Contribution.*—When the negligence of a railroad company causes the passenger getting aboard of its passenger train to be thrown against a truck of an express company left by the latter company near the train, and thence beneath the moving train, to his death, and the railroad company is sued for damages for the wrongful death thus inflicted, assuming that the truck was negligently left in a position to contribute to the injury, the negligence of the railroad company would be the dominant cause thereof; but if other-

NEGLIGENCE—*Continued.*

wise, the two companies would be joint tort feasors, and, in this case, there would be no right of indemnity or contribution existing in favor of the railroad company against the express company, its co-delinquent. *Gregg v. Wilmington*, 155 N. C., 18, cited and distinguished. *Doles v. R. R.*, 318.

22. *Railroads—Excursion Trains—Protection for Passengers—Negligence—Questions for Jury—Contributory Negligence.*—In an action for damages against a railroad company sustained by the plaintiff from being shot by another passenger on an excursion train of twelve or fourteen coaches containing both white and colored people, there was evidence tending to show that the railroad company had only the conductor and the trainmaster to preserve order; that several colored passengers had been drinking and had an acquaintance of the plaintiff down on the platform of a coach where the coaches for white and colored people came together, beating him, and in endeavoring to save his acquaintance, the plaintiff was pulling him from the place of assault into the coach for white people, when he, in turn, was assaulted, and one of the negroes shot him through the body. The conductor had replied that he had no authority to arrest people, when requested to repress the shooting and rowdyism which had been going on in the "colored" coaches, but neither he nor the trainmaster was near when the plaintiff was shot: *Held*, sufficient to go to the jury upon the issue of defendant's negligence, and that the plaintiff was not barred of his recovery upon the issue of contributory negligence. *Stanley v. R. R.*, 323.

23. *Evidence—Negligent Burning—Sparks from Engine—Dry Brush—Nonsuit.*—In an action for damages by fire alleged negligently to have been started by the defendant lumber company on its own premises and communicated to plaintiff's land, there was evidence tending to show that the defendant was operating a steam logging skidder, adjoining which it had cleared a space, known as a log-deck, by removing the trees and some of the undergrowth, piling them at a distance of 30 to 40 feet, that had become very dry and combustible at the time of the fire, which started in the dry tops of the trees removed in clearing the log-deck; that sparks had been seen the day before, coming from the skidder engine, and that a tram engine, operated by defendant, had been stopped in its operation at the dinner hour, its fire banked so that it could not emit sparks, from twenty, to forty minutes before the fire was first seen; that there were no fires in the vicinity except those of the skidder and tram engines, and there were coals on the ground near the skidder engine: *Held*, under the principle that upon a motion to nonsuit the evidence is to be construed more favorable for the plaintiff, the evidence was sufficient to be submitted to the jury under the issue of defendant's actionable negligence. *Aman v. Lumber Co.*, 369.

24. *Evidence—Negligent Burning—Defective Engine—Sparks.*—In an action to recover damages for the alleged negligent burning by defendant of the trees on plaintiff's land caused by sparks from an engine operating a skidder on the defendant's premises, and thence communicated to the plaintiff's land, evidence which tends to show that

NEGLIGENCE—*Continued.*

the engine had emitted sparks and that coals had come from the engine and were lying upon a log-deck adjacent to it, is competent as bearing upon the defective condition of the engine. *Ibid.*

25. *Negligence—Wrongful Death—Common Law—Interpretation of Statutes.*—The right of recovery for the wrongful death of another did not exist at common law, and rests entirely on statute. *Broadnax v. Broadnax*, 432.

26. *Negligence—Wrongful Death—Widow's Year's Support—Interpretation of Statutes.*—Under our statute (Revisal, sec. 3095) the widow's year's support is assignable from the personal effects of her deceased husband "in possession at the time of his death" in a certain prescribed manner, and the right of recovery for his wrongful death, being conferred by statute after his death, the damages have never belonged to the deceased, and the widow is not entitled to have her year's support assigned to her therefrom. *Ibid.*

27. *Same.*—The amount of damages recovered for a wrongful death, by express provision of our statute, not being "liable to be applied as assets, in the payment of debts and legacies," but to "be disposed of as provided in this act for the distribution of personal property in case of intestacy," Laws of 1868-9, ch. 113, which was brought forward in The Code of 1883 and Revisal, secs. 59 and 60, with the change that the recovery in such instances "shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy": *Held*, that there being no provision in that chapter for the widow's year's support, she is not entitled to have it set apart from a recovery of this character. *Ibid.*

28. *Telegraphs—Mental Anguish—Interstate Messages—Lex Loci Contractus—Place of Negligence—Recovery.*—When a telegraph company receives for transmission a telegram in a State where a recovery for damages for mental anguish alone is not permitted, to be delivered in North Carolina, where such recovery is permitted, and there is negligence in the delivery here, the decisions of this State control. *Semble*, if the negligence occurred elsewhere, a recovery could also be had here in such case. *Raiford v. Telegraph Co.*, 489.

29. *Express Companies—Carriers of Freight—Limitation as to Recovery—Interstate Commerce—Negligence.*—The stipulation in an express receipt providing that no recovery exceeding $50 for loss or damage to a shipment could be had, is invalid, and a recovery of a larger sum is not an interference with the act to regulate interstate commerce upon the authority of *Mule Co. v. R. R.*, *ante*, 215. *Stehli v. Express Co.*, 493.

30. *Street Cars—Electricity—Negligence—Proximate Cause—Instructions.*—There being conflicting evidence in this case as to whether the plaintiff, while engaged in his duties as defendant's conductor on its electric street cars, in helping to replace a derailed car, received the injury complained of by the negligence of the motorman in turning on the electric current, seeing the danger to the plaintiff, or whether it was the plaintiff's negligence in permitting the trolley pole to remain on the wire while performing his work: *Held*, the question

NEGLIGENCE—*Continued.*

of proximate cause was one for the jury, and a prayer for special instruction which made the issue as to contributory negligence depend upon the jury's finding as to whether the plaintiff disobeyed instructions in leaving the trolley pole on the wire while using the switch rod, if the injury would not otherwise have occurred, is erroneous, as it leaves out of consideration that the plaintiff, under the circumstances, may have safely done his work had not the electricity been negligently turned on. *Dellinger v. Electric Co.*, 529.

31. *Street Railways—Pedestrians—Crossing Track—Negligence—Evidence—Presumptions—Nonsuit.*—One who attempts to cross the track of an electric railway, from a place of safety, in front of a car rapidly approaching at night, with signal lights and giving the customary warnings of its approach, and does so in spite of the warnings of a companion, causing a collision and its consequent injury to him, under circumstances which rendered all reasonable efforts of the motorman unavailing to stop the car from the time the danger was apparent to that of the impact, sustains the damages through his own recklessness, which the motorman could not reasonably have anticipated, and not by reason of the defendant's negligence; and a judgment of nonsuit upon the evidence should be entered. *Patterson v. Power Co.*, 577.

NEGOTIABLE INSTRUMENTS. See Bills and Notes.

NONRESIDENT. See Statutes.

NONSUIT. See Questions for Jury.

1. *Evidence—Nonsuit—Negligence—Employer and Employee.*—The rules of a railroad company prohibiting passengers from riding on freight trains should be put in evidence to bar a recovery for the wrongful death of one so riding. There being evidence in this case that the rule had been waived by custom, a judgment of nonsuit entered by reason of the rule is not sustained. *Whitehurst v. R. R.*, 1.

2. *Evidence—Nonsuit—Courts.*—The rule requiring the evidence to be considered in the light most favorable to the plaintiff, on a motion to nonsuit, does not permit of a construction that would in effect supply evidence in support of his contention. *Mayo v. Dawson*, 76.

3. *Railroads—Principal and Agent—Scope of Authority—Ratification—Evidence—Nonsuit.*—When there is conflicting evidence as to whether a local agent of a railroad company had authority to make the contract sued on, or whether the company had ratified the contract, and when a separate cause of action is alleged, with evidence to support it, of further damages caused by the defendant's negligence not depending on the express contract theretofore set out, a judgment of nonsuit should not be entered. *Newberry v. R. R.*, 156.

4. *Appeal and Error—Nonsuit—Scope of Inquiry.*—Upon a nonsuit taken, in this case, in deference to the decision of the trial judge that sufficient evidence of the loss of the original deed in the plaintiff's chain of title to the lands in controversy had not been introduced to let in parol evidence of its execution and contents, and it appearing that the ex-

NONSUIT—*Continued.*

clusion of the deed was the real question involved, it is *Held*, that the reason for the nonsuit should extend to the entire adverse ruling. *Weston v. Lumber Co.*, 263.

5. *Nonsuit—Appeal and Error—Plaintiff's Evidence—Contradictory.*—The court on an appeal from a judgment of nonsuit, in viewing the evidence in the light most favorable to the plaintiff, cannot act upon a portion of the testimony of plaintiff's witness which sustains the contention of the defendant, though such testimony impairs the force of the other statements made by him. *Poe v. Telegraph Co.*, 315.

6. *Insurance, Life—Nonpayment—Waiver—Nonsuit.*—In an action to recover upon a policy of life insurance, the plaintiff put the policy and proof of death in evidence with a letter from the defendant that it had received the remittance in settlement of the policy, and stating, "Your official receipt has been attached to your note." The defendant put in evidence a letter it obtained from the plaintiff, upon due notice to produce, to the effect that the note had been returned unpaid from the bank, marked "No attention," and to keep the policy in force the plaintiff must send remittance by return mail with inclosed formal health certificate, etc: *Held*, the evidence showed that the premium note had not been paid, and whatever may have been the effect, as a waiver, of presenting the note for payment, the failure of the plaintiff to pay negatived it after that date, and, viewing the evidence in the light most favorable to the plaintiff, a judgment of nonsuit was proper. *Sexton v. Insurance Co.*, 596.

NOTES. See Bills and Notes.

NUISANCE.

1. *Conjecture—Averment.*—When the erection of a sawmill is sought to be enjoined, the proof that it will be a nuisance if operated must be shown by evidence which amounts to more than a conjecture; and unless the facts are made to appear from which the courts may see that its operation, under the circumstances shown, will amount to a public or private nuisance, the injunction will be denied, and the mere averment of the plaintiff to sustain his contention is insufficient, the question being one of law upon the facs ascertained. *Berger v. Smith*, 205.

2. *Cities and Towns—Public Nuisance—Sawmills—Courts—Void Ordinances—Injunctions—Remedy at Law.*—An ordinance declaring the operation of a sawmill within its limits to be a nuisance, which in fact is not one, does not deprive the court of its authority to pass upon the question; and it appearing in this case that the mill in question, the erection of which is sought to be enjoined, would not be a nuisance *per se*, and it not appearing that it would be one in fact, but that the ordinance was passed at the instance of the complaining party to prevent competition, it is held that the injunction should not issue, and that the party be left to his action for damages at law, should it hereafter appear that he has sustained any. *Ibid.*

PARDONS.

1. *Executive Pardon—Imprisonment—Restoration of Citizenship—Interpretation of Statutes.*—One who has been convicted of murder in the second degree and has been pardoned by the Governor, and released from imprisonment, may not have his citizenship restored under the provisions of Revisal, sec. 2680, by petition to the judge presiding at any term of the Superior Court held for the county in which the conviction was had, when filed after the expiration of one year after such conviction, for in such instances Revisal, secs. 2675 and 2676 apply, requiring that the petition be filed after the expiration of four years, etc. *In re Jones*, 15.

2. *Same—Practice.*—The question as to whether a pardon from the Governor has the effect of releasing a prisoner, convicted and imprisoned for an infamous crime, from the consequences of his offense to the same extent as if the offense had never been committed, and for that reason he was entitled to be restored to his citizenship, can only be presented when his right of suffrage and registration, or other right of citizenship, which he exercised before the commission of the offense, has been denied. *Ibid.*

PARTIES. See Judgments; Partition; Statutes.

1. *Executors and Administrators—Demonstrative Legacies—Ultimate Devisees—Parties.*—When there is a devise that the rents and profits of the "home place" of the testator be paid upon a specific devise, providing for its payment out of certain other property in the event of its failure or insufficiency to do so, and where there are ultimate devisees whose interests will be affected, such devisees who are to ultimately take under the will are necessary parties to the proceedings to recover the specific legacy, and in their absence an order of the clerk affecting them is error; and in its discretion the court may remand the cause to the clerk for further proceedings. Revisal, sec. 614. *York v. McCall*, 276.

2. *Suits—Notes—Beneficial Owner—Parties.*—An action may now be sustained by the beneficial owner of a note made to another for his use and benefit. *Norfleet v. Insurance Co.*, 327.

3. *Partition—Parties—Estoppel—State's Lands—Grants—Vacant and Unappropriated—Titles.*—J. and his wife were parties to proceedings to partition certain lands, and it appeared by the petition that A. died in 1847, seized and possessed of the lands, and that the wife of J., and others, were his children and heirs at law, and as such were tenants in common thereof. Partition was made and finally adjudicated in 1849: *Held*, that J. and those claiming under him were estopped to deny that A. was the owner of the lands in 1847, and that as the lands were not vacant or unappropriated in 1850, any grant that J. may have obtained at that time from the State to the lands were invalid to pass title to anyone claiming thereunder. *Ibid.*

4. *Actions—Parties—Misjoinder of Parties—Motions—Practice—Principal and Surety.*—An action will not be dismissed for a misjoinder of parties where the plaintiff is suing, in the same action, the principal and surety on an attachment bond. The remedy is by motion to

PARTIES—*Continued.*

have the causes divided, especially in this case, where a nonsuit has been taken as to the principal, and the further prosecution of the action is against the surety on his bond. *Smith v. Bonding Co.*, 574.

PARTITION.

1. *Partition—Dower—Procedure—Interpretation of Statutes.*—Partition of lands and the allotment of dower therein may be had in the same proceedings. Revisal, sec. 2517. *Baggett v. Jackson*, 26.

2. *Partition—Petition—Necessary Parties—Deemed Immaterial—Procedure—Costs.*—The presence of an unnecessary party, in proceedings for partition of lands, will be regarded as immaterial, except as affecting costs. *Ibid.*

3. *Partition—Clerk—Superior Court—Transfer in Term—Jurisdiction.*—The Superior Court acquires jurisdiction over proceedings to partition lands upon their being transferred by the clerk thereto, in term, and may proceed therewith and fully determine all matters in controversy. *Ibid.*

4. *Partition—Parties—Title.*—A party to proceedings to partition lands cannot claim title to the land allowed to another party under a grant from the State taken out after the proceedings, and the principles announced in *Carter v. White*, 134 N. C., 466, have no application to this case. *Owen v. Needham*, 381.

PARTNERSHIPS.

1. *Partnership Obligations—Joint and Several.*—An obligation of a partnership to its creditors is joint and several, and is the undertaking or promise of each of its members. *Norfleet v. R. R.*, 327.

2. *Same—Notes—Contracts—Interpretation—Agreement as to Collateral—Insurance, Life—Notes—Accounts—Application of Proceeds of Security.*—The proceeds of a policy of life insurance which had been hypothecated by the deceased at a bank, as collateral for a note for borrowed money, with the further agreement "that any excess of collateral upon this note shall be applicable to such other note or claim" held by the bank against the borrower, etc., is by the terms of the contract, expressed or implied, applicable to the payment of insurance premiums collected by a firm of which the deceased had been a member, as agents for the bank, and which had not been paid over to it; and to the payment of a note made to the cashier of a bank for its use and benefit and being for money loaned by the bank to the deceased. *Bank v. Scott*, 123 N. C., 540, cited and applied. *Ibid.*

PAYMENT. See Executors and Administrators.

PAYMENT, APPLICATION OF. See Debt, Action of.

PENALTY STATUTES. See Statutes.

1. *Carriers of Goods—Penalty Statutes—Shipment Refused—Entire Loss—Damages Established.*—A consignee may recover the penalty provided by Revisal, sec. 2634, for the failure of the carrier to pay a claim for damages to a shipment of goods, within the specified time,

PENALTY STATUTES—*Continued.*

notwithstanding he may have refused to accept the shipment, when it appears that the loss was entire and he has established his damages as being the value of the goods shipped, according to his demand. *Wilkins v. R. R.*, 54.

2. *Cities and Towns—Penalties—Injunction.*—In this case the testator appointed executors of his will who were also therein named as trustees for certain beneficiaries, who in May of a certain year moved to another town, after the matters of executorship had been closed, leaving those of the trusteeship contiuing: *Held*, (1) the personal property should have been listed at the place of residence of the beneficiaries in June of that year; and the taxes not having been listed at all, it was proper for the commissioners of the town of residence of the beneficiaries to cause the personalty to be listed there and impose the penalty prescribed by Revisal, sec. 5232 (section 72 of the Machinery Act of 1909); a restraining order in this case was improvidently granted. *Smith v. Dunn*, 174

3. *Foreign Corporations—Domesticating Act—Failure to File Charter—Action by Attorney-General—Forfeiture of Penalty.*—An action for the forfeiture provided in section 1194, Revisal, for the failure of a foreign corporation, doing business here, to file its charter with the Secretary of State, must be brought by the Attorney-General for the forfeiture. *Ober v. Katzenstein*, 439.

PLEADINGS. See Marriage and Divorce; Nuisance; Process.

1. *Pleadings—Proceedings to Obtain Information—Materiality—Practice—Appeal and Error.*—In proceedings to elicit information preparatory to filing a complaint in an action by plaintiff alleging that the defendants had conspired to injure the plaintiff's character by preferring false charges against him, and securing his expulsion from the church, it appeared that the information sought was the production of certain letters alleged to have been written by one of the defendants to a certain woman which tended to prove an immoral relationship existing between them, without averment by the plaintiff that he did not know the charges made against him, and without his making the materiality of these letters to his cause appear. The judgment of the clerk, approved by the judge of the lower court, denying the plaintiff the right of examination sought, is upheld on appeal, applying *Bailey v. Matthews*, 156 N. C., 81. *Fields v. Coleman*, 11.

2. *Contracts to Convey Lands—Pleadings—Judgments—Merger.*—In an action to enforce specific performance of a contract to convey lands, it was alleged in the complaint, and denied in the answer, that the plaintiff was "at all times ready, willing, and able to perform the contract on his part"; and by the defendant, which was denied by plaintiff, that he had not executed the contract sued on. It was established by the verdict and judgment that the contract had been made, but that there were certain conditions in the contract forming a material part of the consideration, which the plaintiff had not performed: *Held*, the issue raised by the pleadings had merged in the judgment. *Bateman v. Hopkins*, 59.

PLEADINGS—*Continued.*

3. *Railroads—Damages by Fire—Contributory Negligence—Pleadings.*—In an action for damages to plaintiff's lands from a fire alleged to have negligently been caused by a spark from a passing locomotive of defendant, it is necessary for the defendant to allege, if the defense is available, that the injury thereto was proximately caused by the intervening and independent negligence of the plaintiff in having failed to put it out. *Hardy v. Lumber Co.*, 113.

4. *Homestead—Widow—Deeds and Conveyances—Pleadings—Evidence—Judgments—Estoppel.*—A widow cannot maintain her claim for a homestead in the lands of her deceased husband against the heirs at law when it appears that she has conveyed it by deed to another, and in an action by the heirs at law to recover the lands in possession of the widow's grantee the latter cannot successfully claim the homestead by virtue of his deed, when he has made no such claim in his answer, and has put his whole title in issue, which was decided adversely to him. It was his duty to set up every claim he had to the land, and is precluded as to those he might have set up, but did not. *Caudle v. Morris*, 168.

5. *Pleadings—Material Allegations—Answer—Absence of Denial—Interpretation of Statutes—Interstate Commerce—Evidence.*—Material allegations of the complaint are taken as true when not denied by the answer (Revisal, sec. 503); and when the complaint in an action against a railroad company for damages arising from a personal injury negligently inflicted on an employee alleges that the injury occurred on a train over the defendant's road running wholly within the State, so that it appears that the train was an intrastate train, it is incompetent for the defendant to introduce evidence tending to show that the train was an interstate one, in the absence of a denial of the allegation in its answer. *Fleming v. R. R.*, 196.

6. *Contributory Negligence—Partial Defenses—Diminution of Damages—Pleadings.*—While matters in diminution of damages are not required to be specially pleaded under our statutes, except in cases of libel and slander (Revisal, sec. 502), but may be made available under the general issue, in view of the requirement of the Federal Employer's Liability Act, that the fact of contributory negligence should in some way be established, and that procedure for that purpose has been defined and approved under numerous decisions of our Court construing the State statutes controlling the question, the fact of contributory negligence, as referred to in the Federal statute, should be considered and treated as a partial defense, coming within the terms of the local law, and to make same available it must be set up in the answer and proved as the State statute requires. Revisal, sec. 483. *Ibid.*

7. *Executors and Administrators — Wills— Demonstrative Legacies — Pleadings— Issues— Accounting— Designated Funds— Payment.*— In defense of a proceeding against an executor to recover a legacy which by the express terms of the will was to be paid out of the rents and profits of certain lands which had been leased to the executor, and upon failure thereof, out of certain other lands in which the testator had an interest, but which had subsequently been acquired by

PLEADINGS—*Continued.*

the executor, the plea was interposed by the executor that there were no available assets, and none could have been acquired by him, and, further, that the general personal property of the executor had been consumed by the testator's family and used in their support, prior to his qualifying: *Held*, (1) the answer did not raise an issue in bar to an accounting, and only pleas of that character will prevent such course; (2) it was the duty of the executor to pay the plaintiff's legacy from the funds designated and in hand, or which should have been by proper administration of the assets, including the rents from the specified lands to the extent they were due and payable under the lease. *York v. McCall*, 276.

8. *Pleadings—Several Statements—Same Course—Contracts—Money Had and Received—Contracts—Torts—Waiver.*—The complaint in an action to recover a certain sum of money alleged (*a*) it was due by reason of defendant's taking possession of his lands, leasing and collecting the rents to plaintiff's use in the stated sum, which had not been paid, but held by defendant for his use; (*b*) that the said lands were leased by the defendant, the rents collected by him in the said amount, which were payable to plaintiff, but which were paid to defendant and collected by him and wrongfully converted by him to his own use; (*c*) that defendant wrongfully took possession of the land by his tenants and withheld the same, a reasonable rental being in the said sum: *Held*, the complaint stated a cause of action in three several ways the rents sought to be recovered arising from the same transaction, there being no difference whether the rents were received under a contract of lease between plaintiff and defendant or under defendant's wrongful entry and his receiving its rental value; and under the last allegation the plaintiff could waive the tort and recover in contract for money had and received to his use. *Womack v. Carter*, 286.

9. *Pleadings—Action for Rents—Lands—Description—Definiteness—Motions—Demurrer.*—In an action to recover rents for plaintiff's lands alleged to have been wrongfully in defendant's possession and collected by the defendant from his lessees, it is not necessary that the lands be described with the particularity required when title is in dispute, or as in an action of trespass, and if the defendant had been uncertain of the nature of the charge against him, he should have moved the court, in its discretion, for a more definite and certain statement of the cause of action (Revisal, sec. 496), which would probably be granted, if made in good faith. The description of the lands as belonging to plaintiff, in a certain county, which defendant took into his possession at a specified time, *Held*, sufficient. *Ibid.*

10. *Pleadings—Cause of Action—Interpretation—Sufficient as a Whole—Demurrer.*—When a cause of action is stated in three several ways, which taken together are sufficient, a demurrer against one of these statements is bad, though taken alone it is insufficient; for a complaint cannot be thus overthrown unless it is wholly insufficient, or fatally defective as a whole. *Ibid.*

11. *Contracts—Pleadings—Compounding a Felony—Demurrer.*—The plaintiff alleges that the defendant had been the prosecuting witness

PLEADINGS—*Continued.*

in a criminal action against his sons, charged with obtaining from the defendant a certain sum of money under false pretenses; that the sons were then absent from home, and the plaintiff, to stop the prosecution, paid the money to the defendant, under his false and fraudulent representations that the charges in the indictment were true; that the plaintiff was totally unaware of the matters stated in the indictment, and afterwards found them to be false. *Quære*, as to whether the complaint, in this case, sets forth, as a basis of plaintiff's cause of action, an illegal agreement to suppress a criminal prosecution with sufficient definiteness; but if it does, it is *Held*, that the plaintiff and defendant were not *in pari delicto*, and a demurrer was bad. *Sykes v. Thompson*, 348.

12. *Pleadings—Judgment Non Obstante—Practice.*—In this case, there being no matter set up in avoidance of the cause of action alleged, a judgment *non obstante veredicto* could not have been granted. *Todd v. Mackie*, 352.

13. *Contracts—Indemnity — Sureties — Pleadings — Demurrer.*—An action brought for materials furnished in the erection of a building, which were to be paid for by the contractor and which were bought by him therefor and therein used, which sets out a contract and bond signed with a surety, which clearly contemplates that the contractor shall pay the material men and laborers and constitute them the beneficiaries under the contract and bond, states a good cause of action against the surety and a demurrer thereto is bad. *Supply Co. v. Lumber Co.*, 428.

14. *Same—Loss or Damage.*—When a contract and bond of indemnity given by a contractor to the owner of a building to be erected, which was signed by the surety, provides, in addition to saving the owner harmless, for some definite thing, which has not been complied with, as in this instance, to pay for the material used in the building, it is not necessary to allege, in order to maintain an action against the surety, that the owner has suffered pecuniary loss by reason of the contractor's default therein. *Ibid.*

15. *Pleadings — Variance — Merits—Appeal and Error—Interpretation of Statutes.*—The variance between the allegation and proof which will entitle the opposing party to a new trial on appeal must be such as to have misled him to his prejudice in maintaining his action upon the merits. Revisal, secs. 515, 516. *Dellinger v. Railway*, 532.

16. *Same—Party Not Misled.*—In an action to recover damages of a street car company, it was alleged as the ground of recovery, that the plaintiff was a conductor on defendant's street car, and was injured while assisting in getting the derailed car back upon the track, by the negligence of the motorman in turning on the current when he should have observed the danger to plaintiff in doing so. In a separate paragraph it was alleged that the shock, causing the injury complained of, was received while using a switch rod, furnished for the purpose in a certain position with reference to the car and the rail and the proof was that the position of the rod was the reverse from that alleged: *Held*, the defendant was not prejudiced by the variation in the allegation and proof; (*a*) the

PLEADINGS—*Continued.*

ground of the action being the negligent turning on the electricity by the motorman; (*b*) it appearing that the defendant was ready with his evidence in rebuttal to the evidence admitted over its objection; (*c*) the trial judge substantially found as a fact that the defendant had not been misled. *Ibid.*

POOLING STOCKS. See Banks.

PRACTICE. See Burden of Proof; Partition; Motions; Pleadings; Courts.

1. *Executive Pardon—Restoration of Citizenship—Practice.*—The question as to whether a pardon from the Governor has the effect of releasing a prisoner convicted and imprisoned for an infamous crime from the consequences of his offense to the same extent as if the offense had never been committed and for that reason he was entitled to be restored to his citizenship can only be presented when his right of suffrage and registration, or other right of citizenship, which he exercised before the commission of the offense, has been denied. *In re Petition of Jones*, 15.

2. *Appeal and Error—Lower Court—Opening and Concluding Speeches.*—The determination of the lower court as to which party litigant should open and conclude the argument to the jury is not appealable. *Elks v. Hemby*, 20.

3. *Marriage and Divorce—Former Marriage—Living Wife—Judgment—Fraud and Collusion—Procedure.*—A decree in the Superior Court, declaring the defendant's marriage with a former wife void *ab initio*, duly entered subsequently to the ceremony with the plaintiff, who is suing for divorce on the ground that the defendant had a living wife at that time, establishes the fact that the defendant was single at the time of the second marriage sought to be annulled, and cannot be attacked unless impeached by direct proceedings for fraud and collusion. *Taylor v. White*, 38.

4. *Reference—Findings—Appeal and Error—Wills—Advancements—Intent—Practice.*—The findings of fact by a referee, upon the consideration of the evidence and approval of the trial judge, when there is some evidence to support them, will not be reviewed on appeal; and on the appeal taken, in this case, upon the question as to whether a gift by the testator was an advancement, being one of fact as to the intention of the testator, the judgment below is affirmed. *Thompson v. Smith*, 256.

5. *Pleadings—Judgment Non Obstante—Practice.*—In this case, there being no matter set up in avoidance of the cause of action alleged, a judgment *non obstante veredicto* could not have been granted. *Todd v. Mackie*, 352.

6. *Appeal and Error—Basis of Assignments of Error—Procedure.*—Assignments of error must be based upon exceptions duly taken, and the exceptions must have as their basis some ruling of the court appearing affirmatively in the record, and not depending for their existence upon statements made in the exceptions or assignments. *Ibid.*

PRACTICE—*Continued.*

7. *Appeal and Error—Certiorari—Laches—Procedure.*—The plaintiff's motion for a *certiorari* having been disallowed at a former term of the Supreme Court without prejudice, for the purpose of allowing him to renew his motion after he had applied to the trial judge to correct the case in the particular set out in his petition, *Held*, the plaintiff should have again moved the court for the writ before the call of the district to which the case belonged, and it comes too late after argument and after the case has been submitted to the court for decision, which other business of the counsel, and their inadvertence to the time of calling the district, will not excuse. Supreme Court Rule 41. *Ibid.*

8. *Nonresidents—Appeal—Superior Courts—Trial de Novo—Practice.*—The sections of Revisal regulating procedure before justices of the peace, being particularly sections 1473, 1474, 1475, which make the general provisions of the chapter applicable, do not confer on a nonresident defendant the right to a rehearing, or, which is the same thing, a new trial, in the justice's court after judgment, upon failure of personal service and a good defense shown; and the remedy is that given by Revisal, sec. 1491, providing for an appeal, so that the action may be heard *de novo* in the Superior Court; where he will be permitted to interpose his defense. *Thompson v. Notion Co.*, 519.

PREMIUM NOTES. See Insurance.

PRINCIPAL AND AGENT. See Master and Servant; Corporations.

PRINCIPAL AND SURETY. See Practice.

PROCEDURE. See Practice; Injunctions; Motions.

1. *Judgments—Liens—Homestead—Procedure—Trusts and Trustees—Execution.*—In this action, the homestead conveyed being subject to a lien of a judgment creditor, it is *Held*, that in accordance with the relief demanded, the vendee be declared a trustee to convey to the purchaser at the execution sale under the judgment, and that the administrator of the deceased homesteader be authorized to sell the lands and apply the proceeds to the satisfaction of the judgment, though a simpler remedy for the judgment creditor would be to sell under his execution. *Crouch v. Crouch*, 447.

PROCESS. See Statutes; Attachment.

1. *Process—Service—Pleadings—Appearance—Judgments.*—It is not necessary to the validity of a judgment duly entered in the cause that the summons should have been served on defendants therein, when it appears of record that they filed their answer, which is equivalent to a general appearance. *Harris v. Bennett*, 339.

2. *Process—Irregularity—Appearance.*—A voluntary general appearance by the defendants to an action cures all defects and irregularities in the process. *Ibid.*

3. *Process—Pleadings—Not Signed—Irregularities—Jurisdiction—Judgments.*—Parties defendant are held bound by a judgment in the cause, notwithstanding personal service of the summons was not

PROCESS—*Continued.*

made on them, when it appears by the record that the complaint was filed in due and proper form; a paper, in form and substance purporting to be the answer, though not signed, is found in the judgment roll, having been so filed for many years, and the judgment of the court itself recites that the case was heard upon complaint and answer, and the fact that the answer was not signed is a mere irregularity which does not affect the validity of the proceedings. *Ibid.*

4. *Justices' Court—Nonresidents—Service by Publication—Judgments—Motions—New Trial—Interpretation of Statutes.*—The provisions of Revisal, sec. 449, which permits a nonresident defendant, upon whom personal service has not been made, to defend an action after judgment has been rendered therein, under certain prescribed conditions, are construed with reference to other sections of the Code of Civil Procedure, and thus considered with sections 448 and 430, it appears that they are made to apply to actions in the Superior Court. *Thompson v. Notion Co.*, 519.

5. *Process, Abuse of—Attachment—Failure of Proof.*—It does not necessarily follow that a plaintiff has abused the process of the court in suing out attachment proceedings against his debtor which he has not sustained. *Wright v. Harris*, 542.

PROXIMATE CAUSE. See Negligence; Contributory Negligence; Insurance.

PUNITIVE DAMAGES. See Damages.

QUANTUM VALEBAT. See Contracts.

QUESTIONS FOR JURY. See Evidence; Nonsuit.

QUESTIONS OF LAW. See Courts.

RAILROADS. See Street Railroads.

1. *Railroads—Freight Trains—Passengers—Rule of Employer—Rule of Company—Conduct—Waiver.*—When there is evidence tending to show that the plaintiff's intestate, an employee, was negligently killed while riding on defendant railroad company's freight train, a rule of the company prohibiting passengers from riding on a train of that kind will not bar a recovery when it is shown that the rule had been violated so frequently and so openly, and for such a length of time, that the employers could, with exercise of ordinary care, have known that it was not observed. *Whitehurst v. R. R.*, 1.

2. *Railroads—Logging Roads—Liens—Independent Contractor—Interpretation of Statutes.*—A logging road operated by the use of steam is a railroad within the meaning of section 2018, and by following the requirements of that section a lien may be obtained for work done in its construction, though under an independent contractor. *Carter v. Lumber Co.*, 8.

3. *Same—Intent—Prospective Effect.*—Legislative enactments, in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general

RAILROADS—*Continued.*

scope coming into existence subsequent to their passage. Hence, Revisal, sec. 2018, first enacted in 1872, applies to logging roads operated by steam, though they may not have been in existence at the time it was first passed, in 1773. *Ibid.*

4. *Railroads — Logging Roads— Negligence—Contributory Negligence— Presumptions—Consistent Verdict—Determinative Findings.*—In an action for damages for the wrongful killing of plaintiff's intestate, the verdict of the jury upon the issues of negligence and contributory negligence being "no" to the former and "yes" to the latter, is not inconsistent, for though the answer of "yes" to the second issue presupposes negligence on the part of the defendant, it does not include proximate cause, which is necssary to be found; and the answer upon the second issue being conclusive, it becomes unnecessary on appeal to consider the plaintiff's exceptions arising upon the first one. *Hamilton v. Lumber Co.*, 47.

5. *Railroads—Negligence—Master and Servant—Safe Place to Work— Safe Appliances—Negligence.*—In an action by an employee to recover damages of his employer for the failure of the latter to furnish him a reasonably safe place to work, and with safe, proper, and necessary tools, such as are adopted and in general use for doing the work, and for his failure to use reasonable care and precaution for the safety of the employee engaged therein, it appearing from the entire evidence that the defendant railroad company's passenger train, for some unexplained reason, careened slightly over the track, crossing a trestle, while slowly running within the limits of a town, twisting the rails on one side so that it became necessary to free the angle bars, used for uniting the rails at their ends, in the work of clearing the track for an expected train to pass. Owing to the position of the twisted rails, it became necessary to knock off the heads of the bolts, fastening the angle bars to the rail ends, with a hammer, and then knock the rails to free the angle bars, which had been bolted in their hollows. This was being done by the plaintiff and two other employees under the direction of the section master, and while knocking a rail to free an angle bar, the bar flew off, for some unexplained reason, and struck the plaintiff on the head: *Held*, (1) there was no evidence of negligence of the defendant in failing to provide the plaintiff with a safe place to work, under the surrounding conditions; (2) the plaintiff's injury was the result of an accident which ordinary foresight and judgment could not guard against, and a motion to nonsuit was properly allowed. *Briley v. R. R.*, 88.

6. *Railroads—Damage by Fire—Spark Arrester—Foul Right of Way— Negligence—Continuity of Acts—Evidence.*—In an action to recover damages against a railroad company for negligently burning over the lands of the plaintiff, evidence is sufficient to be submitted to the jury which tends to show that the defendant's passing locomotive had a defective spark arrester, that its right of way was, at that place, in a foul and inflammable condition, and that a live spark from the locomotive was the cause of the fire, which was communicated continuously to the plaintiff's land over the lands of others. *Hardy v. Lumber Co.*, 113.

RAILROADS—*Continued.*

7. *Railroads—Damage by Fire—Right of Way—Evidence—Questions for Jury.*—Testimony of a witness that the fire alleged to have caused the damages to plaintiff's lands through the defendant's negligence in the operation of its train over a foul or inflammable right of way, was seen on defendant's right of way and track, is evidence sufficient upon the question as to whether the defendant owned the right of way where the fire occurred. *Ibid.*

8. *Railroads—Principal and Agent—Local Agent—Scope of Authority—Secret Limitations.*—Local station agents of a railroad company are presumed to have the usual and necessary authority to carry on the business intrusted to them, and to make contracts binding upon the railroad company within the scope of their authority, which may not be diminished by restrictions or special instructions therein from the company which are uncommunicated to the shipper. *Newberry v. R. R.*, 160.

9. *Same—Contracts—Special Cars.*—A local freight agent of a railroad company may make reasonable contracts for the shipment of goods, on a specified day, in cars of a certain kind, etc., and such contracts, being within the usual scope of the powers conferred on agencies of this character, will bind the company, though the terms of the particular agreement are in excess of the powers actually conferred. *Ibid.*

10. *Railroads — Principal and Agent — Local Agent — Contracts — Special Cars—Special Authority—Evidence.*—In an action brought by a traveling troupe to recover from a railroad company damages alleged to have been caused by a breach of contract, made with the defendant's local agent, to furnish a baggage car indeterminately beyond his station, it is competent for the defendant to show the want of authority of the agent to make a contract of that character. *Ibid.*

11. *Railroads—Principal and Agent—Scope of Authority—Ratification—Evidence — Nonsuit.*— When there is conflicting evidence as to whether a local agent of a railroad company had authority to make the contract sued on, or whether the company had ratified the contract, and when a separate cause of action is alleged, with evidence to support it, of further damages caused by the defendant's negligence not depending on the express contract theretofore set out, a judgment of nonsuit should not be entered. *Ibid.*

12. *Railroads—Fires—Wrongful Death—Contributory Negligence—Apprehension of Loss — Evidence — Questions for Jury.*—In an action against a railroad company for damages for the negligent killing of plaintiff's intestate, the court may not hold as a matter of law that the plaintiff's action is barred by the contributory negligence of the intestate, when the evidence tends to show that the intestate was burned to death while endeavoring to extinguish an extensive fire caused by negligence in the operation of the defendant's locomotive, on lands adjoining her own, and it appears that she had reasonable apprehension that it would spread to her own lands and destroy her dwelling thereon situated; and in this case it is held that evidence is sufficient to be submitted to the jury on the issue as to contributory negligence. *McKay v. R. R.*, 260.

RAILROADS—*Continued.*

13. *Railroads— Crossings— Signals— Negligence—Look and Listen—Contributory Negligence—Evidence—Nonsuit—Questions for Jury.*—In an action for damages against a railroad company for the negligent killing of plaintiff's intestate by the defendant's train while crossing its track on a public road in a buggy with another, there was evidence tending to show that, before attempting to cross the track, the intestate stopped, looked, and listened, and did not see or hear the approaching train until the horses were on it; and that there was an obstruction to the view which rendered it impossible to sooner see the train; that the intestate could have been seen by the engineer on the train a distance of 300 or 400 feet, and conflicting evidence as to whether the usual signals for the crossing had been given by those in charge of the locomotive: *Held*, a charge by the court, under this evidence, that the plaintiff's cause of action was barred by the contributory negligence of the intestate, would be an expression of opinion by the court upon the question as to whether the intestate had exercised the care required of him under the circumstances, which is prohibited by the statute. Revisal, sec.. 535. *Cooper v. R. R.*, 140 N. C., 209; *Mayes v. R. R.*, 119 N. C., 758, cited and applied. *Osborne v. R. R.*, 309.

14. *Railroads—Master and Servant—Safe Place to Work—Projecting Sill—Instructions—Negligence—Contributory Negligence—Questions for Jury.*—In an action to recover damages inflicted by a railroad on its employee, there was evidence tending to show that the employee was an uninstructed porter on defendant's train and at night was told by the conductor to unlock a switch for the train to pass, and as the train was passing with moderate speed the employee, having a lantern in his hand necessary to give him light, caught hold of the grab-iron of the passing train with his other hand, and while boarding it in this manner, his foot struck against a sill of unusual length, projecting from the outside of the curve, of which he had no knowledge, and inflicted the injury complained of: *Held*, (1) evidence sufficient to go to the jury upon the circumstances, on the defendant's negligence in failing to supply its employee a safe place to work; (2) testimony as to the unusual length of the sill was competent; (3) a prayer for instruction that the employee was guilty of contributory negligence in not using both his hands to board the train, under the circumstances, was properly refused, it being a question for the jury. *Sanders v. R. R.*, 526.

RECEIVERS. See Corporations.

RESCISSION. See Frauds.

REFERENCE.

Reference—Findings—Appeal and Error—Wills—Advancements—Intent—Practice.—The findings of fact by a referee, upon the consideration of the evidence and approval of the trial judge, when there is some evidence to support them, will not be reviewed on appeal; and on the appeal taken, in this case, upon the question as to whether a gift by the testator was an advancement, being one of fact as to the intention of the testator, the judgment below is affirmed. *Thompson v. Smith*, 256.

REGISTRATION. See Deeds and Conveyances.

REMAINDERMEN. See Judgments.

RES JUDICATA. See Appeal and Error.

RIGHT OF WAY. See Easements.

REVISAL.

SEC.

59. This section does not contemplate dower interest in a recovery for wrongful death. *Broadnax v. Broadnax*, 423.

60. This section does not contemplate dower interest in a recovery for a wrongful death. *Broadnax v. Broadnax*, 423.

133. The presumption that money paid by a parent to a child is an advancement may be rebutted. *Thompson v. Smith*, 256.

144. A petition to recover a legacy may be entered before the clerk, and upheld, in proper cases, if the executor has admitted assets, or it is proved that he has them. *York v. McCall*, 276.

430. Nonresident defendants upon whom personal service has not been made may defend after judgment in the Superior Court only. *Thompson v. Notion Co.*, 519.

441. Irregularity of proceedings wherein infants are interested is cured by their appearing by guardian. *Harris v. Bennett*, 339.

448. Nonresident defendants upon whom personal service has not been made may defend after judgment in the Superior Court only. *Thompson v. Notion Co.*, 519.

449. Nonresident defendants upon whom personal service has not been made may defend after judgment in the Superior Court only. *Thompson v. Notion Co.*, 519.

483. Matters in diminution of damages, under Federal Employers' Liability Act, must be pleaded. *Fleming v. R. R.*, 196.

483. Assumption of risks should be considered under issue of contributory negligence, with burden of proof on party pleading it. *Pigford v. R. R.*, 93.

502. In cases of libel and slander, matters in diminution of damages are not required to be pleaded. *Fleming v. R. R.*, 196.

503. Material allegations, not denied, are taken as true. *Fleming v. R. R.*, 196

515. A variation between allegation and proof must mislead to entitle appealing party to new trial. *Dellinger v. Electric Co.*, 532.

516. A variation between allegation and proof must mislead to entitle appealing party to new trial. *Dellinger v. Electric Co.*, 532.

535. Upon the question of contributory negligence of intestate in crossing a railroad track, where the view was obstructed, it was error for the judge to charge the jury to answer the issue "Yes," as it was, in this case, an expression of opinion as to the care the intestate exercised. *Osborne v. R. R.*, 309.

552. When in doubt as to whether a verdict carries interest, the judge should refer the matter back to the jury. *Fountain Co. v. Schell*, 529.

587. An appeal may be had from a judgment affecting the sufficiency of a petition to form a school district. *Gill v. Commissioners*, 176.

REVISAL—*Continued.*

SEC.

614. The Superior Court may remand proceedings in which it appears that devisees, who are ultimately to take under the will, have not been made parties. *York v. McCall*, 276.

686. The effect of this statute upon a conveyance of a homestead is not retroactive. *Crouch v. Crouch*, 447.

758. When an attorney fills out attachment papers, including bond, upon authority of the clerk, who does not pass thereon at the time, the proceedings are void. *Carson v. Woodrow*, 143.

763. The statute on claim and delivery bond commences to run from rendition of judgment. *Smith v. Bonding Co.*, 574.

768. The statute does not begin to run on a replevy bond from the time the property was replevied, but from rendition of judgment. *Smith v. Bonding Co.*, 574.

774. The undertaking required by this section is unnecessary when attachment has been vacated. *Lumber Co. v. Buhmann*, 385.

775. The undertaking required by this section is unnecessary when attachment has been vacated. *Lumber Co. v. Buhmann*, 385.

803. The courts must have competent jurisdiction over the subject-matter of a controversy submitted without action, and the Superior Court may not determine an action involving a $5 license tax. *Drug Co. v. Lenoir*, 571.

980. Generally a deed must be registered in county where land is situated. *Weston v. Lumber Co.*, 263.

988. This section applies to conveyances of lands, by implication. *Weston v. Lumber Co.*, 263.

1009. This section contemplates probates and registrations of courts of pleas and quarter sessions. *Weston v. Lumber Co.*, 263.

1160. Holders in good faith of full-paid certificates of stock in a corporation are not liable for its debts. *Whitlock v. Alexander*, 465.

1161. Holders in good faith of full-paid certificates of stock in a corporation are not liable for its debts. *Whitlock v. Alexander*, 465.

1473. Nonresident defendants, not personally served with process, may not defend after judgment in justice's court. Their remedy is by appeal. Section 1491. *Thompson v. Notion Co.*, 519.

1474. Nonresident defendants, not personally served with process, may not defend in justice's court, after judgment. The remedy is by appeal. Section 1491. *Thompson v. Notion Co.*, 519.

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1491. Nonresident defendants, not personally served with process, may not defend in justice's court, after judgment. The remedy is by appeal under this section. *Thompson v. Notion Co.*, 519.

1556. The presumption of advancement, when money is paid by a parent to a child, may be rebutted. *Thompson v. Smith*, 256.

1556 (4). Lands devised to be held by a trustee during minority of devisees, and then sold, are not converted when the devisees die intestate within that period. *Elliott v. Loftin*, 361.

1563. The requirements as to affidavits of this section do not apply to void marriages. *Taylor v. White*, 38.

REVISAL—*Continued.*

SEC.

1572. When reasonably required, electric companies may cut trees, etc., outside of their rights of way. *Power Co. v. Wissler*, 269.

1574. When reasonably required, electric companies may cut trees, etc., outside of their rights of way. *Power Co. v. Wissler*, 269.

1599. This section allows deeds to be registered in the right county, by capias, etc. *Weston v. Lumber Co.*, 263.

1631. This section does not apply to conversations had by witness with deceased, tending to show his intent in disposing of his property by his will. *Rakestraw v. Pratt*, 436.

1690. Where the defense of a "gaming contract" is set up by verified answer, the burden is on plaintiff to show the contract lawful. *Cobb v. Guthrie*, 313

1691. Where the defense of a "gaming contract" is set up by verified answer, the burden is on plaintiff to show the contract lawful. *Cobb v. Guthrie*, 313.

2018. The provisions of this section apply to logging roads. *Carter v. Lumber Co.*, 8.

2208. The burden of proof is on party seeking to show fraud when negotiable instrument has apparently been acquired in due course. *Bank v. Brown*, 23.

2508. The provisions of this section include the right of actual partition by remainderman as well as sale for division. *Baggett v. Jackson*, 26.

2517. Dower may be allotted in partition of lands. *Baggett v. Jackson*, 26.

2575. Power of eminent domain not exhausted by one act of condemnation. *Power Co. v. Wissler*, 269.

2575. When reasonably required, electric companies may cut trees, etc., outside of their rights of way. *Power Co. v. Wissler*, 269.

2576. When reasonably required, electric companies may cut trees, etc., outside of their rights of way. *Power Co. v. Wissler*, 269.

2584. Usually the "reasonable necessity" for condemnation of lands is left to the corporation exercising it, within the existing powers conferred. *Power Co. v. Wissler*, 269.

2605. A railroad company has power to swear in officers for protection of passengers, and is not excused from negligence for not having done so. *Stanley v. R. R.*, 323.

2606. A railroad company has power to swear in officers for safety of passengers, and is not excused from negligence for not having done so. *Stanley v. R. R.*, 323.

2624. The provisions of this section for establishing contributory negligence and assumption of risk, with reference to Federal Employers' Liability Act, apply. *Fleming v. R. R.*, 196.

2675. Citizenship should be restored under this section, and 2676, and may not be done by pardon. *In re Petition of Jones*, 15.

2676. Citizenship should be restored under this section, and 2675, and may not be done by pardon. *In re Petition of Jones*, 15.

2680. The Governor's pardon does not restore to citizenship. *In re Petition of Jones*, 15.

2909. Recitals in a deed are *prima facie* true, with burden of showing the contrary on party claiming otherwise. *Board of Education v. Remick*, 562.

REVISAL—*Continued.*

SEC.

2924. Municipal corporation charters giving, in addition to the powers specifically conferred, all such as are incident and usual under the general law, may "annually levy a tax on all trades." *Drug Co. v. Lenoir*, 571.

3095. Damages for wrongful death is no part of decedent's estate, and dower therefrom may not be claimed. *Broadnax v. Broadnax*, 432.

3127 (3). Where a party requests another person to be called in a few days before his death, and believing himself *in extremis*, gave him specific directions as to the disposition of his personalty, it is a sufficient intent that he "bear witness," under this section. *In re Polly Garland's Will*, 555.

3145. This section only applies where after-born child has not been provided for. *Flanner v. Flanner*, 126.

3346. This section does not apply as to proof of negligence required in setting fire to lands, etc. *Caton v. Toler*, 104.

3757 (*b*). A railroad company has power to swear in officers for safety of passengers, and is not excused from negligence for not having done so. *Stanley v. R. R.*, 323.

4047. A tax deed for swamp lands is presumptive evidence that assessors appraised and valued the land, and is constitutional in making the recitations of the deed *prima facie* true. *Board of Education v. Remick*, 562.

4115. The petition required by this section is a condition precedent in forming school districts and levying taxes, etc., and is necessary to confer jurisdiction on the commissioners, and injunctive relief may be had in proper instances. Women are not eligible to vote, and it is not required that female landowners should sign the petition. *Gill v. Petitioners*, 176.

5217. Personal property of a ward or of a deceased person should be listed where they reside, when residents of the State. *Smith v. Dunn*, 174.

5232. The penalty of this section applies where personal property of beneficiaries is not listed where they reside by the trustee. *Smith v. Dunn*, 174.

5453. This section does not apply to separate charters granted municipalities. *Pender v Salisbury*, 363.

5453. Provisions of Revised Code, sec. 29, validating deeds registered by copy, etc., in right county, are not repealed by this section. *Weston v. Lumber Co.*, 263.

SALES. See Executors and Administrators; Equity.

Judicial Sales—Purchasers—Notice of Defects.—A purchaser at a judicial sale is only required to see that the court had jurisdiction of the parties and the subject-matter of the proceedings, and that the judgment authorized the sale. *Harris v. Bennett*, 339.

SCHOOLS. See Corporations.

SCHOOL DISTRICT. See County Commissioners.

SCIENTER. See Evidence.

SEPARABLE CONTROVERSY. See Statutes.

SHERIFFS. See Process.

STABLE KEEPER. See Bailment.

STATUTES. See Penalty Statutes; State's Lands.

STATUTE OF FRAUDS.

Deeds and Conveyances—Timber—Statute of Frauds—Parol Evidence—Questions for Jury.—There was evidence in this case tending to show that the owner of lands, having conveyed the standing timber thereon, after the expiration of the period of time for its cutting and removal, sold and conveyed the land by deed, and at the same time said to the grantee that he had sold him the land "and everything there is on it"; that the grantee mentioned severed logs, etc., that were on the land, which the grantor said was included in the transaction: *Held*, it was not necessary that the deed to the lands specify the cut timber, and the parol evidence of the sale of the logs was sufficient to be submitted to the jury upon the question as to whether the logs were included in the sale. *Lumber Co. v. Brown*, 281.

STATUTE OF USES. See Trusts and Trustees.

STATE'S LANDS.

1. *Partition—Parties—Estoppel—State's Lands—Grants—Vacant and Unappropriated—Titles.*—J. and his wife were parties to proceedings to partition certain lands, and it appeared by the petition that A. died in 1847, seized and possessed of the lands, and that the wife of J. and others were his children and heirs at law, and as such were tenants in common thereof. Partition was made and finally adjudicated in 1849: *Held*, that J. and those claiming under him were estopped to deny that A. was the owner of the lands in 1847, and that as the lands were not vacant or unappropriated in 1850, any grants that J. may have obtained at that time from the State to the lands were invalid to pass title to anyone claiming thereunder. *Owen v. Needham*, 381.

2. *Tax Deeds—Recitations—Listing for Taxes—Sufficiency—Interpretation of Statutes.*—A tax deed made by the sheriff to the Governor in 1799, among other things recited, that "the land was not given in by any person or persons whatever for the payment of taxes thereof," and it is *Held*, that this made the land liable to taxation under Laws 1782 (Iredell's Statutes, ch. VII, sec. 6, p. 430), and the objection to the deed, that it does not state that the land had not become "liable to be sold for taxes," is untenable. *Board of Education v. Remick*, 562.

3. *State's Swamp Lands—Tax Deeds—Appraisement and Valuation—Subject to Taxation—Presumptions—Burden of Proof—Interpretation of Statutes.*—As to a tax deed for swamp lands, Revisal, sec. 4047, makes it presumptive evidence that the assessors valued and appraised the land therein conveyed, with the burden of proof to the contrary on the one setting up its invalidity; and further, by the provisions of Revisal, sec. 2909, it must be shown by him that either such property

STATE'S LANDS—*Continued.*

was not subject to taxation for the year or years named in the deed, or that the taxes had been paid before the sale, or that the property had been redeemed from the sale. *Ibid.*

4. *State's Lands—Tax Deeds—Presumptions—Interpretation of Statutes—Constitutional Law.*—Revisal, sec. 4047, making the recitations in a tax deed for swamp lands *prima facie* true, is constitutional and valid. *Ibid.*

5. *Tax Deeds—Description—Parol Evidence—State's Lands—Grants.*—The tax deed for the lands in question is held, in this case, not too indefinite in its description of the lands, it referring to a grant from the State which identified them sufficiently, and they could also be identified by parol evidence; but as the tax deed was made to the Governor, and the lands were originally granted by the State, if the description in the grant were too indefinite, the title would have remained in the State. *Ibid.*

6. *State's Lands—Literary Fund—Subsequent Grants—Interpretation of Statutes.*—By the Laws 1825, ch. 1268, sec. 1, all vacant and unappropriated State swamp lands were transferred to the Literary Fund for the support of common schools; by Revised Statutes, 1837, ch. 67, sec. 3, all the swamp lands not theretofore duly entered and granted to individuals were vested in that corporation in trust for education and establishing schools, and a like provision was made in Laws 1842, ch. 36, sec. 2. Hence, a grant of lands, embraced in the above transfers to the Literary Fund, made in 1849, was void, the grantee admittedly not having been in possession at any time. *Ibid.*

7. *State's Lands—Literary Find—"Vacant and Unappropriated"—Interpretation of Statutes.*—State swamp lands in 1795, were sold for taxes and a valid deed therefor made to the Governor in 1799, and transferred by the State to the Literary Fund under the various legislative acts. In 1849 the State issued a grant which is set up as a defect in the title of the Literary Fund on the ground that it did not meet the statutory requirement that the lands be vacant and unappropriated: *Held*, the objection was untenable under the provisions of Laws 1788, p. 115, Iredell's Collected Statutes. *Ibid.*

STREET RAILROAD. See Negligence.

TAXATION. See Trusts and Trustees; Injunction.

1. *Interpretation of Statutes.*—The provisions of Article V, sec. 5, of our State Constitution are permissive in their nature, and the Legislature may establish the exemption to the full constitutional limit or it may provide for a lesser one; and to obtain the benefit of the exemption which is established, as, in this case, for educational purposes, the property must be devoted exclusively to that purpose, it being required for incorporated colleges, etc., that the real estate exemption be confined to buildings with the land they occupy, and to such adjacent land, etc., which is wholly devoted to educational purposes, and which belong to and are actually and exclusively occupied by these institutions, and to the buildings on such lands used as residences by the "officers and instructors of such educational institutions." *Corporation Commission v. Construction Co.*, 582.

TAXATION—*Continued.*

2. *Educational Corporations—Taxation—Exemptions—Constitutional Law—Statutes—Interpretation.*—In interpreting the authority, our State Constitution, Article V, sec. 5, conferring upon the Legislature power to exempt property incorporated for educational purposes from taxation, reference may be made to Article III, sec. 14, declaring that "schools and the means of education shall be forever encouraged," which appears also in our State Constitution of 1776, and Revisal, sec. 71, exempting all property used exclusively for educational purposes, is constitutional in purview of both of these articles of the Constitution construed together. *Ibid.*

3. *Personal Profit.*—It appearing in this case that the president of an educational institution and his predecessors, for fifty years, had consecrated their efforts to conducting a college with success, and that it having become necessary to renew and enlarge the school building, resort was had to the formation of a corporation for that purpose, the president of the college taking 264 shares of the capital stock of 543 shares, his friends and fellow-citizens the remainder in small amounts in recognition of the benefits of having the college in their community; that the funds available not being sufficient, the corporation, to complete the building, exclusively devoted to school purposes, borrowed $10,000 secured by deed of trust on the property, the entire investment turned over to the president of the college at a nominal rental, and with the purpose of creating a sinking fund for the payment of the debt, the other incorporators thus far receiving no return upon their investment: *Held*, the property thus used is exempt from taxation under Laws 1911, ch. 50, sec. 71, and the statute is constitutional; and the fact that the president may receive private or separate benefit from the enterprise does not affect this construction. *Ibid.*

4. *Drainage Districts—Bond Issues—Taxation—Exemptions—Constitutional Law.*—Drainage districts are not regarded as municipal corporations in purview of the Constitution, Article V, sec. 5, and a legislative act exempting their bonds from taxation violates the uniform rule as to taxation required by Article V, sec. 3, and by Article V, sec. 9, and hence such an act is unconstitutional. *Commissioners v. Webb.* 594.

TAX DEEDS. See Deeds and Conveyances.

TELEGRAPHS.

1. *Telegraphs—Delay in Delivery—Mental Anguish—Means of Conveyance—Physical Condition—Negligence—Evidence—Damages.*—When there is evidence of negligence on the part of defendant telegraph company in the delay of a telegram announcing the death of a sister, it is competent for the plaintiff to introduce evidence tending to show that his physical condition was such at the time to prevent his availing himself of the only means he had of reaching his destination in time for the funeral, by going part of the distance by train and a part by private conveyance, and that by reason of the delay in delivering the telegram he was prevented from taking an all-rail journey, for which he did not have the money, but could have borrowed it, and that he suffered mental anguish in consequence. *Poe v. Telegraph Co.*, 315.

TELEGRAPHS—*Continued.*

2. *Telegraphs—Free Delivery Limits—Mailed Telegram—Negligence—Evidence—Questions for Jury.*—When the addressee of a telegram is beyond the free delivery limits of the telegraph company's terminal office, and there is conflicting evidence as to whether the defendant company promptly mailed it to the addressee, a finding of the jury in plaintiff's favor, under an instruction to find for the defendant if the telegram was thus mailed, is conclusive. *Raiford v. Telegraph Co.*, 489.

TENANT BY THE CURTESY. See Wills.

TIMBER DEED. See Deeds and Conveyances.

TORTS.

1. *Carriers of Goods—Negligence—Tort.*—The negligent failure of a common carrier to safely deliver the subject-matter of its bill of lading is a tort for which the carrier is liable independently of its contract. *Mule Co. v. R. R.*, 215.

2. *Fraud—Deceit—Tort—Waiver—Damages—Implied Promise to Pay.*—In an action of deceit, in making false representations which induced the plaintiff to exchange his mule for defendant's horse, the plaintiff may waive the tort and recover his damages as for money had and received upon an implied promise of the defendant to pay it. *Fields v. Brown*, 295.

3. *Carriers of Passengers—Negligence—Dominant Cause—Joint Tort Feasors—Indemnity—Contribution.*—When the negligence of a railroad company causes the passenger getting aboard of its passenger train to be thrown against a truck of an express company left by the latter company near the train, and thence beneath the moving train, to his death, and the railroad company is sued for damages for the wrongful death thus inflicted, assuming that the truck was negligently left in a position to contribute to the injury, the negligence of the railroad company would be the dominant cause thereof; but if otherwise, the two companies would be joint tort feasors, and, in this case, there would be no right of indemnity or contribution existing in favor of the railroad company against the express company, its co-delinquent. *Gregg v. Wilmington*, 155 N. C., 18, cited and distinguished. *Doles v. R. R.*, 318.

TRUSTS AND TRUSTEES.

1. *Wills—Trusts and Trustees—Personal Property—Place of Taxation—Interpretation of Statutes.*—Under the provisions of Revisal, sec. 5217, a guardian shall list the property of his ward for the purpose of taxation where such ward resided on the first day of June, and an executor or administrator shall list the property of the deceased where he resided on the first day of June, unless such ward or deceased person were nonresident of this State, in which case the guardian or personal representative shall list the property where he himself resided on the first day of June. *Smith v. Dunn*, 174.

2. *Trusts and Trustees—Uses and Trusts—Statute of Uses—Active Trusts.*—A devise of lands to be held in trust for the purpose of collecting

TRUSTS AND TRUSTEES—*Continued.*

the rents and profits and paying them over to the beneficiary named, and to perform other duties, creates an active trust, evidencing the testator's intent that the legal title should remain in the trustee to execute the uses designated; and, the trust being active, it is not executed by the statute of uses; and the lands may not be subjected to execution issued on a judgment debt of the *cestui que trust.* The distinction is drawn between this case and those wherein there has been a devise or conveyance of rents and profits to a person directly, by ALLEN, J. *Lummus v. Davidson*, 484.

UNDUE INFLUENCE. See Frauds; Wills.

USURY. See Equity.

VENDOR AND VENDEE.

1. *Principal and Agent—Broker—Definition—Presumptions—Knowledge Implied—Vendor and Vendee.*—One dealing with a cotton broker engaged in the business of selling cotton on commission for several firms is presumed to know that the duties of a broker are to bring the seller and the purchaser together in the transaction as vendor and vendee, payment being made directly from the latter to the former; and where it appears that the transaction was made directly between the supposed broker and the purchaser, the bills of lading for the cotton, invoices, etc., being in the name of the former, the one from whom the supposed broker has purchased the cotton for himself cannot be held liable for damages on the ground that the cotton furnished did not come up to specifications, and that he had requested the purchaser to give this broker his business on a former occasion. *Latham v. Field*, 335.

2. *Contracts—Vendor and Vendee—Fertilizer—Option of Cancellation—Measure of Damages.*—In an action to recover the balance of the purchase price of tobacco fertilizer sold under a contract making it optional with the plaintiff to cancel the order, it is held, on defendant's counterclaim for damages for the failure of plaintiff to deliver the goods, that recovery could only be had for damages accrued up to the time of the plaintiff's notice that he would exercise his option—in this case, the cost of preparing the plant-bed and for the higher priced labor employed and held by the defendant in readiness, and the profits on fertilizer actually sold by him, as contemplated by the parties, caused by his inability to substitute others, owing to the late date of cancellation; and not for the loss of crop incident to the option exercised under the contract by the plaintiff. *Ober v. Katzenstein*, 439.

VERDICT.

1. *Railroads—Logging Roads—Negligence—Contributory Negligence—Presumptions—Consistent Verdict—Determinative Findings.*—In an action for damages for the wrongful killing of plaintiff's intestate, the verdict of the jury upon the issues of negligence and contributory negligence, being "no" to the former and "yes" to the latter, is not inconsistent, for though the answer of "yes" to the second issue presupposes negligence on the part of the defendant, it does not include

VERDICT—*Continued.*

proximate cause, which is necessary to be found; and the answer upon the second issue being conclusive, it becomes unnecessary on appeal to consider the plaintiff's exceptions arising upon the first one. *Hamilton v. Lumber Co.*, 47.

2. *Contracts, Breach of—Admissions—Verdict—Appeal and Error.*—The plaintiff in this case, having admitted that he had broken his contract with the defendant, for which damages are sought by the latter by way of counterclaim, it is *Held*, that the defendant is entitled to recover the damages arising therefrom. *Seawell v. Person*, 291.

WAGERING CONTRACTS. See Contracts.

WAIVER.

1. *Fraud—Deceit—Tort—Waiver—Damages—Implied Promise to Pay.*—In an action of deceit, in making false representations which induced the plaintiff to exchange his mule for defendant's horse, the plaintiff may waive the tort and recover his damages as for money had and received upon an implied promise of the defendant to pay it. *Fields v. Brown*, 295.

2. *Cities and Towns—Charter Provisions—Damages—Written Demand—Waiver—Interpretation of Statutes.*—The municipal authorities cannot waive the provisions of a city's charter requiring written demand to be made, in a certain prescribed manner, upon the board of aldermen, as a condition precedent to the bringing of an action for damages against the municipality. *Pender v. Salisbury*, 363.

3. *Insurance, Life—Nonpayment—Waiver—Nonsuit.*—In an action to recover upon a policy of life insurance, the plaintiff put the policy and proof of death in evidence with a letter from the defendant that it had received the remittance in settlement of the policy, and stating, "Your official receipt has been attached to your note." The defendant put in evidence a letter it obtained from the plaintiff, upon due notice to produce, to the effect that the note had been returned unpaid from the bank, marked "No attention," and to keep the policy in force the plaintiff must send remittance by return mail with inclosed formal health certificate, etc.: *Held*, the evidence showed that the premium note had not been paid, and whatever may have been the effect, as a waiver, of presenting the note for payment, the failure of the plaintiff to pay negatived it after that date, and, viewing the evidence in the light most favorable to the plaintiff, a judgment of nonsuit was proper. *Sexton v. Insurance Co.*, 596.

WIDOW'S YEAR'S SUPPORT. See Statutes.

WILLS. See Executors and Administrators.

1. *Wills—After-born Child—Descent and Distribution—Intent—Interpretation of Statutes.*—Revisal, sec. 3145, providing that when children are born "after the making of the parent's will" and the parent die without making provision for them, they "shall be entitled to such share and proportion of such parent's estate as if he or she had died intestate," etc., is construed as not intending to control a parent as

WILLS—*Continued.*

to the provision he should make for the child, but to apply when by inadvertence or mistake the after-born child has not been provided for; and unless the omission was intentional, or provision is made for the child, either under the will or some settlement or provision ultra, the after-born child takes his share, and the statute applies whether there was one or more children. *Flanner v. Flanner*, 126.

2. *Wills—Devices—Estates—Remainders—Tenant by the Curtesy.*—A will devised to M., testator's niece, "all my real estate on the south side of College Street through to Bay Street, also all the land known as the Summerland land on the west side of the public road, during her natural life, and if she marries and leaves heirs from such marriage, then to her heirs in fee simple; if she dies without issue from such marriage, all the real estate loaned to her to be divided between J. and B.: *Held*, (1) that said M. took only a life estate, with remainder to her children, and on her death without children or issue of her marriage then living, the ultimate devisees became the owners entitled to possession of the property; (2) the term "loaned," under the meaning of the clause, is synonymous with give, devise, or bequeath, and in this case the term applies to both parcels of land, and the devise creating only a life estate in the niece, the surviving husband is not entitled as tenant by the curtesy, though there had been issue born alive during coverture. *Faison v. Moore*, 148.

3. *Same—Cities and Towns—Penalties—Injunction.*—In this case the testator appointed executors of his will who were also therein named as trustees for certain beneficiaries, who in May of a certain year moved to another town, after the matters of executorship had been closed, leaving those of the trusteeship continuing: *Held*, (1) the personal property should have been listed at the place of residence of the beneficiaries in June of that year; and the taxes not having been listed at all, it was proper for the commissioners of the town of residence of the beneficiaries to cause the personality to be listed there and impose the penalty prescribed by Revisal, sec. 5232 (section 72 of the Machinery Act of 1909); a restraining order in this case was improvidently granted. *Ibid.*

4. *Wills—Devises—Advancements—Definition.*—An advancement is an irrevocable gift *in presenti* of money or of property, real or personal, to a child by a parent, to enable the donee to anticipate his inheritance or succession to the extent of the gift. *Thompson v. Smith*, 256.

5. *Wills—Devises—Advancements—Intent—Interpretation of Statutes.*—Property transferred or money paid by the parent to the child is *prima facie* an advancement, but the presumption thus raised may be rebutted by parol, even when there is a recital of a consideration in a deed, by showing that the parent had a contrary intent at the time; and this rule as to the intention of the testator is not altered by our statute. Revisal, secs. 133 and 1556, Rule 2. *Hollister v. Attmore*, 58 N. C., 373, cited and applied. *Ibid.*

6. *Wills—Interpretation—Intent—Conversion—Realty—Descent and Distribution—Interpretation of Statutes.*—A testator devised lands to his three sons, the rents to be used for their benefit till the youngest

WILLS—*Continued.*

became twenty-one years of age, then the lands to be sold for cash and divided between them. The devisees died intestate, without wife or child, before the youngest became of age: *Held*, the intent of the testator controlling, there was not, under the terms of the will, a conversion of the lands into personality as of the death of the testator, but the lands remained realty to descend to the heirs at law of the blood of the testator. Revisal, sec. 1556, Rule 4. *Elliott v. Loftin*, 361.

7. *Wills—Partial Intestacy—Presumptions—Burden of Proof.*—The presumption of law is against partial intestacy, and the one who seeks to establish it has the burden of rebutting that presumption. *Austin v. Austin*, 367.

8. *Same—"Home Place"—Adjoining Tracts of Land—Cultivated as One—Devise of Home Tract—Evidence—Nonsuit.*—A testate had acquired two adjoining tracts of land at different times; the first he called the "home place" and the other by a different name, but cultivated them together. He devised "the northern side of the dividing line of the home tract of land" to one of his sons, and "the south side of the dividing line of said tract" to another of his sons, and provided for the others of his children by bequests of his personalty: *Held*, by the devise of the "home tract" both tracts passed to his two sons to be divided as indicated; for there being no further evidence, the presumption is against intestacy as to the second tract of land acquired by the testator, and a judgment of nonsuit upon the evidence was properly granted. *Ibid.*

9. *Wills—Statutory Right.*—The right to dispose of property by will is entirely statutory, and in order to make a valid will, the requirements of the statute must be observed. *In re Garland Will*, 555.

10. *Same—Nuncupative Wills—Personalty—Interpretation of Statutes—Request—"Bear Witness"—Words and Phrases.*—Our statute, Revisal, sec. 3127 (3), among other things, requires that a nuncupative will must be proved "on the oath of at least two credible witnesses, present at the making thereof, who state that they were specially required to bear witness thereto by the testator himself," etc.: *Held*, it is sufficient to show on the question of the testator's requesting that the witnesses "bear witness" to the will, that believing himself to be *in extremis*, he told the witness during his last illness that he wanted to make a will, who, at his request, called in another, and while they were at his bedside, testator gave specific directions for the disposition of his personal property; and though he had theretofore expressed his wish to make a written will, and had failed in his effort to do so, the matters sought to be established as the nuncupative will were declared at a time he was apprehensive he would become unable to talk, and his death occurred about four days thereafter. *Ibid.*

WITNESSES.

1. *Witnesses, Expert—Hypothetical Question—Sufficiency.*—A hypothetical question asked an expert witness which substantially combines

WITNESSES—*Continued.*

all of the facts and is sufficiently explicit for him to give an intelligent and safe opinion which would justify a finding of all of these facts by the jury, is sufficient. *Pigford v. R. R.*, 93.

2. *Witnesses, Nonexpert—Fire Damage—Evidence—Facts.*—In an action for damages for the burning of plaintiff's land and timber, alleged to have been caused by the defendant's negligence, there was evidence that the fire broke out on plaintiff's lands after some low lightwood stumps, on the defendant's land, where he had been clearing it, had been burning and smoldering for twenty-four hours, about 44 yards from the nearest of these stumps: *Held*, it was competent for nonexpert witnesses, who were qualified from their own observation and experience, to testify as a statement of fact and relative to the inquiry, that lightwood stumps, under the conditions indicated, were not dangerous as to sparks and not likely to throw them any distance. *Caton v. Toler*, 104.

WORDS AND PHRASES. See Mortgages; Wills.

Mortgages — Cropper — Land Designated — Any Other Crop Cultivated—Words and Phrases.—In a mortgage on crops on lands, the expression, "any other crops he (the lessor) may tend," is held to be substantially the same as if expressed, "any other crops he may cultivate." *Hurley v. Ray*, 376.